the persons enfranchised are described as "male persons," the neutral term "person" is used in describing the university elector, and the suggested inference is that this was done deliberately so as to admit women.

I am afraid, however, that a much more superficial reason was what led to the variation. If we turn to the Universities (Scotland) Act 1858, which set up the University Councils—the bodies which constitute the constituencies—we find that the word used is "person." Now this is exactly what Parliament would naturally do—minded to give votes to the members of the General Councils, it turns to the description of them in the Act which established those councils and adopts the term there used.

This is the genesis of the enfranchising section—what is its effect? Now the "persons" so described were in fact solely men, for in 1858 and in 1868 the universities did not receive women as students, and did not confer on them degrees. It is obvious, therefore, that the persons contemplated in the enfranchisement of the Scotch graduates were men.

As the case of the appellants is entirely one of words, it may be added that in 1858, as in 1868, the avail of the words "male persons" as distinguished from "persons" had been greatly reduced by Lord Brougham's Act, so that the choice of the word "person" had of itself the smaller significance in the direction of including women. The one expression, like the other, needs to be read in the light of the subject-matter.

The case of the appellants has, as I have said, the word "person" (in the Act of 1868) for its basis, but it is necessary to remember that it is only by virtue of an ordinance of the University Commissioners under an Act of 1889 (dealing purely with academic as distinguished from political matters) that women were made eligible for graduation and thus were introduced into the University Councils. Now it must be allowed that if Parliament has by this means conferred the franchise on women, it has taken the most roundabout way to do it. Whichever view be taken of the merits of the question whether women should vote for Members of Parliament, it is at least a grave and important question for Parliament to decide. This question, according to the theory of this appeal, Parliament devolved on a Royal Commission about the details of academic affairs which had power, moreover, to provide graduation (and by consequence the franchise) for women in one university or in all, according to its absolute discretion. It is difficult to ascribe such proceedings to Parliament and at the same time retain the conventional respect for our Legislature.

I have only to add that if I have not in this judgment relied on the words about legal incapacity, it is not that I do not consider the argument on them to be legitimate. But I prefer broader grounds, and I think that a judgment is wholesome and of good example which puts forward subject-matter and fundamental constitutional law as guides of construction never to be neglected in favour of verbal possibilities.

LORD COLLINS—I am of the same opinion.

Their Lordships dismissed the appeal with expenses.

For the Appellants (Pursuers and Reclaimers)—Parties (Miss Macmillan and Miss Simson). Agents—William Purves, W.S., Edinburgh—Neish, Howell, & Haldane, London.

Counsel for the Respondents (Defenders and Respondents)—Dean of Faculty (Scott Dickson, K.C.)—Macmillan. Agents—W. & J. Cook, W.S., Edinburgh—John Kennedy, W.S., Westminster.

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# COURT OF SESSION.

*Saturday, November* 21.

## EXTRA DIVISION.

## MACDUFF *v.* SPENCE'S TRUSTEES.

*Succession—Trust—Uncertainty—Amount of Charitable Bequest—Direction to Trustees to Apply Interest of Residue or so much thereof as they might Deem Expedient.*

After bequeathing legacies and annuities a testatrix directed her trustees to hold the residue of her estate and "to apply the interest or annual proceeds thereof, or so much of said interest or annual proceeds thereof as they may deem expedient, towards such charitable purposes within the city or county of Aberdeen as my trustees shall think fit, full discretionary power being hereby conferred on my trustees as to the selection of the said charitable purposes above referred to." The testatrix's sole heir sought to have this bequest declared void in respect that the subject of the bequest was left uncertain and optional in amount.

*Held* that the discretion as to the amount to be distributed conferred by the testatrix upon the trustees did not invalidate the bequest, and that if in the future the trustees should fail to distribute the whole of the income any question regarding such possible surplus could only be determined when it emerged.

On the 23rd September 1907 Mrs Margaret Lucy Spence or Macduff, residing at 8 Greenhill Gardens, Edinburgh, brought an action against Lachlan Mackinnon, advocate in Aberdeen, and others, the trustees acting under the trust-disposition and settlement of the late Miss Caroline Jane Spence of 32 Albyn Place, Aberdeen, dated 11th May and recorded 26th November 1906. In it the pursuer, *inter alia*, (1) sought declarator that the directions as to the residue of the trust estate contained in the thirteenth purpose of the trust-disposition and settlement were void, invalid, and in-

effectual, and that the residue formed intestate succession of the testatrix and belonged to the pursuer as heir-at-law and sole heir *in mobilibus*.

The thirteenth purpose of the trust-disposition and settlement was:—"As regards the residue of my estate, including therein the capital of the sums required to meet the annuities hereinbefore provided, as these shall respectively expire, I appoint my trustees, subject to such further bequests as I may hereafter make, to hold, settle, and secure the same in their own names, and to apply the interest or annual proceeds thereof, or so much of said interest or annual proceeds thereof as they may deem expedient, towards such charitable purposes within the city or county of Aberdeen as my trustees shall think fit, full discretionary power being hereby conferred on my trustees as to the selection of the said charitable purposes above referred to, and I appoint that the capital of the residue of my said estates shall be called 'Miss Caroline Jane Spence's Fund.'"

[*See also narrative in opinion of Lord Dundas.*]

The Lord Ordinary (JOHNSTON) on 18th December 1907 pronounced an interlocutor declaring, in terms of the first conclusion, that the bequest of residue was void for uncertainty.

*Opinion.*—"By her settlement, dated 11th May 1906, the late Miss Caroline Jane Spence, of 32 Albyn Place, Aberdeen, as regards the residue of her estate, appointed her trustees 'to hold, settle, and secure the same in their own names, and to apply the interest or annual proceeds thereof, or so much of said interest or annual proceeds thereof as they may deem expedient, towards such charitable purposes within the city or county of Aberdeen as my trustees shall think fit, full discretionary power being hereby conferred on my trustees as to the selection of the said charitable purposes above referred to, and I appoint that the capital of the residue of my said estates shall be called "Miss Caroline Jane Spence's Fund."'

"It is admitted that but for the words which I have underlined, this would be a good bequest for behoof of such Aberdeen or Aberdeenshire charities as the trustees of the testatrix might select. But it is maintained that the introduction of these words vitiate the bequest by creating uncertainty, not in the objects, but in the subject of the bequest. It is with regret that I come to the conclusion that this contention must prevail.

"The trustees, in answer to my question what did the words underlined import, gave three alleged possible explanations.

"*First.* A direction to the trustees to apply the whole income in charity, but with a discretion to distribute among different charities.

"*Second.* A direction to the trustees to apply the whole income in charity, but with a discretion as to distributing the whole income within the year of its accruing, anything left over being merely carried forward into the next year.

"*Third.* A direction to apply the whole or such part of the income as they deem expedient in charity, their discretion to be exercised within the year, and such part as they do not so apply falling into intestacy.

"The only one of these suggested constructions which I think it is really necessary to consider is the first, and I would gladly give effect to it if I thought the words used would bear it. But I cannot do so without substituting for the actual words used certain perfectly different words, having a meaning which the words used can by no natural construction bear. I am practically asked to read the words 'or so much of said interest or annual proceeds thereof as they may deem expedient' as equivalent to 'in such proportions as they may deem expedient.' In the first place, it is impossible in this manner to get rid of the disjunctive 'or,' which makes it clear that the testatrix had in mind two different and alternative subjects of the bequest, viz.,—the interest or annual proceeds of her residue, and so much of said interest or annual proceeds as the trustees might deem expedient. And in the second place, even if that initial difficulty could be got rid of, it would, I think, be impossible, in the collocation in which they occur, to paraphrase the words used in the manner suggested.

"If, then, the words must bear their natural meaning in the collocation in which they are found, it follows that the testatrix has given a discretion to her trustees not merely, as she expressly states, 'as to the selection of the said charitable purposes above referred to,' but as to what part of her estate shall be given in charity, and what part shall fall into intestacy, or remain with the heir and executor, for the pursuer happens to fill both positions. Such discretion I do not think that the testatrix could legally and competently confer upon her trustees.

"There can be no doubt of the law that in order to disinherit either heir or executor the testator must by his settlement substitute somebody else, whether a person or a class of persons, to take the beneficial interest in his estate—*M'Caig* v. *University of Glasgow*, 1907 S.C. 231. There is here no question as to the certainty of the class of persons or objects meant to be benefited, for it has been accepted since the case of *Crichton* v. *Grierson*, 1828, 3 W. & S. 329, that the term 'charitable purposes' was sufficiently descriptive of a particular class of objects. The real import of that judgment is that a description which is not in itself really 'particular' shall, out of favour to charity, be deemed to be 'particular,' and this has been the law of Scotland since its date. But then in the present case, what portion of the residue or income of residue is given to this particular purpose? That the testatrix has not defined, but has left to her trustees. They may give all, or some, or none. That is an invocation of the *alienum arbitrium* which the law does not

countenance. It has gone no further in that direction than to say that where the truster defines particular objects he may leave it to the discretion of others to distribute his estate among those objects—*Hill* v. *Burns*, 1826, 2 W. & S. 80.

"It will not support such a bequest that the trustees *may* apply the whole income to charity. The question is not whether the trustees *may* so apply it, but whether they *are bound* so to apply it—*Morice* v. *Bishop of Durham* (1804), 9 Ves. 399, and other cases. Nor can it be maintained that, so far as they choose to apply the income in charity, the bequest is good, and only, so far as they fail so to apply it, the income falls into intestacy. If that argument were good, *pari ratione* the bequests in *Blair* v. *Duncan*, 4 Fr. (H.L.) 1; *Grimond*, 7 Fr. (H.L.) 90, and similar cases, must have been sustained, instead of being found invalid.

"As I think that the testatrix has left it in the discretion of her trustees how far her heir and executrix was to be disinherited, and as I think that she could not competently leave such discretion to her trustees, I am brought to the conclusion that this bequest is void.

"In these cases there is always an appeal to the principle of the benignant interpretation of charitable bequests. I had to consider the extent to which that principle has ever actually been carried in the recent case of *Hay's Trustees* v. *Baillie*, 45 S.L.R. 908. I find that it has led to fixing that charitable is a sufficiently particular definition of a purpose to receive effect—*Crichton* v. *Grierson*, *supra*—and to the acceptance as sufficient of a very sketchy description of the actual charitable purpose contemplated, leaving to the Court to fill in the detail—as in the *Morgan Hospital* case, 19 D. 918, 3 Macq. 134, for example. But I cannot find that it has been successfully appealed to to any other or wider extent or effect, and certainly not for the justification of the substitution for words actually used, of words having a totally different meaning, in order to give effect to the general indication of a charitable intention.

"I shall therefore grant decree in terms of the first conclusion of the summons, and I think that the expenses of the case so far should come out of the estate. *Quoad ultra* I shall continue the case and grant leave to reclaim."

The defenders reclaimed, and argued—The intention of the testatrix was to confer upon her trustees a distributive power to carry over income into the following year. Such words were only intended to confer wide latitude of time of paying out—*Dick's Trustees* v. *Dick*, 1907 S.C. 953, *per* the Lord President at p. 959, Lord Dundas at 958, 44 S.L.R. 680, 1908 S.C. (H.L.) 27, *per* Lord Chancellor at p. 28, [1908] A.C. 347, 45 S.L.R. 683. Even if the Lord Ordinary's construction of the deed were sound, there was here no question of uncertainty as to the objects of the bequest, for these were admittedly valid charitable purposes, and where there are ascertained beneficiaries, it was competent to give trustees discretion as to the amount of the bequest—*Macfarlane's Trustees* v. *Macfarlane*, December 10, 1903, 6 F. 201, 41 S.L.R. 164; *MacTavish* v. *Reid's Trustees*, November 2, 1904, 12 S.L.T. 404; *Chambers' Trustees* v. *Smith*, April 15, 1878, 5 R. (H.L.) 151, 15 S.L.R. 541; M'Laren on Wills, p. 1196. No authority could be cited for any other requisite of validity than that the beneficiary should be ascertained and be a legitimate object of bequest. The question in *Grimond*, March 6, 1905, 7 F. (H.L.) 90, 42 S.L.R. 466, and *Blair*, December 17, 1901, 4 F. (H.L.) 1, 39 S.L.R. 212, cited by the Lord Ordinary, was whether the object to which the trustees must necessarily give the funds was charitable, and that did not arise here. In *Morice*, (1804) 9 Ves. 399, the legacy was not charitable and did not receive the favourable construction. Even if the clause in this will were invalid as a direction to the trustees, it was still valid as a power conferred upon them.

Argued for pursuer (respondent)—The Lord Ordinary's construction of the will was sound, and the natural meaning of the words in dispute was that power was conferred on the trustees to determine how far the residue should fall into intestacy. The discretion to allocate among various charities was clearly expressed by other words. The meaning for which the defenders argued gave no effect to the clause, for there was no rule of trust administration compelling expenditure of all income within the current year. Therefore the discretion related to the subject of the bequest, and left its amount uncertain. There could be no divestiture of heirs or next-of-kin except by means of beneficial rights validly constituted in favour of third parties—*M'Caig* v. *University of Glasgow*, 1907 S.C. 231, Lord Kyllachy at p. 242, 44 S.L.R. 198. In *Dick's Trustees*, *cit. sup.*, the trustees could not divert any part of the bequest from charity. If this bequest were upheld the trustees would be free to allot illusory amounts to charity, and thus to enrich the next-of-kin. To make trust purposes effective and valid trustees must be bound to an enforceable duty which they were not free to neglect—*Morice* v. *Bishop of Durham*, *cit. sup.*; *Kendall* v. *Granger* (1842), 5 Beav. 300, Lord Langdale, M.R., at p. 302.

At advising—

LORD DUNDAS — Miss Caroline Jane Spence, who resided in Aberdeen, died on 29th November 1906, leaving a trust-disposition and settlement, dated 11th May in the same year. The question in this case relates to the construction and effect of the bequest of residue contained in that settlement, which was a universal one. The total value of Miss Spence's estate, heritable and moveable, appears to have been about £40,000. Parties were not agreed upon a figure at which the free residue might be approximately estimated; but it will obviously be a greatly diminished one, because—apart from debts, expenses, and Government duties—the settlement provides for payment of certain annuities and of a large number of legacies. It may be mentioned that the latter include specific

bequests to charitable objects, both in and outside of Aberdeen, and to relatives of the testatrix (including her sister, the pursuer of this action, and the pursuer's children), and other persons. The residuary clause is expressed in the following terms, viz.:—"Thirteenth . . . . . [*quotes, supra*] . . . ."

The action is raised by the only sister of the testatrix, who is admittedly her heir-at-law and sole heir *in mobilibus*. The defenders are the trustees acting under the settlement. The summons concludes for declarator that the provisions and directions of the settlement in regard to residue are void, invalid, and ineffectual, and that the whole residue forms intestate estate of the truster, and belongs to the pursuer, as heir-at-law and sole heir *in mobilibus*, as aforesaid; and conclusions follow for accounting and payment upon that footing.

The crucial words in the residuary clause above quoted are "or so much of said interest or annual proceeds thereof as they (the trustees) may deem expedient." It is admitted for the pursuer that if these words had been absent the bequest of the residue would have been good and valid. But it is maintained that their introduction makes the whole bequest void from uncertainty. The Lord Ordinary has come, with expressed regret, to the conclusion that the pursuer's contention must be sustained.

The case is an interesting and in some respects a novel one. I am prepared to agree with the Lord Ordinary that it would not be a legitimate construction of the language of the residuary clause to read it as amounting to a direction to the trustees to apply the whole annual proceeds of the residue among the class of charitable objects indicated, in such proportions as they may think fit. But this concession does not, in my judgment, lead necessarily to the conclusion that the residuary bequest must be here and now held void. The trustees are certainly empowered to apply the whole proceeds among the class of charities (which is admitted to be sufficiently defined); and we heard no suggestion that they would have any practical difficulty in so applying the whole income year by year. So long as the trustees did so, the whole proceeds of the residue would be applied in a perfectly legal manner. Nor is there any direction or authority given to them to apply any part of the income to a purpose which the law will not countenance, as was the case, *e.g.*, in *Blair*, 4 F. (H.L.), and in *Grimond*, 7 F. (H.L.) 90, referred to in the Lord Ordinary's opinion. It can only be said on behalf of the pursuer that the trustees may perhaps fail to apply the whole income to and among the charities. I do not think this contingency is sufficient to warrant us in setting aside the whole bequest *ab ante* as void from uncertainty. It is true that if during any year or series of years the trustees should not in fact apply the whole income among the objects of the bequest, with the result that a balance of material amount was found in their hands undisposed of at any time, questions might arise as to the heir's right to such moneys. These questions would require to be determined if and when they emerged, but they cannot, I think, now be anticipated. If the truster's directions to her trustees had applied to the distribution of the capital (instead of the income) of her estate, no real difficulty would, in my judgment, have arisen; and though the failure of the trustees to apply the income or any part of it might give rise hereafter to more doubtful questions, I do not see that there is any difference in principle. Indeed, even if what I have called the crucial words in the residuary clause had been omitted, very similar questions must, I apprehend, have arisen if the trustees had not in fact distributed the whole income as directed by the settlement. Yet it was conceded that if these words had been omitted the residuary bequest would have been unchallengeable upon the ground of uncertainty. It seems to me, therefore, that it would be quite premature to grant decree of declarator at present, as the pursuer desires and the Lord Ordinary has done.

This case is not, I think, governed by any previous decision of which I am aware. It appears to me to involve quite different considerations from those present in the cases upon which the Lord Ordinary seems to rely. His Lordship says in the course of his opinion—"It will not support such a bequest that the trustees may apply the whole income to charity. The question is not whether the trustees may so apply it, but whether they are bound so to apply it—*Morice* v. *Bishop of Durham*, 1804, 9 Ves. 399, and other cases. Nor can it be maintained that so far as they choose to apply the income in charity the bequest is good, and only in so far as they fail so to apply it the income falls into intestacy. If that argument were good, *pari ratione* the bequest in *Blair* v. *Duncan*, 4 Fr. (H.L.) 1, and *Grimond*, 7 Fr. (H.L.) 90, and similar cases, must have been sustained instead of being found invalid." With great respect to the Lord Ordinary, I think he has somewhat misinterpreted or misapplied the import of the cases he refers to. In *Blair* and in *Grimond* the trustees were given an express option to apply the money in whole or in part to an object or purpose so vague as to be incapable of execution, and the whole bequest was upon that ground held to be void from uncertainty. Again in *Morice*, as I read the case, just as in *Blair* and in *Grimond*, the flaw in the bequest was that the executor might under the language of the settlement have applied the money to a purpose which the law does not countenance. The direction there given to the executor was to dispose of the ultimate residue "to such objects of benevolence and liberality as the Bishop of Durham" (who was the executor) "in his own discretion shall most approve of." The sole question was whether this trust was one "for charitable purposes," as the technical meaning of these words, derived chiefly from the well-known English statute of Elizabeth, is understood by the courts in England. The Master of the Rolls (Sir Wm. Grant) answered this question in the

negative, and in so deciding observed that "the question is not whether he" (the executor) "may apply it" (the residue) "upon purposes strictly charitable, but whether he is bound so to apply it." I apprehend that the Master of the Rolls meant no more than this, that the bequest was not validated because the executor might under the settlement apply the whole residue to purposes strictly charitable, if he had also (as in fact he had) an expressed option to apply it to purposes outside the legal definition of charity. His Lordship pointed out that "the trusts may be completely executed without bestowing any part of the estate upon purposes strictly charitable." (See also *per* Lord Chancellor Eldon in affirming Sir William Grant's judgment in that case—*Morice*, 1805, 10 Ves. 522, at p. 541.) All the cases referred to seem thus to be quite in line upon this matter; but I do not think the doctrine which they illustrate has any application to the case now under consideration. For there is here no direction or authority given by Miss Spence to her trustees to apply any part of the residue to an illegal or uncertain purpose, whereas in all the cases referred to the settlement expressly contained an optional power to do so. There is admittedly no uncertainty as to the class indicated as the objects of the truster's bounty, but (at the most) a possible or contingent uncertainty as to the amount which may in fact be distributed by the trustees. It does not appear that they will have any difficulty in applying the whole income to and among the favoured class. So long as they so apply it no question can arise, and the executor or heir-at-law will so far as I see be effectually ousted by force of the settlement. There seems little reason to apprehend that any questions need arise in the future; but, as already observed, I think it will be time to determine such questions if and when they may emerge. Meanwhile I think the trustees ought to be left undisturbed in the free exercise of their administrative powers. I know of no case where a bequest the scope of which was confined to strictly lawful purposes has been set aside upon no other ground than that the trustees charged with the duty of administering it had a discretionary power as to the amount which they should think proper so to distribute. For the reasons I have expressed I am of opinion that the Lord Ordinary's interlocutor ought to be recalled and the action dismissed.

LORD PEARSON—I concur.

LORD M'LAREN—I also concur. I only add that the setting aside of a will on the ground of uncertainty is really a counsel of despair. It is an expression of the inability of the Court by approximation to extract the legal meaning from the will or testament. Therefore it is never to be resorted to if by the application of reasonably critical methods to the interpretation of the will we can arrive at a result consistent with the charitable intentions of the testator. I do not think that the will in the present case is in this desperate condition. The worst that can be said of it is that instead of giving the whole of her money to charitable purposes in the city and county of Aberdeen, the testatrix gave only such part of her means as the trustees might find to be necessary. Well, supposing that these words, "so much of the annual proceeds thereof as my trustees deem expedient," had not been there, and it had been found that it was impossible to spend the whole of this considerable sum of money usefully in charities of the kind which she favoured, what would the result be? Not that the will would be void, but that the Court would endeavour upon principles of approximation to apply the money to cognate purposes or that the surplus would revert to the heir-at-law. I think it would be a most unfortunate and inequitable result if the mere expression by the testator of something which everyone knows might happen, namely, that there might be a fund in excess of what was required—were to have the effect of invalidating the will which would have been perfectly good if she had said nothing about it, but had left her administrators to apply to the Court if this contingency should occur. I do not add more, because I entirely agree with Lord Dundas.

The Court recalled the interlocutor of the Lord Ordinary and dismissed the action.

Counsel for Pursuer (Respondent)—Constable, K.C. — Hon. W. Watson. Agents —Traquair, Dickson, & MacLaren, W.S.

Counsel for Defenders (Reclaimers) — Hunter, K.C.—Grainger Stewart. Agents —Morton, Smart, Macdonald, & Prosser, W.S.

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*Saturday, November* 21.

## SECOND DIVISION.

## LAIDLAW AND OTHERS (ROBERTSON'S TRUSTEES), PETITIONERS.

*Trust—Nobile Officium—Advance to Major Beneficiary out of Prospective Share not yet Vested.*

A truster by his settlement directed his trustees to pay an annuity of £300 to his widow, which annuity he declared to be alimentary, for behoof not only of herself but of any children who might live in family with her and be unable to support themselves; to accumulate any surplus income and add it to the residue; and to hold and apply the residue for behoof of his children and the issue of predeceasing children *per stirpes*, payment to be made after the death of the widow and on his children attaining majority. The truster declared that these provisions should vest at the respective terms of payment, and provided—"My trustees may, in their sole discretion, even during my wife's life, lay out, pay over, and ad-