[14th *July* 1837.]

JOHN MILLER, Esquire, and Others, Appellants.—
Knight—Miller.

GEORGE ROWAN and JOHN MILLER, Trustees of JAMES BLACK, Respondents.—*Sir William Follett—Austin.*

Testament—Trust.—A bequest in a trust deed of settlement, of the residue of the testator's estate to trustees, with power to keep up the trust by assumption of new trustees, to apply the proceeds "to such benevolent and charitable "purposes, as they think proper," with a recommendation, if they exceeded 600*l.*, to vest them in these persons, and apply the annual proceeds in "yearly payments to "faithful domestic servants settled in Glasgow, or the "neighbourhood, who can produce testimonials of good "character and morals, from their masters or mistresses "after ten years service; no one to be entitled to more "than 10*l.* sterling yearly, but as much less as my said "trustees may think proper;" or, in the event of the residue not amounting to 600*l.*, to distribute the same "to "such charitable and benevolent purposes" as the trustees might think proper—Held (affirming the judgment of the Court of Session) not to be void through uncertainty. Observed (in support of the judgment of the Court of Session) that where a sum appointed to be lent out on security in liferent to a legatee was at her death, to be "payable to the trustees," there was no bequest to the trustees individually, but that the sum was to merge in the general fund of the trust estate.

Trust—Expenses.—In a question, as to the validity of a deed of settlement challenged as void through uncertainty, the costs ordered to be paid out of the estate to the party challenging, although unsuccessful.

On the 31st of May, 1827, Dr. James Black executed the following trust disposition and settlement: "I James Black, sometime surgeon in Jamaica, at present residing in Glasgow, being resolved to settle the "succession to my estate, in order to prevent all disputes among my relations after my death, and having "full confidence in the persons after named for executing the trust herein-after committed to them, have "assigned and disponed, as I do hereby give, grant, "assign, dispone, convey, and make over, from me, my "heirs and executors, after my death, to and in favour "of James Maxwell of Baillieston, George Rowan, "Esq. of Holmfauldhead, and John Miller, merchant "in Glasgow, and to such of them as shall accept "hereof, and to the survivors and survivor of the acceptors, and to such person or persons as may be assumed "by them, or to the survivors or survivor, to supply "the deficiency of such as may die or decline to act, "and which they are hereby empowered to do when "they see proper, the major number alive and accepting at the time being always a quorum, as trustees or "trustee for the ends, uses, and purposes after specified, and with and under the whole burdens and "conditions herein-after expressed, all and sundry "lands, houses, tenements, heritable bonds, adjudications, tacks, reservations, sums of money heritably "secured, and also all and sundry goods, gear, sums of "money, debts, and effects, household furniture and "plenishing, including silver plate, plated articles, and "bed and table linen, and, in general, the whole heritable and moveable, real and personal estate, of whatever kind or denomination, and wherever situated, "that may be belonging, indebted, or resting owing to

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" me, or to which I may have right in any manner of " way at the time of my death, with all that shall then " have followed or may be competent to follow there- " upon, dispensing with the generality hereof, and " declaring these presents to be equally valid, and " effectual, as if every particular of my estate and " effects had been herein specially described and dis- " poned. But these presents are granted and to be " accepted of by my said disponees and their foresaids " in trust always for the ends, uses, and purposes after " mentioned; viz. my said trustees and theirs aforesaid, " shall, in the first place, pay all my just and lawful " debts, and that without the necessity of a legal con- " stitution, provided they are satisfied of the justness " thereof, and also of my sickbed and funeral charges, " and the expense of executing this trust. In the second " place, I appoint my said trustees to pay to the said " James Maxwell, my cousin, the sum of one hundred " guineas, to purchase a piece of plate, and to pay to " the second child of the said James Maxwell, the sum " of 300*l.* sterling. In the third place, I appoint my " said trustees to lend out the sum of 2,000*l.* sterling on " good heritable or personal security, taking the interest " of the said sum payable to Mary Maxwell, my cousin, " half-yearly during her life, commencing the first " term's payment, at the first term of Whitsunday, or " Martinmas, that shall occur after my death, and the " next at the next term thereafter, and so on half-yearly " and proportionally; and the said principal sum itself " payable to my said trustees, or theirs aforesaid at her " death. In the fourth place, I appoint my said trus- " tees to make payment of 200*l.* sterling to each of " Stephen Rowan, James Hutton Rowan, and George

" Christian Rowan, sons of the said George Rowan; " and as I think it was the intention of my dear de- " parted sister Mary Black, if she had made a will, to " have left the flat of the house in Union Place, with " the pertinents, to her adopted son, the said James " Hutton Rowan, I direct and appoint my said trustees, " as soon after my death as convenient, to assign and " dispone the said flat in Union Place, as the same is " more fully described in the title deeds thereof, with " the whole pertinents, to and in favour of the said " James Hutton Rowan, and his heirs and assignees, with " the rents thereof from and after the first term of Whit- " sunday or Martinmas after my death. In the fifth " place, I appoint my said trustees, to make payment " to my godson, James Black Miller, son of the said " John Miller, of the sum of 500*l.* sterling. In the " sixth place, I appoint my said trustees to make pay- " ment to Marion Miller, residing in Glasgow, my " adopted sister, of the yearly interest of 3,000*l.* sterling " at the current rate of interest in Glasgow for the time " being, and that half-yearly in equal proportions, " commencing the first term's payment at the first term " of Whitsunday, or Martinmas, that shall occur after " my death during her life, and also to deliver over to " her all my household furniture and plenishing, in- " cluding silver plate and plated articles, and bed and " table linen; and at the death of the said Marion " Miller, I appoint my said trustees to make payment " of the foresaid principal sum, of 3,000*l.* sterling to my " foresaid godson, James Black Miller. In the seventh " place, I appoint my said trustees to pay my servant " Susan Johnston, if in my service at the time of my " death, the sum of 250*l.* sterling, in consideration of

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" her faithful services, for the purpose of purchasing an " annuity to her, and which I direct them to see purchased; but if she shall not be in my service at the " time of my death, the said sum shall be restricted to " 100*l.* sterling. In the eighth place, I appoint my " said trustees, to pay to the directors of the Glasgow " Royal Infirmary, for behoof of that institution, the " sum of 200*l.* sterling, and the like sum of 200*l.* " sterling, to the directors or managers of each of the " Lock Hospital, Magdalene Asylum, and School for " the Instruction of the Deaf and Dumb in Glasgow, " each for behoof of these respective institutions: Declaring, as it is hereby expressly provided and declared, " that the several sums above provided, so far as not " otherwise directed, shall be payable to the respective " persons and directors foresaid at the first term of " Whitsunday, or Martinmas, that shall occur six months " after my death, and shall bear interest after that " period till paid. And lastly, my said trustees shall " apply the rest, and residue, of my estate, and effects, to " such benevolent and charitable purposes as they think " proper; and if the same shall amount to 600*l.* sterling or upwards, I recommend to my said trustees " and their foresaids to execute a deed vesting the same " in themselves, and apply the annual proceeds thereof, " after deducting expenses, in yearly payments to " faithful domestic servants settled in Glasgow or the " neighbourhood, who can produce testimonials of good " character and morals from their masters or mistresses " after ten years service, no person to be entitled to " more than 10*l.* sterling yearly, but as much less as " my said trustees may think proper; and if the free " residue of my estate shall not amount to the sum of

"600*l.* sterling, I authorize my said trustees to distri-
"bute the same to such charitable or benevolent pur-
"poses as they may think proper. And I hereby
"appoint my said trustees and their foresaids to be my
"only executors, excluding all others from that office,
"with power to my said before-named trustees, and
"executors, and the acceptors or acceptor, survivors
"or survivor, and their quorum, to execute every
"conveyance or other deed in favour of such person or
"persons as may be assumed by them into the said
"trust that they think proper and necessary, with the
"same power, and for the purposes herein written;
"with power, to my said trustees, and executors, and
"theirs aforesaid, to sell and dispose of my said herit-
"able and moveable estate, except as herein-before
"directed, and to grant all necessary deeds in favour
"of the purchasers. And I bind and oblige myself
"and my heirs to infeft and seise the said trustees, and
"theirs aforesaid, in the said heritable subjects, and for
"that purpose, to enter with the superiors of the same,
"and to grant dispositions, procuratories of resignation,
"precepts of sasine, and all other deeds necessary for
"divesting myself and them of, and investing my said
"trustees and theirs aforesaid fully and completely in,
"the said subjects; declaring that my said trustees and
"executors, and those to be assumed by them, shall
"not be liable for omissions, or the one for the other,
"but each for his own actual intromissions only, after
"deducting necessary disbursements and expenses, as
"the said intromissions shall be ascertained by the
"account or oath, if required, of the disburser while in
"life, and by such account alone, in case of death, in
"place of all other mode of proof. And I authorize

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"my said trustees to settle, by submission or compro-
"mise, all disputed claims for and against my estate,
"and to name a factor under them in the execution of
"this trust; and I revoke all former settlements and
"mortis causa dispositions executed by me, reserving,
"however, my life-rent of the premises, with full power
"to me, at any time during my life, and even upon
"deathbed, to alter, innovate, or cancel these presents
"in whole or in part."

Dr. Black died on the 19th October, 1834, and Mr. George Rowan, and John Miller, who alone survived, accepted the office of trustees.

On examining Dr. Black's repositories after the funeral, the foregoing deed of settlement was found in an envelope endorsed in the handwriting of the professional gentleman by whom the deed was prepared.

"Dr. James Black's settlement, executed this 31st
"day of May, 1827 years, and deposited with me till
"called for. (Signed) WM. LAWRIE."

There was also found in the repositories a circular addressed to Dr. Black, on the back of which were the following pencil markings or jottings made by Dr. Black :—

" James Maxwell - - -	£400
" M. Maxwell - - - -	2,000
" Rowans - - -	600
" M. Miller - - -	3,000
" J. B. Miller - - -	3,500
" Charities - - -	600
	£10,100
" Bakers - - -	£5,600
" Thistle - - -	3,500
" Gas - - -	3,000
" Stock - - -	5,000
	£17,100

There was also found in the repositories a paper containing the following memoranda :—

"To Marion Miller and Mary Maxwell the interest "of my 7,453*l.* three per cent. stock, and my shares of "the gas company; the annual interest for their lives, "share and share alike, which is to devolve upon their "death, upon James Black Miller, son of John Miller, "St. V. Street; in case of death, to his sons in succes-"sion and their heirs. To the eldest lawful daughter "of James Maxwell, Esq., of Baillieston, 500*l.* To "George Rowan of Holmfauldhead, 500*l.* ea. To four "charities 1,000*l.*, or 250*l.* ea. To Susan Johnston, "my servant, 10*l.* per annum, to be paid every six "months. To Jessie and M. Gammot, 50*l.*=25*l.* ea. "To John and M. Stewart, 50*l.* To Mrs. Stark, 200*l.* "To Greigs, 50*l.*=400*l.*

"Household furniture, M. Miller. The residue for "servants. A sermon to be preached every 4th June "by the clergy of Glasgow in succession, for which "they are to be allowed five guineas; and the annual "interest to be distributed in rewarding good and "faithful servants ; or "prizes of 5*l.* ea. Domestics, three male and three "female; manufacturing do.; agricultural, in the circle "of three miles round Glasgow, do.; trades do. Trus-"tees,—provost, and bailies, and clergy."

The property of Dr. Black, at the time of his death amounted, as stated by the trustees, to 19,395*l.*, of which the amount destined in specific pecuniary legacies was 7,300*l.*; and the value of the household furniture, silver plate, &c. bequeathed to Miss Marion Miller, amounts to 132*l.*, leaving a residue of about 12,000*l.*

Certain questions having arisen as to the intention

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of Dr. Black, in regard to one of the special legacies, and also as to whether, there was a valid conveyance of the residue to the exclusion of his next of kin, the trustees instituted a process of multiplepoinding, for the purpose of obtaining the decision of the Court of Session. Although claims had been lodged on behalf of all the legatees, these were all settled, with the exception of the special legacy of 2,000*l.* to Mary Maxwell; and the questions were limited to the construction of the settlement in regard to that legacy, and to the disposal of the residue which was destined to charitable purposes. The trustees claimed to be entitled to the fee of the legacy of 2,000*l.*; first, in their individual capacities for their own personal behoof; and, secondly, in their official capacity of trustees.

On the other hand, the next of kin claimed to be preferred to the residue, including that sum of 2,000*l.*

The Lord Ordinary (Jeffrey), on the 12th January, 1836, pronounced the following interlocutor:—" Finds, " 1st, that the fee of the sum of 2,000*l.* directed to be " life-rented by Mary Maxwell, belongs to and is vested " in the trustees of the late James Black, not as indi- " viduals, or for their own personal benefit, but as such " trustees only, and must accordingly form a part of " the residue of his estate, to be disposed of as such " residue is by his trust-deed directed to be disposed " of after the termination of the said life-rent, and the " payment of all the special legacies and provisions: " Finds, 2d, that the destination of the whole of the " said residue contained in and expressed by the last " provision, or declaration, of the said trust-deed, is not " void, either for uncertainty, or as having been made " through error or ignorance on the part of the truster;

" that the trustees are therefore bound to carry it into
" effect, and to administer and apply the said residue
" in conformity to the said destination; and that the
" next of kin of the truster, have no title or interest, in
" the matter so long as the trustees shall duly ad-
" minister as aforesaid; and before farther answer
" appoints the cause to be enrolled, that parties may
" state what decreet of preference or otherwise will be
" required to carry these findings into effect, with
" reference to the shape of the action, and the present
" state of the fund in medio.

" *Note.*—The first point turns wholly on a questio
" voluntatis, and it seems to the Lord Ordinary im-
" possible to suppose that the truster really intended to
" give 2,000*l.* to any individuals, who might happen to
" be vested with the character of his trustees, at the
" death of his niece Mary Maxwell. There is a full
" power in the deed to assume additional trustees at
" pleasure, and an instruction to fill up the places
" of those who might die or be disqualified, while the
" direction upon which this claim of the existing trus-
" tees is exclusively vested is merely that they shall
" vest the 2,000*l.* in such a way as that the interest
" shall be payable to Mary Maxwell during her life,
" and the principal, to 'the said trustees and their fore-
" 'saids (that is, their successors in office) at her death.'
" The Lord Ordinary cannot entertain a doubt, that it
" was to be so payable to them as trustees; and that,
" if not otherwise appropriated by new codicils, or
" legacies of the truster, it must revert and fall back
" into the general mass of the trust estate.

" As to the objection of uncertainty, or substantial
" delegation, of the inalienable right of testing to third

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" parties, the Lord Ordinary thinks that it has been set " at rest by the recent cases of Hill v. Burns[1] and " Crichton v. Crichton[2], both most elaborately argued " through all their stages, and both ultimately con- " firmed by judgments of affirmance in the House of " Lords.

" In Crichton's case the destination of the residue was " quite as vague and indefinite as it would have been in " this case if the sum had fallen short of 600*l.* But as " it greatly exceeds that sum, the Lord Ordinary con- " ceives that the recommendation to apply it for behoof " of meritorious servants in Glasgow is to be regarded " as a specific instruction or expression of will on the " part of the truster; and in that view it is infinitely " more precise than any thing that occurred either in " Crichton's or Hill's case, or indeed in any of the " earlier cases; and on a point thus settled by authority " it would be idle to go into any general argument " on the grounds and reasons of the decisions.

" The greater part of the argument and almost the " whole of the evidence, brought to show the supposed " error of the truster, as to the amount of the residue, " which he meant to be affected by this destination, ap- " pears to the Lord Ordinary to be irrelevant and inad- " missible. Beyond all doubt, the trust-deed conveys his " whole property for the purposes therein mentioned; " and it is altogether impossible, therefore, to suppose " that he meant to die intestate, as to any part of it. " The disposition of the residue accordingly is of ' the

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[1] Hill v. Burns, 14th Dec. 1824, 3 S. & D., 389, (new ed. p. 275.) affirmed, 14th April, 1826, 2 W. & S. p. 80.

[2] Crichton v. Crichton, 12th May, 1826, 4 S. & D. p. 553, (new ed. p. 561.) affirmed, 25th July, 1828, 3 W. & S. p. 329.

" 'rest and residue of my estate and effects,' in the " most general and comprehensive terms; and though " the case is supposed of its falling short of 600*l.*, the " disposition recommended on the opposite supposition " is not a disposition of 600*l.* or any such sum, but a " disposition to take effect 'if it shall amount to 600*l.* " 'or upwards.'

" It may appear (and in fact it is) extraordinary, that, " with the knowledge the truster had, of the actual " extent of his funds, he should ever have contemplated " the case of the residue falling below 600*l.* But even " if no explanation could be suggested, the Lord Ordi- " nary could not upon this account refuse effect to the " clear words of the deliberate deed of a sane man. " He is satisfied, however, with the explanation given " by the trustees. The deed was executed upwards of " seven years before the truster's death, and contains " full power to revoke and alter. It was quite possible, " therefore, that either by additional legacies, or by " misfortunes, or extravagance on his own part, the " free residue might be so reduced before the trust " came into operation as either to be altogether anni- " hilated, or to fall below the sum of 600*l.*, which he " seems to have considered as the minimum upon which " his scheme for the benefit of deserving servants could " be set going."[1]

To the above judgment the Lords of the Second Division adhered, on the 23d of February, 1836.

Miller and others, the next of kin, appealed.

Appellants.—In the Court below, the judges seem to have confined their attention merely to the last clause

[1] 14 D., B., M., 555.

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and direction in the settlement, by which the trustees are directed to apply the residue of Dr. Black's estate "to "such benevolent and charitable purposes as they may "think proper," whereas regard must be had to the entirety of the deed in interpreting the meaning of this very general, and ambiguous clause.

The first question that arises upon the import of this clause is, whether a bequest for such benevolent and charitable purposes as the trustees may think proper is not absolutely void? Such a bequest is not imperative on the trustees; it is merely one of a recommendatory nature, putting the execution of it entirely in their discretion, and leaving it altogether vague and indefinite. The testator had by previous clauses left sums for charitable and benevolent purposes to various existing constituted or incorporated bodies, entrusted with the means and the power of applying to the right purposes the sums so bequeathed. The bequests to the Glasgow Infirmary, to the Lock Hospital, to the Magdalene Asylum, to the School for the Instruction of Deaf and Dumb, are all of a charitable and benevolent nature, and being specific, and imperative, and not discretionary, must be carried into execution by the trustees. In like manner, the legacy, to the testator's domestic servant, and the bequests to near relatives and others, may be all considered as falling under the same category of charitable and benevolent purposes of a specific kind, and imposing an obligation on the trustees, to implement the directions of the testator.

But the general words used in the clause in question, that the trustees "shall apply the rest and residue of "my estate to such benevolent and charitable purposes "as they may think proper," impose on them no legal obligation, and are insufficient to raise a trust.

These words are followed by mere expressions of recommendation to the trustees, to vest the residue in themselves, and otherwise to act according to their own discretion. The testator says, " I recommend to my said " trustees, to execute a deed, vesting the same in them- " selves, and apply the annual proceeds thereof, &c. in " yearly payments, to faithful domestic servants," &c. The word " recommend" does not imply a determination that something shall be done, but advice merely. The testator could not by this recommendation, mean the same thing as if he had imperatively enjoined the trustees to do this act. The true test of the validity of the bequest is, whether the trustees could be compelled by a court to apply the residue to any specific purpose? In no case has it been held in Scotland, that mere words of recommendation are adequate to the creation of a trust. The words used and sustained in former cases as creating a trust, have been of a precise and definite kind,—an express order, injunction, or request to apply the funds in a certain manner. The question is, not whether the trustees may not apply the residue to purposes wholly charitable, but whether they are bound so to apply it? This was the view taken by Sir W. Grant in Morrice and the Bishop of Durham[1], and by Lord Cottenham in Kershaw and Williams[2], 11th Dec. 1835. They are not bound, for they are not enjoined to apply it to payments to domestic servants. They are recommended to vest the fund in themselves; but they might, if they so pleased, vest it in any manner which they in

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[1] Morrice v. Bishop of Durham, 9 Vesey, 399; Ellis v. Selby, 7 Simons, p. 352, affirmed by the L. C. 1 Mylne & Craig, p. 286.

[2] Heard July 13, and decided December 11, 1835, at the Rolls; the case will be reported by Messrs. Mylne and Keen.

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their discretion might deem fit. There is no controlling power in any party, which any court could enforce, under which the trustees could be compelled to vest the fund, or apply it in the way recommended. They might apply it to any purposes more consonant to their discretion; and this they would probably attempt to do under the mere general words, directing an application to purposes of charity and benevolence. But, under these general words, the will is bad for uncertainty; and a mere recommendation will not supply the want of an imperative clause of a specific kind, sufficient to raise a trust which courts in Scotland could enforce. The law of Scotland has never yet gone so far as the law of England, in giving to mere precatory, or recommendatory, words, a meaning and effect, equivalent to a command, or desire by the testator; and it has been well observed upon the English cases on this point[1], "It seems to be "generally admitted that they have carried the doctrine "of raising trusts from words of desire and recom-"mendation to a length which is hardly consistent with "sound policy or convenience; the effect, indeed, is "almost to take from a testator the power of expressing "a wish without imposing an obligation." Accordingly, since the case of Lord Andover and Heneage[2], the inclination of English courts has been, to narrow the meaning of unlimited words, showing thereby an inclination to disregard words not imperative; and in a Scotch cause the same principle of strict construction ought to be applied.

But in the next place, the will is ineffectual towards the purposes contended for by the respondents, inasmuch

[1] Powell on Devizes, 358 (Jarman's edition).

[2] 1 Simon's Rep. p. 542.

as there is no proper machinery provided for the upholding or subsistence of the trust, or the carrying into effect the permanent purposes said to have been contemplated by the testator.

The deed is of the nature of a conveyance in favour of Mr. Maxwell, Mr. Rowan, and Mr. Miller, "and to "such of them as shall accept hereof, and to the sur-"vivors and survivor of the acceptors, and to such "person or persons, as may be assumed by them, or to "the survivors or survivor, to supply the deficiency of "such as may die, or decline to act, and which they "are hereby empowered to do when they see proper, "the major number alive and accepting at the time "being always a quorum, as trustees or trustee, for the "ends, &c. after specified."

The trustees, or any one of their number surviving, may assume other trustees; but the trustees named have alone the power of assumption. That power is not communicated to those, who may be assumed by the present trustees, neither is there any continuous devolution of the power of assumption. The trust nomination therefore, necessarily terminates with the present trustees, and the persons whom they or the survivors or survivor may name, because there is no trust given to their heirs.

Dr. Black has not availed himself of those forms of expression by which a properly constituted and permanently subsisting trust management could be upheld, and which will be found in all the books of styles of conveyancing in Scotland; so that the operation of this trust, must necessarily be of a limited nature, confined to the purposes which may be forthwith carried into effect.

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In all the other recent charitable bequests which the Court of Session have sustained; not only did the deeds provide, the means of upholding, and continuing the trust, but by declaring the fund bequeathed, to be applicable to the purposes of institutions actually existing, or to be established and incorporated, which of course had their own means of management, the bequests were made as permanent as the existence of the institutions intended to be benefited. Thus, in the case of Hill v. Hood[1], the testatrix appointed the residue of her estate "to be applied by my said trustees and their foresaid "in aid of the institutions for charitable and benevolent purposes established in the city of Glasgow "and its neighbourhood." The residue being thus left in aid of institutions established or to be established, and which necessarily had their particular directors for managing their other funds, there could be no difficulty in the permanent management and application of the bequest. In Crichton's trust, there was a declaration by the testator, that "it is my wish that such remaining "means and estate, shall be applied in such charitable "purposes and in bequests to such of my friends as "may be pointed out by my said dearly beloved wife, "with the approbation of a majority of my said trustees." In this case the trust was more of a temporary nature, at least it admitted of a more ready and early distribution of the residuary estate, and so did not require the creation of a machinery so permanent in its character, as the present bequest would have required; but in fact, the means of upholding the trust was created and made permanent till its purposes should be fulfilled.

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[1] Hill v. Hood. Dec. 14, 1824. 3 Sh. & D. p. 275. (new ed.) Affirmed April 14, 1826, 2 W. & S. Appeals.

In the later case of Murdoch[1], a party who was born, resided, and died in Glasgow, executed a deed of settlement, dated at Glasgow, in favour of trustees resident there, and bequeathed by a codicil, dated also at Glasgow, a sum to be laid out in lands to support a school, " to be under the management of the magistrates " and ministers of the established church." It was held that the magistrates and ministers referred to were those of Glasgow; and the bequest being directed to be laid out in lands, and the management of it being devolved on the corporation of the city, a permanent trust was created.

But the trust in question is inept for its purposes, as it does not provide the requisite machinery for giving endurance, and stability to its management. A trust of this sort, in order to be valid, must be of a character so distinct in its provisions as to leave no difficulty in a court of law being able to enforce the directions or injunctions of the testator. In Williams against Kershaw,[2] Lord Cottenham observed, that " a trust to be carried " into execution by the Court, must be of such a nature " that it can be under the control of the Court." Now, this bequest could not to any proper effect be under the control of the Court, since it is deficient in the means by which the Court could be enabled to exercise its control, or to interfere at all in supplying the defective operation of the testator's will. There is no power existing in, or assumed by the Scotch courts of renewing a trust which may have lapsed through the failure of the trustees or any other cause. The general rule of these courts is,

[1] Murdoch v. the Magistrates and Ministers of Glasgow, Nov. 30, 1827; 6 S. & D. p. 50. (new ed. 186.)

[2] 4 Mylne v. Keen Reports (not yet reported.)

to refuse to appoint new trustees to carry into effect a will containing even bequests of a specific kind.[1]

Respondents.—The instructions given to the trustees in the trust-deed are sufficiently explicit and distinct, and the deed is in all respects effectual to vest the whole funds in the trustees for the purposes expressed, to the exclusion of the heirs-at-law.

Whatever difficulties may have attended the question in an earlier period of the law of Scotland, they have been removed by recent decisions both in the Court of Session and in the House of Lords. The plea of the appellants is, that the deed is void from the form in which it is conceived, and from uncertainty.

The general rule of law is, that a person may dispose of his property either by a deed inter vivos or mortis causâ in such manner and for such purposes as he chooses, provided these purposes are in themselves lawful. Testamentary deeds in particular are so much favourites of the law, that it is imperative upon courts of justice to interpret them in the manner best calculated to carry into effect the intentions of the testator. In this case the testator's intention, that the residue of his funds should be devoted to charitable purposes, is beyond all doubt, and the only possible question that can arise is the competency of his delegating to his trustees a certain amount of discretionary power in regard to the selection of the charities to which his funds were to be applied. The legal principles and analogies in favour of the competency of such delegation

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[1] Marjoribanks, Petitioner, Feb. 27, 1822, S. & D. p. 335. (new ed. 333.) Christie, Petitioner, Feb. 3, 1827, 5 S. & D. p. 272. (new ed.) Allan v. Glasgow's Trustees, 2 Shaw & Maclean's Appeal Cases, 333. (reversed.)

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have been so thoroughly discussed in a variety of adjudged cases, that it is sufficient to refer to those decisions by which both points have been definitively settled.[1]

Now the words of the deed are unequivocally expressed. The testator says:—" And, lastly, my said " trustees shall apply the rest and residue of my estate " and effects to such benevolent and charitable purposes " as they think proper; and if the same shall amount to " 600*l.* sterling, or upwards, I recommend to my said " trustees and their foresaids to execute a deed vesting " the same in themselves, and apply the annual pro- " ceeds thereof, after deducting expenses, in yearly " payments to faithful domestic servants settled in " Glasgow or the neighbourhood, who can produce " testimonials of good character and morals from their " masters or mistresses after ten years service; no " person to be entitled to more than 10*l.* sterling yearly, " but as much less as my said trustees may think proper. " And if the free residue of my estate shall not amount " to the sum of 600*l.* sterling, I authorize my said " trustees to distribute the same to such charitable or " benevolent purposes as they may think proper."

There can be no doubt that this clause imports that the

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[1] Hill v. Burns, 14th Dec. 1824, 3 S. & D. p. 389. (new ed. 275), affirmed on appeal 14th April 1826, 2 W. & S. 80.

Crichton v. Crichton, 12th May 1826, 4 S. & D. 561 (new ed.), affirmed on appeal 25th July 1828, 3 W. & S. 329.

Murray v. Fleming, 28th Nov. 1729, Fol. Dic. p. 289, Mor. 4075.

Campbell v. Campbell, 16th Dec. 1738, Fol. Dic. 1. 211, and 2. 290; Mor. 4076. 31. 95.

Brown's Trustees, 3d Aug. 1762, Fac. Coll. 3. 213, No. 95. Mor. 2318; Wharrie, 16th July 1760, Mor. 6599.

Snodgrass v. Buchanan, 16th Dec. 1806, Fac. Coll. 13. and 586. No. 263, Ap. No. 1.

Dick v. Ferguson, Jan. 22, 1758, Kames, Select Dic. 199, Mor. 7446.

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residue was to be devoted to charitable purposes, and that these purposes are to be left at the discretion of the trustees, with a recommendation to them, in the event of the residue exceeding 600*l.*, to apply the funds to the particular purpose mentioned by the testator.

It is vain to say that this is a mere suggestion, and not a direction to the trustees. The plain meaning and intent of the testator is, that the bequests shall be applied as pointed out by him; and in testamentary deeds the courts always look to what was the intention, and on ascertaining it give effect to it in whatever words it may be expressed. Accordingly, the appellants have altogether failed, in establishing, that the law of England would refuse to recognize a trust deed, such as the present, on the ground either of the uncertainty in the expression of the testator's will, or the incompetency of delegating such discretionary powers as those which were conveyed to the trustees. Indeed, they themselves admit, that the English courts make an exception from the application of these principles in regard to bequests to charitable objects, which is an admission that the English courts would refuse to apply them to the trust under which the respondents act.

LORD BROUGHAM.—My Lords, the last case in which I have to advise your Lordships to give judgment is that of Miller v. Black's Trustees, which was heard a few days ago. This will dispose of all the Scotch cases heard except two, those of Donaldson v. Haldaaes and Court v. Robarts, which your Lordships are prevented from deciding, as you likewise are from deciding several of the English cases which we have heard, in consequence of the determination taken against allowing even a

single day's delay in closing the Session, a sacrifice which one could have wished had been made to the important judicial business of this House.

The question in this case arises, upon the construction of an instrument being the trust disposition and settlement of a gentleman of the name of James Black, executed on the 31st of May, 1827, to operate subsequently to his decease, being in the nature of an instrument mortis causâ, according to the forms of the Scotch law. The deed came into effect by the decease of Mr. Black, in the month of October, 1834. The question turned upon the construction of two parts of the instrument; the first of those parts is in these words:—" In the third place, I appoint my said " trustees to lend out the sum of 2,000*l.* sterling on good " heritable or personal security, taking the interest of " said sum payable to Mary Maxwell, my cousin, half-" yearly during her life, commencing the first term's pay-" ment at the first term of Whitsunday or Martinmas " that shall occur after my death, and the said princi-" pal sum itself payable to my said trustees or theirs " aforesaid at her death;" by " theirs aforesaid" clearly meaning, as heirs or representatives are not specified, persons whom the trustees are entitled to assume for the purpose of filling up vacancies occasioned by death or declining to act. The only other part of the instrument important for consideration is this: — " And, " lastly, my said trustees shall apply the rest and " residue of my estate and effects to such benevolent " and charitable purposes as they think proper; and if " the same shall amount to 600*l.* sterling or upwards, " I recommend to my said trustees and their foresaids " to execute a deed vesting the same in themselves,

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" and apply the annual proceeds thereof, after deduct-
" ing expenses, in yearly payments to faithful domestic
" servants settled in Glasgow or the neighbourhood
" who can produce testimonials of good character and
" morals from their masters or mistresses after ten years
" service; no person to be entitled to more than 10*l.*
" sterling annually, but as much less as my said trus-
" tees may think proper; and if the free residue of
" my estate shall not amount to the sum of 600*l.*, I
" authorize my said trustees to distribute the same to
" such charitable or benevolent purposes as they may
" think proper," which aids the construction of the word
" and " in the former part of the deed, that of reading
it " or."

My Lords, upon the first part of this instrument to which I have referred it has been contended, not so much here as in the Court below, that the sum of 2,000*l.*, the interest of which is given to Mary Maxwell for her life, and to the trustees at her death, does not sink into the general residue of the trust, but is given to the trustees beneficially and for trouble. It does not, however, seem possible to maintain this proposition. The clause comes within the general words creating a trust: the words are, " but in trust always for the ends, uses, and " purposes after mentioned;" the sum is given to them by the name of trustees; it is given also to " theirs " foresaid;" that is, to the new trustees to be assumed by them, and of whom the maker of the deed knew nothing. To hold it a gift for trouble would be doing violence to the whole tenor of the instrument, and nothing but express words or plain implication could take it out of the general trust fund. No reliance indeed was placed upon this point at the bar, and had

there been nothing more in the case I should not have detained your Lordships with any observations.

But two other questions have been made, and on those the argument has mainly turned; first, whether or not there is a trust constituted by the deed so as to enable the application of the fund to be effected according to the maker's intention, supposing that to be sufficiently certain, and that it is such an intention as can be supported; and secondly, whether or not the intention is sufficiently certain, and can be supported.

Upon the first question there seems no reasonable ground of doubt. It might be enough to look at the part of the deed immediately following the charitable gift, providing that the trustees named shall execute the conveyances to those whom they are empowered to assume into the trust, with the same powers and for the purposes herein written. Now, among these is that of assuming others to fill up the vacancies by death or declining to act; and though the trustees are only empowered to assume on vacancies, that is quite sufficient for continuing the trust, and would make it their duty to continue it even if they altogether decline themselves. But there is a sufficient power in the Court of Session to provide for continuing the trust in a case of this description had there been no such clause. It is unnecessary to inquire what power the Court has, or what it is in use to exercise in the case of private trusts becoming defective by death or non-acceptance, although the case of Busby in 2 Shaw and Dunlop[1], of Christie in 5 Shaw and Dunlop[2], and still more precisely that of Moir in 4 Shaw and Dunlop[3],—cases so late as 1825

[1] p. 176. (new ed. p. 157.) 1st Feb. 1823.
[2] p. 293. (new ed. p. 272.) 3d Feb. 1827.
[3] p. 80. (new ed. p. 808.) 6th July 1826.

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and 1826,—appear to leave no doubt that in one way or another the Court will prevent the failure of a testator's or a disponer's intention for want of trustees; and to this proposition of course those cases are no kind of exception in which the Court refused to interfere where the property was given to the heir or other person upon the trustees dying or refusing to act, as Macdowal v. Macdowal, in Morrison, page 7454,—a case which, as I stated during the argument, came precisely within the principle which ought to govern the exercise of the power of supplying a trust,—that if a trustee dies or refuses the trust, where it is quite clear that the intention of the testator was that in such an event the heir should take the estate discharged from any trust, the Court would not be fulfilling the intention of the maker of the deed, but acting contrary to his intention, if it supplied a trustee, for that is the very event provided for, the gift going over and the trust ceasing. I apprehend, (though it is unnecessary to dispose of that question) that this gift cannot be considered as being in the predicament in which it was contended at the bar to be; namely, that though there is a most distinct constitution of a trust, yet no mention being made of heirs, executors, and administrators, if one of the trustees refused to act, so that the quorum no longer existed, or, if they all refused to act, or all died, the Court had no power to give effect to the testator's intention,—an argument which would require a much stronger case to support it, than any produced at the bar. But it is unnecessary to enter upon that consideration, for in the present case, there is no question whatever. The case of Macdowal v. Macdowal clearly shows, without deciding how the Court would act, in the case of a private trust, that without any doubt the Court " will

"interpose" (I am now reading the words of the judges in that case, which occurred in 1789, when, if at any time, the bench of Scotland was filled by accomplished lawyers, thoroughly versed not only in the principles but in the practice of the law of Scotland, and therefore is of high authority); "the Court will inter-"pose," as it is said, "where no person has any imme-"diate interest in the management," and estates destined to charitable uses are expressly given by their Lordships as an instance. On this point I have rather referred to the cases, and especially the more recent ones, than even to the highly respectable authority of Mr. Erskine, in the 3d book of his Institutes, because, certainly, in former times the Court of Session was in use to go further in supplying defects in trusts, than its later practice appears to warrant.

Then, my Lords, as to the second question. Is this gift validly given to charitable uses? The maker of the deed first says, that the residue shall be applied by the trustees to such benevolent and charitable purposes as they may think proper. Suppose we read "and" "or," the authorities in the Scotch law, do not entitle us to hold that this is so uncertain as to be void. In Hill v. Burns, decided by this House, the fund was to be distributed among institutions established or to be established in Glasgow, or its neighbourhood "for "charitable and benevolent purposes,"—the same words; this was held sufficiently certain by the Court of Session, and their judgment was affirmed by your Lordships. Indeed the distinction between charitable and benevolent uses was not taken in that case, and there appears nothing in the authorities on this subject which should lead us to suppose that the Scotch law has ever given the technical meaning to the word "charity"

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or "charitable" which our English law has given since the statute of Elizabeth. It is true that in Hill v. Burns, "institutions in or near Glasgow" are named; but I am now citing the case on the use of the word "benevolent" only. For that nothing can turn upon the generality of the words in the present case, namely, "charitable purposes," if the addition of "benevolent" does not vitiate the gift, appears clear, from the latest decision of this House, that in Crichton v. Grierson, where it was held, after a careful consideration of all the authorities by the noble and learned Lord who then presided, that a gift to trustees "to be applied to "such charitable purposes" as they shall think fit is good by the law of Scotland. The addition in that case of "bequests to friends and relations" was much relied on in the argument at the bar and in the printed cases, but it does not form the ground of the decision. My noble and learned friend (Lord Lyndhurst) expressly held, that "charitable purposes" would be sufficient by the law of England, and that the Scotch law is less strict, than ours, in this respect, of which indeed there can be no doubt.

I do not however think that the case rests here. There follows the general gift a recommendation of a specific distribution, namely, yearly payments to faithful domestic servants settled in Glasgow and its neighbourhood who can produce testimonials of good conduct from their masters after ten years service, and no one to receive more than 10*l.* a year; how much less being in the discretion of the trustees. There are several of the gifts in the cases referred to, which have been supported by the Court below as well as by this House, though considerably less precise and definite than this.

Nor does the word "recommend" indicate here a mere suggestion or advice. It must be taken as imperative. The disponer first, it is true, gives the trustees a full discretion; but he then proceeds to specify and provide for two events,—the one, that of the residue exceeding 600*l.*, and the other that of its falling below 600*l.* In the former event he specifies, under the form of recommending, the support of old servants; in the latter event he leaves the trustees to distribute to such charitable or benevolent purposes as they may think proper. Supposing therefore that any doubt could have arisen whether "recommend" was imperative or not, had it merely followed the first general words, (though I do not at all think it would in that case have been otherwise than imperative) the addition of the third clause removes all doubt, and shows that the discretion only, is vested where the sum falls short of 600*l.*

That there can be no difficulty in superintending the administration of this fund, I take it to be quite clear. The cases referred to, particularly that of Cowan's Hospital[1], 1825, reported in 4 Shaw and Dunlop, prove incontestably that persons having an interest in a charity are entitled to put the powers of the Court in motion with respect to its management; and I take it to be equally clear that the next of kin of the founder may pursue the same course.

The decree, appealed from, must therefore be affirmed. But as whatever doubt may be thought to exist, in the case has been occasioned by the terms of the deed; and more especially considering, that this is the case of a fund given to a charity by a person who appears not to have

[1] p. 276. (new ed. p. 280.)

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been at all sure—probably, who did not suppose—that it would turn out to be any thing like so considerable as it has done, for he speaks of its exceeding 600*l.* or falling short of 600*l.*, and it turned out to be 12,000*l.*, (upon which an argument was raised, grounded on a case in Ambler, that he did not mean, if it was much more than 600*l.*, that it should be so applied); I am of opinion, that the whole of all parties costs, both below and here, should be borne by the estate.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the whole costs of all parties in this cause in the Court of Session and in this House be paid out of the estate in question.

DEANS & DUNLOP—ARCHIBALD GRAHAM, Solicitors.