as representing the interest of Macmillan & Grant, claimed a right of hypothec over the rental book of the estate and other writings which had come into their possession on the employment of Captain and Mrs Mackay. The Lord Ordinary remitted to a commissioner to take proof under the specification, when Mr Tod appeared, and declined both to produce the book and to say where it was. The commissioner having reported the matter to the Court, a discussion followed as to the validity of the alleged right of hypothec. In the course of the discussion it was admitted that the rental book was in the possession of the Messrs Tod, but they maintained their right to retain it until payment of their account, or at any rate of that part of their account which was incurred in the recal and appointment of a new judicial factor, because that was both beneficial to the estate and a direct charge against it. The Lord Ordinary pronounced the following interlocutor, which has been acquiesced in :—

"28*th February* 1867.—The Lord Ordinary, having heard counsel on the report of the commissioner, No. 40 of process, relative to the objection raised by the haver, under the call made upon him to produce in terms of articles 1st and 2d of the specification No. 37 of process, Finds that the haver is bound to answer the question whether he has the rental book and other writs called for in his possession, and if so, to produce the said rental book; and ordains him to produce the same by Monday first, under reservation of any claim he may have to payment out of the estate in the hands of the judicial factor of such of the accounts in respect of which the claim of hypothec is asserted, as he can instruct are properly chargeable against that estate, and have not already been paid, and reserving *hoc statu* the questions raised as to production of the decree-dative and inventory: Finds the haver liable in the expenses of this discussion, which modifies to five guineas, and decerns. DAVID MURE."

"*Note.*—The rental book called for ought, in the opinion of the Lord Ordinary, to have been handed over to the predecessor of the present judicial factor by the agent whose representative now claims right to retain it, when the trust estate was taken out of the charge of his client, Mrs Mackay, and placed under judicial management in 1840, and this would probably have been done had that judicial factor properly discharged the duties devolved on him by the Court. In these circumstances, it appears to the Lord Ordinary that the representative of the agent who so omitted to hand over the rental book to the judicial factor is not entitled, in respect of any of the rules which have hitherto been applied in regard to an agent's hypothec, to refuse to deliver up that book to the officer of Court under whose charge the estate now is, because of accounts incurred on the employment of one of the beneficiaries interested in the estate after it had been placed under a judicial factor. When the question was discussed before the Lord Ordinary, the claim to retain was accordingly not insisted on, in regard to several of the accounts in the appendix to the answers for the executor, on whose behalf the claim was set up; and, in particular, in regard to Nos. 2 and 5, and, as the Lord Ordinary understood, No. 7 of that abstract, and the Lord Ordinary does not very well see upon what ground, *ex facie* of the other accounts, a claim to retain can be maintained in respect of them as against the present judicial factor, unless it can be shown that the business was incurred upon the employment of his predecessor in the office or in proceedings necessary to be taken against that predecessor for the protection of the estate; and which, in the peculiar circumstances of the case it may have been necessary to do. While, therefore, the Lord Ordinary has appointed the rental book to be produced, he has inserted a reservation which will keep open any claim the haver can instruct to be properly chargeable against the trust-estate, which is sufficient to meet any such demand; and he has also reserved *hoc statu* the question as to ordering production of the decree dative and inventory. "D. M."

Counsel for Haver—Mr G. H. Pattison. Agents—H. & H. Tod, W.S.

Counsel for Judicial Factor—Mr W. A. Brown. Agent—J. C. Baxter, S.S.C.

HOUSE OF LORDS.

Monday—Thursday, March 18—21.

OSWALD'S TRUSTEES *v.* OSWALD AND OTHERS.

(In Court of Session 2 Macp. 249.)

Entail—Contravention—Prohibitions against Alienation and Altering the Order of Succession—Mortis Causa Deed. An heir of entail in possession executed a *mortis causa* trust-deed, conveying the entailed lands to trustees, who maintained that the conveyance was within the granter's power, because the prohibition against alienation was ineffectual, being erased *in substantialibus*. *Held* (aff. C. of S.), that the deed was not an alienation, but an alteration of the order of succession, which was prohibited by a clause not said to be ineffectual, and that therefore it was a contravention of the entail.

This was an appeal from a judgment of the Second Division of the Court of Session, in an action of declarator at the instance of the trustees and beneficiaries named in the trust-deed of the late Richard Alexander Oswald, Esq., of Auchencruive, dated 19th October 1838. Mr Oswald died on 19th June 1841.

The pursuers concluded for declarator that they had right under the trust-deed to the whole heritable and moveable property of the late Mr Oswald, and especially to certain specified lands which Mr Oswald held under a deed of entail, dated 22d January 1790. The deed of entail contained a prohibition against alienating the lands, and another against altering the order of succession. But, in the prohibition against alienation, the word "irredeemably" was written on an erasure, which, it was maintained, rendered that prohibition ineffectual and entitled Mr Oswald to convey the lands to the pursuers.

The defender, Mr Alexander Oswald, pleaded that the trust-deed was not a deed of alienation in the sense of the statute 1685, c. 22, but a deed altering the order of succession, and that, although the clause prohibiting alienation might be ineffectual because of the erasure *in substantialibus*, the clause prohibiting the alteration of the order of succession was not in that position; and that therefore the late Mr Oswald had no power to grant the trust-deed in so far as it affected the subjects of the entail.

The Lord Ordinary (Jerviswoode) assoilzied the defenders, and on a reclaiming note the Second

Division unanimously adhered. The trust-deed was held to be an alteration of the order of succession, and therefore invalid as a contravention of the tailzie, whether the prohibition against alienation was valid or not.

The pursuers appealed.

ANDERSON, Q.C., and GEORGE YOUNG, for them, argued—As it was clear that the late Mr Oswald was not prohibited from selling or alienating the estate, the sole question was whether the deed which he had executed was an alienation or simply a deed affecting the order of succession. In Scotland, it was not competent for a fiar to alienate his estate except by a conveyance which had a present and immediate operation. Now, this deed which was executed was a *de presenti* conveyance. It was a disposition, and not of the nature of a will. The trustees were disponees or singular successors, and not legatees. A disposition to the trustees to sell was in effect the same thing as a conveyance to singular successors. The Court below was therefore wrong in holding that this was of the nature of a deed altering the order of succession, and the interlocutors appealed ought to be reversed.

The ATTORNEY-GENERAL (Sir John Rolt) and RUTHERFURD CLARK, for the respondents, were not called on.

LORD CHANCELLOR (CHELMSFORD)—My Lords, this is an appeal from an interlocutor of the Second Division of the Court of Session adhering to an interlocutor of the Lord Ordinary in an action of declarator and reduction at the instance of the pursuers.

The object of the action is to have it declared that the pursuers, as trustees under a trust-disposition and settlement executed by Richard Alexander Oswald on the 19th October 1838, had full right to the whole lands and heritages, goods, gear, debts, and sums of money, claims and demands, and in general the whole means and estates heritable and moveable, real and personal, of what nature or kind soever, and wheresoever situated, which belonged to the said Richard Alexander Oswald.

The defenders, in answer, allege that Oswald had no power to make the trust-disposition and settlement, being prohibited by a deed of tailzie of the lands and heritages, dated the 22d January 1790, under which he was heir in tail in possession.

The deed of tailzie was made by trustees in execution of a trust contained in a tailzie of the estate of Auchencruive of date 24th March 1780; but it must be regarded as an independent tailzie, and not as depending upon any reference to the prior deed.

It contains two prohibitory clauses, upon one of which the whole question turns. The first of them is a prohibition against changing the order of succession—"That it shall not be lawful to, or in the power of, the said Richard Alexander Oswald, or any of the heirs-male general or of tailzie, who shall succeed to the said lands and estate, to alter, innovate, or change this present taillie, or nomination, or order of succession herein prescribed, or do or grant any act or deed that may import or infer any alteration, innovation, or change thereof directly or indirectly." The second is against alienations in these words—"That it shall not be in the power of the said Richard Alexander Oswald, or of any of the heirs-male general or of taillie, who shall succeed to the said lands and estate, to sell, alienate, impignorate, or dispone the said lands and estate, or any part thereof, either irredeemably or under reversion."

In this latter clause the word "irredeemably" is written upon an erasure, and this being an alteration *in essentialibus*, the whole clause is vitiated, and in consequence there is no valid prohibition against alienation.

The only prohibitory clause which is effective is that against altering the order of succession. The question therefore is whether the trust-disposition and settlement of the 19th October 1838 is to be regarded as an alteration of the order of succession, and therefore prohibited, or as an alienation, and within the competency of Richard Alexander Oswald by reason of the invalidity of the clause prohibiting alienation.

The deed in question is a *mortis causa* disposition by Oswald to trustees, and the purposes of the trust are declared to be for payment of the truster's debts and legacies, and after these payments in trust during the life of his widow, when she should think proper, to sell and dispose of the trust-estate and effects and to invest the monies in the funds, and pay the whole of the dividends to her, and after her death to lay out and invest a sum of £30,000 for the use of the truster's granddaughter, with trusts for his grandchildren and nephews and nieces, and on failure of all the preceding trusts the residue to be distributed under the English statute of distributions.

The appellants contend that this deed is an alienation of the estate, and not a mere alteration of the order of succession. First, because the trustees are singular successors; and secondly, because it directs an entire conversion of the estate into money, and so produces not a mere alteration, but a complete termination of the order of succession. And in support of this view they rely strongly upon the case of Syme *v.* Dickson as a decision which ought to govern the case.

In Syme *v.* Dickson there was an entail, with a prohibition against alienation and contracting debts, but none against altering the order of succession. The heir in tail in possession made a *mortis causa* disposition to trustees, to sell and dispose of the lands for payment of his debts, and to pay the residue to his heirs and assigns. In order that this deed should be valid it was necessary to establish that it was not an alienation, but an alteration of the order of succession. The Court of Session, in the first place, found that the entail did not contain a valid prohibition against altering the order of succession. Therefore the trustees brought an action to have it found that by the trust-deed the heir of entail in possession did actually alter the order of succession. The defender pleaded that the pursuer never altered the order of succession, and that by executing the trust-deed for the purpose of selling and paying debts he committed a contravention of the entail. The Court, after the Lord Ordinary had sustained the defences generally, adhered to his judgment on the defence that the truster had not by the trust-deed made an effectual alteration of the succession.

Now, upon this case it must be observed that the deed was a disposition to trustees for payment of debts, and therefore in its terms an alienation within the prohibitory clause. The trustee, in order to take it out of the operation of that clause, endeavoured to give the deed the character of one effecting an alteration of the succession. But unless the pursuer could have satisfied the Court that if it actually altered the order of succession it was not by means of a deed which amounted to an alienation, he could not have succeeded. I do not understand Syme *v.* Dickson to be an authority

for the proposition apparently contended for in this case, that if the deed had been one altering the order of succession it could not at the same time be an alienation. There seems to be no reason why a deed should not at once violate both prohibitions.

But the argument of the appellants appeared to make the object of the two prohibitory clauses so entirely different as to be capable of only separate and distinct infringement. Thus, after speaking of the three cardinal prohibitions against alienation, and contracting debts, and altering the order of succession, and of the distinction preserved between them in the statute of 1685, and the Act of Parliament of 1848, they quoted the following words of Lord Fullerton in Oliphant's case (13 D. 1179) :—"The question is brought to this point—whether the deed of 1816 is an alienation or an alteration of the order of succession. No doubt every question of this kind may be stated so as to raise an apparent difficulty ; for a deed altering the order of succession is an alienation as to those heirs who are excluded ; and, on the other hand, an alienation is a most effectual alteration of the former order of succession."

These observations were made on a case in which the entail effectually prohibited alienation but did not prohibit alteration of the order of succession, and in which the deed was clearly of the latter description, for the heiress in tail gave, granted, and disponed the estate to and in favour of herself, and failing her to and in favour of her second son and his heirs, whom failing to a series of heirs different from those called in the original destination. And Lord Fullerton, remarking that "the deed was in the ordinary form of a deed of alteration," added an observation which completely meets the present case. He said—"I do not think that a disposition leaving the disponer in full possession, and conveying the estate after her death to a third party, would have been an alienation but an alteration of the order of succession."

In the present case Richard Alexander Oswald, whilst he was heir in tail in possession, might have made an effectual disposition during his life, there being no valid prohibition against alienation. But his trust-disposition and settlement was not to come into operation until his death, when the succession immediately opened to the next of kin in tail. It seems impossible to deny that the trust-disposition and settlement, if permitted to take effect, would innovate and change the order of succession, and divert the estate into a different channel. The observation of Lord Fullerton in Oliphant's case, to which I have just referred, is in exact accordance with the unanimous judgments of the Lord Ordinary and the Judges of the Second Division in the present case, that the deed in question is not an alienation, but an alteration of the order of succession. With such a weight of authority against the appellants I have no hesitation in advising your Lordships that the interlocutors appealed from ought to be affirmed.

Lord CRANWORTH—My Lords, it is hardly necessary to remind your Lordships that a Scotch entail, in order to be to all intents effectual, must be protected by three properly framed prohibitory clauses—*i.e.*, a clause against alienation, a clause against incurring debts, and a clause against altering the order of succession.

Before the passing of Lord Rutherfurd's Act in 1848, a defect in any one of these prohibitions did not make the tailzie void, but simply left to the heir of tailzie in possession the liberty to do the act not duly prohibited, the other provisions of the tailzie remaining in force ; and the question in this case having arisen in 1841, must be solved irrespectively of the Act of 1848.

I assume for the present argument that there is here no valid prohibition against alienation, and therefore if what was done by the *mortis causa* deed of 1838 is to be treated as an alienation of the entailed estate by Richard Alexander Oswald, and not as an altering of the order of succession, then the appellants are right, and the Court below was wrong. But I am of opinion that what was done by the *mortis causa* deed, assuming it to apply to and to comprise the entailed lands, was, as to those lands, not an alienation within the meaning of the statutes regulating entails, but was an altering of the order of succession.

A separate meaning ought to be given to every one of the three restrictions, and therefore although every alienation may popularly be described as altering the order of succession, yet that is not in my opinion the meaning of the word "alienation" as used in the statutes. Alienation is a distruction of the succession rather than an alteration of its course. It removes the subject alienated from the operation of the tailzie, and leaves it as if no tailzie existed. If that be a correct interpretation of the language of the statutes when they speak of alienation, as I cannot doubt it is, there was here no alienation ; for alienation, to be valid, if made by an heir of tailzie not prohibited from alienation, must be made by him while he is in possession as heir of tailzie. He may in his lifetime, by alienation, destroy the succession, but as soon as he dies, his power over the entailed property is at an end, and the title of the person next in succession under the tailzie takes effect ; and if the right of that person is defeated by the *mortis causa* deed, the effect of that deed is to divert the course of succession from the person entitled under the tailzie, and to carry it to the person or persons entitled under the *mortis causa* deed. It can make no difference that the person claiming to be entitled under the *mortis causa* deed is thereby directed to sell. He can only do that after he has succeeded to the estate in an order of succession different from that prescribed by the tailzie.

On these short grounds the decision of the Court below appears to me to have been perfectly correct.

Lord WESTBURY—My Lords, I am ready to grant, for the purpose of the present judgment, to the appellants that the erasure contained in the prohibiting clause against sale, alienation, and impignoration vitiates the whole of that prohibition. I am also ready to grant or to assume, for the purpose of the present argument, that if the settler in the deed of 1838 had been an unrestrained fee-simple proprietor, the lands in question might have been taken as passing by virtue of that instrument.

It may be unnecessary to mention (but perhaps it may be desirable to do so, in order to show that we have not forgotten it) the well established principle that an heir of entail, according to the Scotch law of entail, is absolute fiar, and has all the characteristics of a fee-simple proprietor, save to the extent to which he is restrained by the fetters of the entail. One other observation may be necessary—namely, that this is a case *inter haeredes ;* and deeds of entail being by Scotch law good at common law, it is here simply necessary to inquire whether the deed of 1838 is struck at by any prohibition ; because if there be a prohibi-

tion within the terms of which that deed falls, it will be sufficient to avoid the instrument.

The argument on the part of the appellants consists of two propositions—one forming the major premiss of their syllogism, the other the minor. Their first proposition was this:—No gratuitous deeds of alienation fall within the terms of a simple prohibition against altering the order of succession. They attempted to maintain that general proposition on the authority of two or three cases, the principal of which were, first, the case of Syme *v.* Dickson, and then, secondly, Lady Dalhousie's case. Now, in the case of Syme *v.* Dickson there was a prohibition against alienation, but there was no prohibition against altering the order of succession. The instrument which was executed by the heir of entail had an immediate operation, because it conveyed to trustees the lands then belonging to him, and which he should possess at the time of his death; And the trust was present and immediate—namely, to sell those lands. It was not a revocable instrument, nor was a liferent reserved to the granter. That deed, therefore, was struck at by the prohibition against alienation; but the contention was to give it a different character from that of alienation, and to bring it, if possible, within the character of a deed altering the order of succession. The Court of Session, however, held that it was an alienation, and refused to bring it within the compass of any prohibition, if there had been a prohibition against altering the order of succession. That case by no means proves this conclusion that a gratuitous deed of alienation may not be bad as an instrument altering the order of succession.

In Lady Dalhousie's case the circumstances were reversed. In that case the nature of the instrument was of this kind. (I take the statement in both of these cases from the statements made by the appellants themselves.) In Lady Dalhousie's case the heir of entail executed a disposition in favour of himself and the heirs-male of his body, and it was attempted to be contended there that that was an alienation. But it was held that inasmuch as the estate of the disponer was reserved to the disponer, it was not an alienation, but was a deed altering the the order of succession.

With regard to the first general proposition of the appellants, it appears to me to be effectually disproved by the language of the judge in the case of Oliphant (which has been already referred to by my noble and learned friend the Lord Chancellor), and also by the decision of this House in the case of Innes *v.* Cowan, both of which cases appear to me effectually to dispose of the assertion that a gratuitous deed of alienation cannot be struck at by a clause against altering the order of succession.

The next proposition, and the minor premiss of the appellants, is, that this particular instrument of 1838 is a deed of alienation; and being a deed of alienation, they say it cannot be brought within the compass of the prohibition against altering the order of succession.

Now it is in this proposition, as in most instances of false reasoning, that the error of the appellants principally lies. My Lords, this deed has none of the characteristics of alienation. In the first place, the liferent of the settler is absolutely reserved. In the next place, the deed is purely *mortis causa*, and therefore in its own nature revocable. In the third place, it is expressly made, subject to revocation, even at the last moment of the granter's life. Now, what is the character of an instrument of that kind? Can it be properly termed an alienation? It has no operation whatever *inter vivos*. It has no operation until the death of the settler. Then, on the death of the settler what is the effect? Why, that under the original deed of entail, the heir of tailzie under the destination in that deed becomes entitled. But what would be the operation of this trust-deed of 1838? Its only operation, its only object, aim, and purpose, would be to give to the estate a different owner from the successor that would be entitled to it under the destination of the entail. But can any one say that an instrument, the object and effect of which are clearly to alter the ownership at the death of the settler, is not an instrument which has for its sole purpose and aim, and its only operation, to give to the estate a different succession at the death of the settler?

My Lords, this case appears to me so plain, that I should hardly have supposed that it could be made capable of any serious discussion, but for the able and learned argument which we have heard.

But these being the characteristics of the deed, I submit to your Lordships that unquestionably the conclusion of the Court of Session was right, and I therefore concur in these words of the Lord Justice-Clerk, in which he says—"Such a testamentary conveyance seems to be in every sense of the term a contravention of the tailzie, an alteration and innovation of the order and course of the succession, a substitution of a new succession for the tailzied succession, the nomination of new successors not members of the tailzie. The pursuers therefore, in my opinion, as trustees, are the successors of Mr Oswald in the true testamentary sense of that term, because they take from him by an instrument which is gratuitous, executed *mortis causa*, revocable, undelivered, and ineffectual during the lifetime of the maker."

But an instrument of which these things may be truly predicated cannot be called an alienation except by a misnomer. It is nothing to say that it would be competent to the trustees to feudalise their titles under that deed. If they had done so the destination of the deed still remained revocable, having no effect whatever on the enjoyment of the property till the death of the settler. These are the characteristics, not of a deed of alienation operating *de presenti inter vivos*, but of an instrument, the effect of which is postponed till the death of the settler, and then intended to operate upon the destination contained in the deed of entail, by substituting a new line into the order of succession.

I have not, therefore, the least doubt, nor have I for a moment felt any doubt from the commencement of the argument, as soon as the facts of the case were ascertained, with regard to the correctness of the decision of the Court of Session.

Lord COLONSAY—My Lords, I have very little to say in addition to the observations which have been made by your Lordships, because I concur entirely in those observations and in the conclusion at which your Lordships have arrived. It appears to me that this deed in form partakes of the character of an alienation, but it does not, on that account, cease to be a deed altering the order of succession.

I see it stated in the written argument for the appellants that "a deed altering the succession is a deed whereby an heir of entail in possession of the estate under a destination to himself and his heirs-male resigns it in favour and for new infeftment to himself and his heirs-general. In such a case the heirs-general take through him,

and not from him." Now, it is true that that is a most common mode of altering the order of succession. But it is not the only mode of altering the order of succession. I know no authority for holding that an alteration in the order of succession may not be effected, although the heir in possession does not first convey to himself. Indeed I think the appellants were unable to sustain this argument even in their printed case, because in a subsequent part of it they fall off from that position, and seem substantially to admit that if this deed had been one conveying the estate to trustees in the manner in which it is attempted to be conveyed, with instructions to make it over to another set of heirs, in that case it would have been a deed altering the order of succession. That implies that a conveyance to trustees, though it be not in form an alienation, may still be a step in the alteration of the order of succession, and that it is not merely by a resignation in favour of himself and his heirs that an alteration in the succession can be effected.

This leads us to look at the nature of this deed. The deed is one which is made by the settler for the purpose of settling affairs at his death. It is a deed which conveys to trustees, but it is revocable and not to take effect during his life; it is *mortis causa*—in every sense a gratuitous deed; and that being the nature of the deed, it attempts to put the estates into the hands of trustees, with directions to do certain things. One is to give a liferent to a party who is not entitled to a liferent under the entail. Therefore it is a deed which takes away the succession to the estate from the heirs who were appointed by the entail. That appears to me an incompetent mode of proceeding. It has not the ordinary force of an alienation, nor what I think is meant by "alienation," under the statute of 1685. It is not a *de presenti* conveyance. The party did not divest himself of the estate at all; he did not put it away from him. He did not give it over to any other person, and therefore, though partaking in form of the character of alienation, it is not a conveyance such as is contemplated under the clause of the entail which prohibits alienation, but it is an attempt to alter the order of succession, and it is therefore a contravention of that clause of the entail which effectually prohibits alterations of the order of succession.

I abstain from giving any opinion upon a point which was raised in the argument as to the effect of this erasure. I do not think it necessary to do anything further than to assume that it may be conclusive at all events against "irredeemable alienations." Nor do I give any opinion upon the further point, whether this general conveyance would be effectual to carry an estate which was settled by an entail without any particular mention of the lands. That question may afterwards come before the House, but at present I abstain from expressing any opinion on it.

Mr ANDERSON—My Lords, with respect to costs, your Lordships may remember that there was a great volume which you thought unnecessary and which aggravated the costs very considerably.

LORD CHANCELLOR—The House does not allow any discussion as to costs after judgment has been given.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Agents for Appellants—Hunter, Blair, & Cowan, W.S., and Preston Karslake, 4 Regent Street.

Agents for Respondents—Dundas & Wilson, C.S., and Loch & Maclaurin, Westminster.

Thursday—Friday, March 21—22.

BRUCE AND OTHERS *v.* THE PRESBYTERY OF DEER.

(In Court of Session, 3 Macp. 402.)

Legacy—Uncertainty. A legacy of the residue of an estate to the poor of a Presbytery held (aff. C. of S.) not to be void from uncertainty.

This was an appeal against a judgment of the Second Division of the Court of Session in an action of multiplepoinding, raised at the instance of Mr Alexander Bruce, as executor-dative of the deceased James Bruce of Innerquhomery, in the parish of Longside, and county of Aberdeen. The question arose on the effect of the residuary clause in the testator's holograph will, which was in these words:—"The whole of the balance of my property I leave to poor of this prisbitery, to be divided—I mean the interest—by the sessions of the several churches, but to be paid to all Christians except Roman Catholics. Ja. Bruce, Middleton, 7th Oct. 1852."

The next of kin of the deceased claimed the residue of his estate, which amounted to about £60,000, on the ground that the above bequest was void from uncertainty. It was also claimed by the ministers and kirk-sessions of the Presbytery of Deer, within whose bounds the testator lived, and wrote the bequest.

The Lord Ordinary (Kinloch) and the Second Division held that the bequest was not void or ineffectual by reason of uncertainty, but was valid and effectual.

The next of kin appealed.

The ATTORNEY-GENERAL (Sir John Rolt), ANDERSON, Q.C., and SKELTON, for them, argued:—This bequest was void from uncertainty. The law of Scotland was very different from that of England on the subject of charitable bequests, for there was no statute of mortmain in Scotland, nor doctrine of Cyprès, nor a statute of charitable uses. In all the cases hitherto there had been a certainty in the legatees and in the object of the bequest, but here there was neither. The Lord Ordinary, in considering the clause, inserted the definite article before the word "poor;" but even that did not remove the ambiguity. The poor might mean those receiving parish relief, those who received relief from the kirk-sessions, the result of the collections at the kirk doors, and those who were poor but did not receive relief either one way or another. The subsequent words did not remove the uncertainty. The testator spoke of poor of this Presbytery, and it was not known to what Presbytery he belonged, whether to the Free Church, the United Presbyterian Church, or the Established Church——

(The LORD CHANCELLOR—When kirk-sessions are mentioned without any additional descriptions, the words must be taken to mean the kirk-sessions of that Church which is recognised as the Established Church.

Lord CRANWORTH—There are in Scotland parochial rates for the relief of the poor and also church door collections. There is no Presbytery fund, is there, for the same purpose?)

No; the Presbytery have nothing to do with the relief of the poor. If the word "Presbytery" was to be taken as a word of locality, the expression, "poor of this Presbytery," was indefinite, because the bounds of Presbyteries might be varied from time to time. This was not a gift to the Presbytery for the relief of the poor. Farther,