as his agent very candidly admits, to avoid the diligence of his creditors, and in particular of the Union Bank. And it appears to me that this constitutes notour bankruptcy within the meaning of the 7th section of the statute. The section says that notour bankruptcy shall be constituted "by insolvency concurring with a duly executed charge for payment, followed, where imprisonment is competent, by imprisonment, or formal and regular apprehension of the debtor, or by his flight and absconding from diligence," &c. Now, it is quite clear, I think, that there was insolvency here, that there was a duly executed charge for payment which was on the eve of expiry, and that there was flight or absconding from diligence on the 19th August. But the personal protection upon which the Lord Ordinary founds his judgment was not granted until the 20th, and thus the necessary requisites concurred at a time when Macadam was undoubtedly liable to imprisonment for this debt. The Lord Ordinary, however, reads the section of the statute in this way—that a duly executed charge will not go to constitute notour bankruptcy if it is given at a time when imprisonment is not competent. This reading of the statute raises some novel questions.

In the first place, the Lord Ordinary holds that imprisonment in the sense of the statute is not competent when the debtor is under personal protection. That has never been decided, and I give no opinion upon it. His Lordship holds, in the next place, that imprisonment is not competent when the debtor is under personal protection but can offer no evidence to the messenger that he is protected. On that also I offer no opinion. But he also held further that a duly executed charge with flight will not constitute notour bankruptcy, if imprisonment, in his sense of imprisonment, is not competent at the time the charge is given. And on this too I give no opinion. But the Lord Ordinary goes further, and must go further, and holds that a duly executed charge with flight from diligence will not make notour bankruptcy if after the flight the debtor obtains personal protection. Now, as regards this last proposition, I am prepared to give a very decided opinion, and to hold that a duly executed charge concurring with insolvency and a flight from diligence will constitute notour bankruptcy, although afterwards the debtor may obtain personal protection. These are the facts here; and therefore I think the Lord Ordinary's interlocutor should be recalled.

Lord Deas, Lord Mure, and Lord Shand concurred.

The Court recalled the interlocutor of the Lord Ordinary, and remitted to his Lordship to award sequestration of the estates of A. Simpson & Company, and of William Macadam as a partner thereof, and to proceed further in the sequestration in terms of the statute.

Counsel for Petitioners (Reclaimers) — Asher —Jameson. Agents—J. & F. Anderson, W.S.

Counsel for James & Others—Kinnear—J. P. B. Robertson. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Macadam—M'Kechnie—Dickson. Agents—J. & A. Hastie, S.S.C.

Tuesday, February 24.

SECOND DIVISION.

[Lord Adam, Ordinary.

M'LEAN AND ANOTHER *v.* HENDERSON'S TRUSTEES.

Trust—Charitable Bequest—Bequest "for the Advancement and Diffusion of the Science of Phrenology"—Whether Void from Uncertainty —Mora.

A testator by his will gave power to his son (in a certain event which happened) to dispose by testament of £5000, to be payable at the first term after the death of the testator. In pursuance thereof the son, by his trust-disposition and settlement, directed that the whole residue of his estate (including the £5000) should be applied by his trustees, "in whatever manner they may judge best, for the advancement and diffusion of the science of phrenology and the practical application thereof in particular, giving hereby and committing to my said trustees the most full and unlimited power to manage and dispose of the said residue in whatever manner shall appear to them best suited to promote the ends in view." After a lapse of forty-seven years, during which a succession of trustees were in the possession and management of the funds in question, the son's next-of-kin brought an action to have it found that the residue belonged to them, on the grounds, *inter alia*, that the power given by the original deed had not been validly exercised by the bequest in the trust-disposition and settlement, and that the bequest was void from vagueness and uncertainty. *Held* (1) that the bequest, being made in a deed of a testamentary nature, was in accordance with the power given; and (2) that looking to the charitable nature of the object, to the fact that phrenology was a sufficiently well-defined branch of science, and to the manner in which the truster's directions were to be carried out, it could not be said to be invalid from vagueness or uncertainty.

Alexander Henderson, banker in Edinburgh, who died on 18th February 1828, left a trust-deed and settlement dated 28th December 1827, by which he disponed his whole estate, heritable and moveable, to trustees for various purposes. *Inter alia*, he provided, after various provisions in favour of his son Mr William Ramsay Henderson, as follows:—"And further, should my son die unmarried and without issue, he shall have power to dispose by testament to the extent of £5000 sterling, to be payable at the first term of Whitsunday or Martinmas after his death, with interest thereafter till payment." Mr W. R. Henderson died at the age of 30, unmarried and without issue, on 29th May 1832, thus surviving his father. Mr Alex. Henderson was also survived by his widow and two daughters, one of whom left two children (having been twice married)—Miss Ruth M'Lean and Mr J. Henderson Begg, Advocate,—who were Alex. Henderson's next-of-kin, and pursuers in this action. Mr W.

R. Henderson left a trust-disposition and settlement and two codicils, dated respectively May 1829, April 1830, and Jan. 1832, and all registered on 9th August 1832.

By the trust-disposition and settlement he conveyed to James L'Amy of Dunkenny, Esquire, Advocate; George Combe, Writer to the Signet; and Dr Andrew Combe, physician in Edinburgh, and the survivors or survivor of them, and to such persons as might be assumed by them as trustees, for the ends, uses, and purposes therein mentioned, his whole estate, heritable and moveable. He further conveyed to them and their foresaids, as trustees foresaid, "the sum of £5000 sterling, part of the trust-estate of my said deceased father, to which extent it is declared by his trust-disposition and settlement . . . that I shall have power to dispose by testament, which sum is declared to be payable at the first term of Whitsunday or Martinmas after my death, and which I hereby desire to be paid to my said trustees accordingly." The purposes of the trust were declared to be—(First), Payment of the truster's lawful debts, &c.; (Second to Fifteenth), Payment of various legacies; (Sixteenth), "Inasmuch as my two sisters Ruth and Mary Elizabeth Henderson will in the event of my death be the inheritors of all my late father's property, I think any pecuniary legacy to them altogether uncalled for, and hereby request my trustees to give each of them one of the pictures in my possession painted by myself, they being allowed their choice; . . . And lastly, the whole residue of my means and estate, and of the said sum of £5000 of my father's trust-estate, shall, after answering the purposes above written, be applied by my said trustees, in whatever manner they may judge best, for the advancement and diffusion of the science of phrenology, and the practical application thereof in particular, giving hereby and committing to my said trustees the most full and unlimited power to manage and dispose of the said residue in whatever manner shall appear to them best suited to promote the ends in view; Declaring that if I had less confidence in my trustees I would make it imperative on them to print and publish one or more editions of an 'Essay on the Constitution of Man, considered in Relation to External Objects, by George Combe,' in a cheap form, so as to be easily purchased by the more intelligent individuals of the poorer classes, and mechanics' institutions, &c.; but that I consider it better only to request their particular attention to this suggestion, and to leave them quite at liberty to act as circumstances may seem to them to render expedient, seeing that the state of the country and things impossible to foresee may make what would be of unquestionable advantage now not advisable at some future period of time. But if my decease shall happen before any material change affecting this subject, I request them to act agreeably to my suggestion." The trust-disposition and settlement further provided that the trustees should have power "from time to time to nominate and assume such other person or persons as they shall think fit, to be a trustee or trustees along with them for the management of that part of my trust affairs which relates to the payment of the debts and legacies and annuities above written; and declaring that the powers and privileges of such assumed trustee or trustees shall be as extensive, and their acts and deeds in regard to the last-mentioned portion of my trust affairs as valid, as if their names had been herein inserted; but which trustees so to be assumed for the purpose now specified, shall have no concern with the application of the residue of the said trust-estate and effects, notwithstanding the measures to be adopted by my said original trustees, and those to be assumed by them as after-mentioned, for the advancement and diffusion of phrenology and its applications; and declaring, as it is hereby expressly provided and declared, that upon my said trustees accepting of this trust they shall be bound to nominate, by a writing under their hands, and accepted of by the persons nominated, two or more persons who shall be in the estimation of my trustees enlightened phrenologists, and free from all religious bigotry or narrow-minded intolerance, as successors to my said trustees in the application of the said residuary funds, with the same powers in every respect as are hereby given to my said original trustees in regard to the application of the said residuary funds and the management thereof; and with power also to my said trustees to assume one or more such persons as co-trustees along with themselves for the management of said residuary funds, and the attainment of said objects, and whose powers shall be as extensive as if they had been herein nominated; and with power to the said trustees, original and assumed, and those so to be nominated as successors, again to nominate successors of the same description, and so on *ad perpetuum*, declaring that the nomination of successors shall always become imperative whenever the number of trustees shall be reduced to three." The trustees under this deed entered into possession, and they and their successors in office had administered the trust down to the date of the action.

The pursuers in this action sought for decree of declarator against John Ritchie Findlay, Esq., residing at No. 3 Rothesay Terrace, Edinburgh, Dr Arthur Mitchell, Dr John Sibbald, William Ballantyne Hodgson, Esq., Doctor of Laws, residing at Bonaly, Colinton, near Edinburgh, and John Ferguson, Esq., engraver, Edinburgh, the trustees at the date when the action was brought, "that the said William Ramsay Henderson did not, by the said trust-disposition and settlement and codicils thereto, validly and effectually exercise the power conferred upon him by the trust-deed and settlement of his father . . . to dispose by testament to the extent of £5000 sterling, in so far as the said trust-disposition and settlement of the said William Ramsay Henderson deals, or purports to deal, with the residue of the said sum of £5000: And further, . . . that the whole clauses contained in the said trust-disposition and settlement of the said William Ramsay Henderson, directing the whole residue of his means and estate, and of the said sum of £5000, to be applied by his trustees in whatever manner they may judge best for the advancement and diffusion of the science of phrenology, and the practical application thereof in particular, were and are invalid and ineffectual, or have become and are now inoperative and ineffectual," &c. They further claimed that the residue of the estate and of the sum of £5000 should be disponed, conveyed, and made over to them, and failing that

they claimed a sum of £9785, 2s. 7½d., which was the capital of the trust-funds as at 10th January 1879.

The pursuers averred, *inter alia*, as follows—"The said residuary bequest is vague, uncertain, indefinite, and inextricable. What the truster meant by the expression 'the science of phrenology, and the practical application thereof,' is not known and not ascertainable. Further, there is no specification or limitation of the objects intended to be benefited, and these are not ascertainable. The time, place, and manner in which the truster intended or contemplated that the residuary funds should be applied are uncertain. The purposes of the trust are too indefinite and general to be executed. The said residuary bequest is vague, uncertain, indefinite, and inextricable, in respect of the unlimited discretionary powers attempted to be conferred on the trustees, original and to be assumed." The pursuers further averred that the trustees had in consequence administered the residuary funds in a vague, uncertain, and inconsistent manner, and in support of that statement they instanced upon record, as they alleged, all the objects upon which the trustees had expended the funds at their command from the time when the trust came into existence. These allegations the defenders denied, and stated that they had never experienced any difficulty in carrying out the purposes of the trust, and that the instances given by the pursuers of the application of the funds were inaccurately stated, and bore only a small proportion to the actual questions to which they had applied their minds.

The pursuers further alleged that the terms of the truster's settlement had not been complied with in regard to the assumption of new trustees, as on one occasion the number of trustees had been allowed to be reduced to two before others were assumed.

The pursuers' pleas were, *inter alia*—"(1) On a sound construction of the foresaid trust-deed and settlement of the said Alexander Henderson, and of the foresaid trust-disposition and settlement of the said William Ramsay Henderson, the said William Ramsay Henderson did not validly exercise the power conferred upon him by the former deed to dispose by testament to the extent of £5000, in so far as regards the residue of the said sum. (2) *Separatim*—The residuary bequest contained in the said Willliam Ramsay Henderson's trust-disposition and settlement is invalid on the ground of vagueness and uncertainty. (4) The said residuary bequest is now inoperative and ineffectual, in respect that the defenders are not legally entitled to exercise the unlimited discretionary powers conferred by the said William Ramsay Henderson on the trustees nominated and appointed by himself."

The Lord Ordinary (ADAM) on 13th January 1880 assoilzied the defenders from the conclusions of the summons, adding the following note:—

"*Note.*—[*After stating the facts*]—The ground on which it is maintained that William Ramsay Henderson did not validly execute the power of disposing of the sum of £5000 is, that he had power to do so by 'testament' only, and that the trust-disposition and settlement by which he has professed to do so is not a 'testament.' The Lord Ordinary thinks the objection is not well founded. He thinks that the power might be validly exercised by any deed of a testamentary character which sufficiently expressed the testator's will or intention as regards the disposal of the sum in question, and he thinks that the trust-disposition and settlement does so.

"It was next maintained that the bequest to promote the science of phrenology and its practical application was null in respect of its vagueness and uncertainty.

"The Lord Ordinary understands by the science of phrenology that branch of scientific inquiry which undertakes to investigate the nature and functions of the brain. There may possibly be differences of opinion as to the scientific value of such investigations. There may also be differences of opinion as to the scientific character and value of some of the modes of investigation which have been adopted by the trustees. But the validity of the bequest does not depend on these considerations. The question is, Whether phrenology is a sufficiently distinct and definite branch of science to be the subject of a bequest? The Lord Ordinary thinks that it is. He does not think, for example, that a bequest to promote the science of physiology would be null on the ground of vagueness or uncertainty. So neither does he think that a bequest to promote the science of phrenology, which may be said to be a branch of the science of physiology, is invalid. The Lord Ordinary was referred to the case of *Low's Executors* v. *Macdonald*, June 21, 1873, 11 Macph. 744, in which it was held that a bequest to charities in Glasgow and Aberdeen, without specification of any particular charities, was null from vagueness and uncertainty. So it might be that a bequest to promote 'science,' without specification of any particular science, might be held to be null; but in this case there is no specification of the particular science which the truster desired to promote. If the particular science be specified, it does not appear to the Lord Ordinary to be necessary that the mode and manner in which the bequest should be applied for the promotion of the science should be specified. It would appear to be enough that this has been left to the discretion of the trustees—*Leavers* v. *Clayton*, April 8, 1878, 8 Chy. Div. 584.

"It was further maintained by the pursuers, that, assuming the bequest to have been originally valid, the trust had lapsed, and could not be resuscitated by the Court, and that they as the heirs of the truster were now entitled to the residue.

"The facts upon which this plea is founded are that the trustees, original and assumed, were reduced to two in number by the death of Sheriff L'Amy on 15th January 1854; that by the trust-disposition and settlement it was *ultra vires* of a lesser number of trustees than three to assume new trustees; that consequently the deeds of nomination and assumption of 1st March 1854, 1st March 1859, and 26th and 29th January and 5th February 1872, under which the defenders, the present trustees, profess to act, are invalid, and that the trust consequently has come to an end.

"By the trust-disposition the estates are conveyed to the trustees named and the survivor of

them, and to such persons as might be assumed by them.

"The truster then provides for the assumption of trustees as regards that portion of the trust affairs which related to the payment of debts, legacies, and annuities, and it was declared that they should have no concern with the administration of the residue. He then provides that upon his trustees accepting of the trust they should be bound to nominate two or more persons who should be, in the estimation of the trustees, enlightened phrenologists, and free from all religious bigotry or narrow-minded intolerance, as successors to his trustees in the application of the residuary funds, with the same powers as were given to the original trustees, with power to the said trustees to assume one or more such persons as co-trustees along with themselves, and whose powers should be as extensive as if they had been originally nominated; and with power to the said trustees, original and assumed, and those to be nominated as successors, again to nominate successors of the same description, and so on *ad perpetuum*, declaring that the nomination of successors should always become imperative whenever the number of trustees should be reduced to three. It is upon this last clause that the pursuers found.

"The power given to the trustees to assume new trustees is unquestionable, and nothing is said as to how many of the trustees shall constitute a quorum No doubt it was the duty of the trustees, whenever their number became reduced to three, to have implemented their direction to nominate new trustees. It does not appear, however, to the Lord Ordinary that the failure of the trustees to do so necessarily implies that the power of the surviving trustees to assume new trustees came to an end. On the contrary, it appears to him to have been the duty of the surviving trustees, so soon as they became aware of the failure, at once to assume new trustees in order to prevent the trust coming to an end.

"The Lord Ordinary is further of opinion, that assuming the trust had thus lapsed, yet if the bequest for the promotion of phrenology is in itself a valid and unobjectional bequest, the result would not be that the pursuers became entitled to the residue, but that the Court would supply the necessary machinery for carrying it into effect."

The pursuers reclaimed, and argued—(1) The power given was to dispose by testament, and the power must be strictly exercised. The deed here was not a testament, for by a testament money must be paid away at once, and here there was a trust. (Lord Justice-Clerk—To say this was not a testament was perfectly unpleadable.) (2) The will was void from uncertainty. Phrenology was no science, no more than astrology was; it was only an empirical sham, which could not be defined.—*Williams* v. *Kershaw*, 1835, 5 Clark & F. 111; *Vezey* v. *Lainson*, 1 Simp. & St. 69; *Leavers* v. *Clayton*, April 8, 1878, 8 Chan. Div. 584; *Low's Exrs.* v. *Grant*, June 21, 1873, 11 Macph. 744; cases collected in Williams on Exrs. 1059; *Morice* v. *Bishop of Durham*, 10 Vesey 536. There was no *jus quæsitum;* and no one who had a right to complain of mal-administration by the trustees. The discretion was here only confided to the original trustees.—*Zeissweiss* v. *James*, January 1870, 3 vol. Amer-Rep. 558. (3) The trustees had not been assumed in terms of the will, in respect that the number was allowed to fall below three—*Nisbet* v. *Fraser*, Jan. 31, 1835, 13 S. 384; *Ireland and Low* v. *Glass*, May 18, 1833, 11 Shaw 626; Williams on Exrs. (2 ed. 1879) 1074; Mortmain Act (9 Geo. II. c. 36); *Presbytery of Dundee* v. *Magistrates of Dundee*, March 19, 1858, 20 D. 849.

Argued for respondents—The bequest was plain. Phrenology was a well-known science, supported by many well-known and scientific men. What was wanting in detail was supplied by the full powers given to the trustees, there being in the will careful provision made for a succession of trustees who would carry out the testator's wishes. The direction as to the assumption of new trustees was not declared, if not carried out, to create an irritancy of the trust. The trust had been carried on for nearly fifty years in accordance with the testator's wishes, and no difficulty had been found in the working of it. It was now too late to interfere.

Authorities — *Townsend* v. *Cairns*, 3 Hare's Chan. Rep. 257; *Nightingale* v. *Goulburn*, 5 Hare's Chan. Rep. 484; *Beaumont* v. *Olivera*, 4 Chan. Ap. 309; *Black's Trustees* v. *Miller*, Feb. 23, 1836, 14 Shaw 555.

At advising—

Lord Ormidale—[*After narrating the facts ut supra*]—The two leading objections to William Ramsay Henderson's disposal of the £5000, besides other subordinate ones which will be noticed in the course of my opinion, so far as necessary, thus appear to be—(1) that even supposing the bequest and direction by William Ramsay Henderson to his trustees to apply the £5000 towards the advancement and diffusion of the science of phrenology to be itself valid and effectual, it has been rendered inoperative by the mode in which he exercised the power conferred on him by his father Alexander Henderson to dispose of the £5000; and (2) that supposing the mode he had taken for disposing of the £5000 to be unobjectionable, the bequest made by him is invalid in respect of its vagueness and uncertainty.

Now, in regard to the first of these two objections, I must own that I have no doubt whatever that it is entirely groundless. It is true, as was urged on the part of the pursuers at the debate, that the £5000 formed no part of William Ramsay Henderson's own proper estate; that his right to deal with it at all arose solely under the power conferred on him by his father Alexander Henderson's deed of settlement; and that he, William Henderson, could do nothing which that power did not warrant. It is said that the mode adopted by him for disposing of the £5000 was not warranted by the power conferred on him by his father. All—except that the mode adopted for disposing of the £5000 was not warranted by the power—may be conceded, but what then? The power conferred on William Ramsay Henderson by his father's deed of settlement was, in the event of his dying unmarried and without issue, to dispose of his father's means and estate "by testament to the extent of £5000, to be payable at the first term of Whitsunday or Martinmas after his death, with interest thereafter till payment." There is no complica-

tion here, and nothing conditional except that the power could not be exercised by Mr Henderson unless he died unmarried and without issue. But he did die unmarried and without issue. The power no doubt also bears that Mr Henderson was to dispose of the £5000 "by testament," by which expression I cannot doubt that nothing more or different was meant than a deed or instrument of a testamentary nature. And if so, that condition of the power has been duly attended to, for it is impossible to dispute, and it was not disputed by the pursuers, that William Ramsay Henderson's trust-disposition and settlement is an instrument of a testamentary nature. But it was argued by the pursuers that the trust-disposition and settlement of William Ramsay Henderson disposing and conveying his whole heritable as well as moveable estate is not simply and technically a testament, but something more. But it appears to me that this is hyper-criticism, and cannot be regarded. The trust-disposition and settlement of William Ramsay Henderson was wholly of a testamentary character, and it conveyed not only the whole of his estate, both heritable and moveable, but also the £5000 in question, on the recital of the power to that effect contained in his father's deed of settlement.

It was further argued, however, by the pursuers in support of their first objection to the validity of the mode which William Ramsay Henderson adopted of exercising the power which had been conferred on him by his father to dispose of the £5000, that he could only do so by disposing of that sum absolutely and at once, and not by continuing his connection with it through the medium of trustees appointed by him in the manner he did. This, again, appears to me to be hyper-criticism, and to be entitled to no consideration. The power conferred on William Ramsay Henderson by his father is not limited, as the pursuers seem to suggest. There is nothing in its terms that can by any ingenuity be construed to mean that William Ramsay Henderson could not dispose of the £5000 by deed of a testamentary nature, to be immediately on his death paid to and enjoyed by any person or persons he might be pleased to name, or to be retained in trust for the purposes of any lawful object he might point out. And in either way he would, as it appears to me, exercise the power conferred on him of disposing of the £5000.

This leads to what I understand to be the main objection of the pursuers to the disposal made by Mr Henderson of the £5000, viz., that a bequest for the advancement and diffusion of the science of phrenology is invalid on the ground of vagueness and uncertainty.

In considering this objection it must be borne in mind that the expression phrenology denotes a known, although not a flourishing, branch of science. It is to be found, if I mistake not, referred to as such in all the ordinary encyclopœdias and other books where sciences are treated of. And I may mention that it forms the subject of a very interesting and instructive article under the title of "George Combe" in the British and Foreign Evangelical Review of October 1878, by an Edinburgh gentleman of well-known ability and scientific attainments. Nor can it be said, and it was not said, however much people may differ as to the utility or tendencies of phrenology in some aspects which may be taken of it, that the advancement and diffusion of it is unlawful.

But all that being conceded, it was argued that the manner in which the bequest is to be carried into effect not being pointed out or defined by William Ramsay Henderson, it is invalid from vagueness and uncertainty. Now, this objection of the pursuers is, in my opinion, wholly untenable, and was, I think, shown at the debate to be so in reason, as well as on the authority of decided cases, both Scotch and English. If, indeed, William Ramsay Henderson had merely bequeathed the £5000 for the advancement and diffusion of phrenology, without appointing trustees for carrying that object into effect, there might have been some room for the pursuers' objection, although even in that case I am not prepared to say that the means of carrying the bequest into effect might not be supplied by the Court. But be that as it may, no such defect exists in the present case, for the testator has himself appointed trustees, who have accepted and acted, to carry the bequest into practical effect. It is true that he has not limited his trustees to any particular mode of procedure, but left that, I think, wisely to their own judgment and discretion. It is also true that he has not even restricted, and again I think wisely, the area or field of operation in or over which phrenology is to be advanced and diffused. His trustees may and are empowered to exercise their own judgment and discretion as to this. They may, I cannot doubt, give prizes or rewards to Frenchmen, or Germans, or Americans, or other foreigners, as well as to Scotchmen or Englishmen, for essays or dissertations calculated in their opinion to promote the desired objects. All this is not only quite consistent with good sense and reason, but is also supported, as I have already said, by decisions of high authority. I refer in particular to the decisions of the House of Lords in the Scotch cases of *Hill and Others* v. *Burns and Others*, April 1826, 2 W. and S. App. Ca. 80; *Crichton* v. *Grierson and Others*, July 25, 1828, 3 W. and S. 329; and *Miller* v. *The Trustees of James Black*, July 1837, 2 S. and M. App. Ca. 866; and the English case of *Whicker* v. *Hume and Others*, July 1858, 7 Clarke's H. of L. Cases, 124. These decisions entirely meet, I think, the pursuers' objections in every and any view that can be taken of them.

In the first of these cases (*Hill* v. *Burns*) the judgment of the House of Lords, affirming that of the Court of Session, was to the effect that a bequest to trustees was valid whereby the testatrix appointed "the residue of her estate to be applied by my said trustees and their foresaids in aid of the institutions for charitable and benevolent purposes established or to be established in the City of Glasgow or neighbourhood thereof, and that in such way and manner, and in such proportions of the principal or capital, or of the interest or annual proceeds of the sums so to be appropriated, as to my trustees and their foresaids shall seem proper; declaring . . . that they shall be the sole judges of the appropriation of the said residue for the purposes aforesaid." The objects of the testatrix's bounty were thus left quite vague and uncertain, but any objection that might otherwise have been taken on that ground was held to be obviated by the testatrix's appoint-

ment of trustees with power to determine the matter. It may be said, however, that the objects of the testatrix's bounty in that case was limited as regards the area or field of their operation to Glasgow and its neighbourhood, while in the present case there is no such limitation. But neither was there any such limitation in the case of *Miller* v. *Black's Trustees*, where the bequest, the validity of which was sustained by the House of Lords, was to trustees, with power "to apply the proceeds to such benevolent and charitable purposes as they think proper," with a recommendation merely—not a restriction—that they should be applied in payments to "faithful domestic servants settled in Glasgow or the neighbourhood." And in the case of *Whicker* v. *Hume* the bequest which was sustained as valid by the House of Lords was one to trustees, to "be applied by them, according to their discretion, for the advancement and propagation of education and learning all over the world." Not only in that case was the area or field of operation unlimited and unrestricted, but the objects of the testator's bounty were also very vague and uncertain, much more so than in the present case, for here one particular science is specified, while in the case referred to "learning," without any definition or limitation, was the object of the bequest. And the case of *Whicker* v. *Hume* is all the more important when it is kept in mind that it appears from the report to have been before various inferior courts, and ultimately decided in conformity with the results previously arrived at in these Courts by the House of Lords, where, in addition to the Lord Chancellor (Chelmsford), Lords Cranworth and Wensleydale took part, and concurred in the judgment.

It is true that in none of the cases referred to, nor in any other that was cited at the debate, did the fund which was the subject of bequest not belong to the testator, but was, as here, merely a fund which some other person gave him a power to dispose of. But having regard to the fact that the testator here was empowered, without restriction or limitation of any kind, to dispose of the fund by testament as he pleased, just as if it had been part of his own proper means and estate, I am unable to see any ground in reason or principle for holding that it should not be governed by the cases which have been referred to.

Nor do I think there is anything in the suggestion that in all the cases referred to the bequests were such as would be held to be of a charitable character under the Act 43 Elizabeth, cap. 4, or the Mortmain Act (9 Geo. III. cap. 36), for although these Acts have no operation in Scotland, the principle of them, so far as the present case is concerned, may very well be held to do so. Accordingly, in the case of *Hill* v. *Burns* I find that Lord Gifford, who moved the judgment of the House of Lords, remarked that testamentary bequests appeared to him to be even more favourably dealt with in Scotland in order to their being given effect to than in England. In *Millar* v. *Black's Trustees* (p. 892 of report) Lord Brougham referred with approbation to an observation of Lord Lyndhurst in *Crichton* v. *Grierson*, to the effect 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." Judging from what is stated by Mr Justice Williams in his Law of Executors, it would appear that in England—and if in England, why not in Scotland?—the bequests (p. 1074) for schools of learning, free schools, and scholars in universities are not only comprehended by the statute of Elizabeth, but also bequests to any purposes of a similar nature "are considered as bequests to charitable uses within the statute of Mortmain." I cannot, therefore, see that any doubt can be entertained regarding the validity of the bequest in question in respect of the nature of the object—the advancement and diffusion of the science of phrenology, that is, of a branch of learning.

And neither do I think that there is anything in the objection which was urged at the debate on the part of the pursuers, that supposing the trustees originally named and appointed by William Ramsay Henderson could competently exercise the discretionary power committed to them, it was quite incompetent for other trustees assumed by them, of whom the testator knew nothing, to do so. To sustain this objection would be tantamount to defeating entirely the object of the testator and putting an end to the trust. But that cannot be done without disregarding the authority of all the cases which have been referred to, for in all of these cases the bequests were to persons named and others who might be assumed by them. Not only so, but in some of these cases the objection also taken in argument by the pursuers, that the trust had actually fallen in consequence of an alleged failure duly to appoint others was dealt with in such a manner as to show that no such objection can or ought to be sustained. In particular, in the case of *Millar* v. *Black's Trustees* Lord Brougham observed (p. 889 of report) that "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," his Lordship added, "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." And then his Lordship proceeds to cite several precedents in support of that dictum, which he says "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."

Then, in regard to the only other point which I think the pursuers endeavoured to make against the validity of the bequest in the present case, that there might be no one to call the trustees to account for mal-administration, I have merely to remark that the same objection might have been made in all the cases which have been referred to. It was indeed put forward in the case of *Hill* v. *Burns*, but held to be untenable.

I do not propose to deal with the defender's plea of prescription, seeing that in the view I have taken of the case otherwise it is unnecessary to do so. Neither party desired that it should be taken up, preferring for obvious reasons that the validity of the bequest in itself should be judicially considered and disposed of on its proper merits. Besides, it may be doubted whether the plea of prescription could be determined without some preparatory investigation of facts, the expense of which it is desirable to avoid.

I am therefore, for the reasons stated, of

opinion that the interlocutor of the Lord Ordinary assoilzieing the defenders from the conclusion of this action is right, and ought to be adhered to.

LORD GIFFORD concurred.

LORD JUSTICE-CLERK—I have come to the same conclusion, but perhaps not without more difficulty than your Lordships. There are two points on which I have felt difficulty. (1) Could it be said that this was a charitable bequest in the sense that the amount of uncertainty about it would invalidate it were it not a charitable bequest? I think it very necessary to keep this in view, as for my part I think that if this is not within the category of charitable bequests it should be void from uncertainty. (2) Does it make any difference that this was not a bequest by a man of his own funds, but a bequest in exercise of a power to bequeath by testament of a certain sum? In other words, did Mr Henderson validly exercise the power given him by his father?

In regard to the first of these points I have felt some difficulty. There is no doubt phrenology is not a branch of knowledge which is necessarily beneficial to mankind, and in most of the cases quoted the objects benefited had that character. But looking to the position of the science in 1828 and 1832, and the unquestionable amount of support it has received from scientific men, I do not think my doubts on this matter came sufficiently to a point to prevail, and therefore I have come to concur with Lord Ormidale on this point.

On the second point—as to whether the power has been validly exercised—there is also some difficulty. If this had been a power given to Mr Henderson to determine the science to which this money should be applied, and he had directed his trustees to do this instead of doing so himself, I think this would have been an improper exercise of the power. But I have come to be of opinion that this comes under the category of cases where the right conferred is substantially equal to a right of property, and in that view of it it was not *ultra vires* that the testator, after he had defined the science, should give to his trustees the power of determining in what way the science should be made out and how the money should be expended on its behalf.

But I am not to be understood as laying down that an ordinary legacy would not be void on the ground of uncertainty, supposing it were not within the category of charitable bequests, merely because the trustees were to say what the object was to which it was to be applied. I do not think that this could be successfully maintained. But here I am of opinion (1) that this was fairly within the category of charitable bequests, and (2) that the exercise of the power by Mr W. R. Henderson was of the same character as if the property had been his own.

On the other matter of the delay there has been in bringing this case, I, for my part, should have been very slow to interfere with the carrying on of a trust which has been in existence so long without challenge, especially when there was no explanation of the delay. It is not, however, necessary to enter into that, as we have been able to decide the case upon the other grounds.

The Court adhered, finding no expenses payable by the pursuers.

Counsel for Pursuers (Reclaimers)—Asher—Thorburn. Agents—Morton, Neilson, & Smart, W.S.

Counsel for Defenders (Respondents)—M'Laren—J. C. Smith. Agents—Leburn & Henderson, S.S.C.

Tuesday, March 2.

FIRST DIVISION.

[Sheriff of Haddington.

CUMMING AND OTHERS (TENNENT'S TRUSTEES) *v.* MAXWELL.

Lease—Sequestration for Rent—Where Landlord Claimed Deduction owing to Entry not being given at Time Stipulated.

A mansion-house, &c., was let on lease, it being, *inter alia*, stipulated that prior to the term of entry the drainage was to be subjected to the inspection of a mutually chosen party. That party reported that the house would be unhealthy for occupation unless with certain repairs. The result of the execution of the repairs was that the tenant did not get possession until three weeks after the stipulated date. He therefore declined to pay rent unless under deduction therefor. *Held* that sequestration for non-payment was in such circumstances incompetent, and that that diligence having been put in execution, fell to be recalled.

Observed that a tenant is entitled to compensation at the hands of the landlord in respect of any period during which he is kept out of possession of the subject leased, unless that period be of trivial duration; but *opinion* reserved as to the proper way of enforcing such a claim.

Held that when the defender in an action of sequestration for non-payment of rent had, pending the result of the cause, consigned in Court the whole amount of the rent alleged to be due, he was entitled to repayment of it on recall of the sequestration proceedings.

Francis Maxwell of Gribton was tenant of the mansion-house, gardens, &c., of St Germains, Haddingtonshire, for three years from Whitsunday 1878, at the rent of £400 per annum. This was a petition for sequestration brought in the Sheriff Court of Haddingtonshire at the instance of the proprietors Robert Cumming and others, the trustees of the late Mr Tennent of Wellpark Brewery, Glasgow, for payment of the half-year's rent said to be due at Martinmas 1878, and in security of the rent to become due at Whitsunday 1879.

Mr Maxwell's defence was that he did not possess the house for the half-year from Whitsunday 1878. His offer had contained a special stipulation that the water and drains should be put in thorough order at the sight of Dr Stevenson Macadam. On that gentleman's report the drains were found to be in such a bad state that extensive repairs and alterations were necessary, which were not completed till some time after the term of Whitsunday. Until these repairs