to prohibit the respondents from exercising any of the powers conferred by their Act, if in the exercise thereof the right of servitude which the complainer has is in anyway affected. I assume that the complainer's right of servitude extends over the ground taken by the respondents, although that is disputed by the latter. Now, if the clause I have above quoted from the respondents' Act is read and construed in accordance with the complainer's contention, the result is, that what the Legislature gave by one clause of the Act it took away by another clause in the same Act. Note how this stands. The Act authorises the respondents to take compulsorily and to use a certain piece of ground for the purposes of their railway. That ground was the property of the Corporation, and to transfer it by force of statute to the respondents on their paying the ascertained price or value was affecting "the rights of the Corporation" in a very direct manner. But nothing in the Act is to affect the "rights of servitude or other rights of the Corporation." Therefore nothing in the Act shall authorise the respondents to take compulsorily the ground in question, as that affects the Corporation's right of property. I have referred to the clause in so far as it deals with the rights of the vassals, because it shows more strikingly the absolute inconsistency between the different provisions of the Act when read as interpreted or construed by the complainer. The result of that construction is however the same, if for rights "of the Corporation" one reads the rights "of the vassals of the Corporation." Now, is that the construction of the clause? It is obviously very improbable that the Legislature intended by the sub-section under consideration to destroy or prevent the carrying out the primary purpose for the accomplishment of which the Act was passed, and a construction which would lead to that conclusion is not to be accepted unless no other can be found. Any reasonable construction which will render the Act available will be preferred to one which will render it nugatory, and in my opinion such a construction can be found.

I agree with the Lord Ordinary in thinking that this sub-section is to be read as preserving all the rights of the Corporation or its vassals in so far as these have not been expressly dealt with. Any right of property servitude or other right which the Act has not transferred or authorised the respondents to acquire is reserved to its present holder unimpaired; just as if the clause had said, subject to the foregoing provisions no rights of the Corporation or their vassals shall be affected. This construction appears not only a reasonable but the right construction, when it is considered that the section (section 35) of which this sub-section forms a part is a mere addendum or proviso qualifying the clauses (and the rights thereby conferred) which precede it. But an addition to or a qualification of preceding clauses presupposes that these clauses shall stand in force as qualified, not that these clauses are thereby repealed or rendered of no avail. A proviso which would operate a repeal of the clause is not a mere qualification.

LORD JUSTICE-CLERK — I so entirely concur in the opinion of your Lordships that I have nothing to add. It would be quite out of the question to read an Act of Parliament as containing provisions absolutely repugnant one with another if it is possible to read it in a sense in which there is no repugnancy, but I agree that there is no difficulty here in reading the sub-section in favour of the Corporation and its vassals consistently with the rest of the Act, namely, that the new proprietors when they got a right to take over a certain portion of the ground did not thereby acquire a right to do anything upon that ground except what is authorised in the Act by which they obtained it, and that every other right which the Corporation or their vassals have over the ground is reserved to them absolutely.

LORD RUTHERFURD CLARK was absent.

The Court adhered.

Counsel for the Complainer—Dickson—Cooper. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Respondents—Lord Advocate Balfour, Q.C. — A. S. D. Thomson. Agent—James Watson, S.S.C.

Saturday, February 4.

FIRST DIVISION.

DAVIDSON *v.* MACRAE AND OTHERS.

Succession — Trust — Discretionary Power of Trustees—Selection of Charitable Purposes — Failure of Trustees — Judicial Factor—Exercise of Power.

A testatrix conveyed her whole estate in trust to two persons named and the acceptor or survivor as trustees, and directed that the residue of her estate should be paid by the trustees "to such charitable or religious purposes, and in such proportions, as they or the acceptor or survivor of them may think proper, according to their or his discretion." The two trustees named having died leaving part of the residue undisposed of, a judicial factor was appointed on the trust-estate.

Held that the discretionary power given to the trustees named by the testatrix was personal to them, and could not be exercised by the judicial factor; that as regarded the undistributed portion of the residue the bequest had failed, and that the same fell to be divided among the next-of-kin of the testatrix.

Helen Robbie died on 28th July 1870 leaving a testament whereby she conveyed her whole estate "to James Webster Barnett,

writer in Dundee, and George Bell Brand, bank agent in Kirriemuir, and to the acceptor or survivor of them," as trustees for the purposes therein mentioned, and she appointed said trustees or the acceptor or survivor to be her sole executors.

The trust purposes were as follows—(1) for payment of all the truster's just and lawful debts, deathbed and funeral expenses, and the expenses of the trust; (2) for payment and delivery, on the expiry of six months after the testator's decease, of certain pecuniary and specific legacies, as specified in the said testament, and with regard to the disposal of the residue of her means and estate, she ordained "the same to be paid by my said executors to such charitable or religious purposes, and in such proportions as they or the acceptor or survivor of them may think proper, according to their or his discretion."

After the death of the testatrix the trustees named accepted office and entered upon the administration of the trust-estate, paid the truster's debts and funeral expenses, and delivered and paid the specific and pecuniary legacies bequeathed by the testament. They also intromitted partially with the residue of the truster's estate, and made payment out of the income and capital of the residue to the Scottish Evangelistic Society for the services of an agent in Kirriemuir, and kindred objects. They also made payments for such purposes as the support of a colporteur, and of a Biblewoman, and distributed small sums among poor people in Kirriemuir. The trustees died without assuming new trustees into the trust, Mr Barnett, the last survivor, dying in 1890. In 1892 James Davidson was appointed judicial factor upon the trust-estate, which amounted to about £700.

Questions having arisen as to the disposal of this sum, the present case was submitted by (1) the judicial factor, and (2) the next-of-kin of the deceased, in order to obtain the opinion of the Court upon the following questions—"(1) Can the discretionary powers committed to her trustees for the distribution of the estate of the deceased Helen Robbie be exercised by the first party, either subject to the supervision of the Court under a scheme to be prepared and submitted by him, or otherwise? or (2) Does the trust-estate under the first party's management fall to be administered and distributed by him amongst the next-of-kin of the deceased as in intestacy?

Argued for the first party—There was here no such uncertainty as to render the bequest void. The action of the trustees had sufficiently defined and declared the intention of the testatrix, and the locality to be benefited—*Hill* v. *Burns*, April 14, 1826, 2 W. & S. 80; *Crichton* v. *Crichton's Trustees*, May 12, 1826, 4 S. 553; *Black's Trustees* v. *Miller*, February 23, 1836, 14 S. 555; *Murdoch* v. *Magistrates of Glasgow*, November 30, 1827, 6 S. 186; *Presbytery of Deer* v. *Bruce*, January 20, 1865, 3 Macph. 402; Jarman on Wills, 243. The intention of the testatrix being sufficiently ascertained the Court would find means to give it effect—*Presbytery of Deer* v. *Bruce; Macandrew, Petitioner, supra.* The judicial factor should accordingly be authorised to apply the residue to such charitable purposes as he might think proper, or a scheme should be prepared and submitted to the Court for approval.

Argued for the second parties—The trust had failed, as there was no means of ascertaining now what objects the testatrix desired to benefit. The doctrine of approximation did not apply, because there was no object or class of objects specified to which to approximate. The testatrix had chosen certain persons as her trustees, and conferred upon them the power of selecting the religious and charitable objects to which her bounty should be applied. There was a clear *delectus personæ*, and the discretionary power conferred upon the trustees was personal to them, and the Court would not authorise a judicial factor to exercise it—M'Laren on Trusts, i. 16; *Ireland* v. *Glass*, May 18, 1833, 11 S. 626; *Dick* v. *Ferguson*, 1758, M. 7446; *Merchants' Company, &c.* v. *Magistrates of Edinburgh*, 1765, M. 7488; *Simson, &c., Petitioners*, January 27, 1883, 10 R. 540, *per* Lord President, 544, and *per* Lord Shand, 546; *Hill, &c.* v. *Thomson*, October 30, 1874, 2 R. 68. The English authorities showed that the Court of Chancery had repeatedly refused to appoint new trustees to exercise a discretionary power of this kind—Tudor on Charitable Trusts, 123-4; Boyle on Charities, 237; *Hibbard* v. *Lambe*, 1756; Ambler's Reports, 309; *Attorney-General* v. *Fletcher*, 1835, 5 L.J. Ch. 75; *Felan* v. *Russell*, 1842, 4 Irish Equity Reports, 701. Discretionary powers to be exercised in the course of administrating a trust, the objects of which were ascertained were to be distinguished from a discretionary power such as was here given of selecting the objects of a testator's bounty—*Magistrates of Dundee, &c.* v. *Morris*, February 8, 1861, 23 D. 493. The English law appeared to differ from the Scots in one respect, because by it the sovereign had power as *parens patriæ* to administer charitable trusts which had failed. In Scots law no such power was conferred upon either the sovereign or the Court, and therefore where a trust failed the trust-estate fell to be divided among the next-of-kin as intestate estate.

At advising—

LORD M'LAREN—This is a special case stated by the judicial factor on the estate of Helen Robbie of the first part, and her next-of-kin of the second part, for the purpose of determining the application of the residue of Miss Robbie's estate. The direction in her will with regard to the disposal of the residue is in these terms—"The same to be paid by my executors to such charitable or religious purposes, and in such proportions as they, or the acceptor or survivor of them, may think proper, according to their or his discretion."

The two executors-nominate accepted the trust, paid the debts and legacies, and made some payments out of residue for charitable

and religious purposes connected with the locality in which the testatrix was interested. After the death of the surviving executor, the residue, amounting to £676, 3s. 4d., was deposited in bank, and the question is, whether this sum is to be applied by the judicial factor, according to his discretion, to charitable and religious purposes, or is to be divided amongst the next-of-kin?

The claim of the next-of-kin is maintained on the ground that the bequest is ineffectual by reason of uncertainty. It is a familiar proposition that a legacy to be effectual must be expressed in such terms as to define the objects as well as the subject of the gift, and this is not to be regarded as a technical rule of construction, but rather as the expression of a logical necessity. There can be no effectual gift unless what is essential to the notion of a gift be set forth in the will or codicil. There is, however, this peculiarity in the case of gifts for charitable purposes, that a gift for charity implies a selection of objects from time to time. Accordingly, a gift for charitable purposes is sufficiently definite as regards the objects of the gift if the testator either provides for the payment of the legacy to an existing institution, or directs the establishment of an administrative body for carrying into effect the charitable purpose, or gives a power of selection to one or more trustees, adding where necessary powers of assumption, or other means of continuing the trust for the necessary period. The first case presents no difficulty. As to the second case, the numerous existing endowments applicable to education attest the recognition in our land from an early period of the principle that a testator may constitute a charitable endowment by merely defining the purpose of his bounty, and giving directions to his executors or disponees to carry out his purpose by framing a scheme of administration, including where necessary the establishment of a permanent body of trustees or managers for administering the trust fund.

The present case comes under the third head. It is a bequest of residue for charitable and religious purposes to be selected by the trustees of the will. It is not surprising that the testatrix should have made no provision for continuing the trust after the death of her trust-disponees, because the estate is of very moderate amount, and it is most probable that the testatrix meant that the fund should be divided once for all within a short period after her death. This, however, has not been done. The accepting trustees died after having made a partial distribution. A judicial factor was appointed for the management of what remains of the residue, and the question is whether the Court, through the factor, can undertake the distribution of this small sum of money amongst local charities and local religious institutions.

If I am right in defining this bequest as a bequest to charitable and religious purposes to be selected by the trust-disponees, it follows that the legacy fails by their death. The appointment of a trustee or *hæres fiduciarius* with a power of selection was essential to the existence of the bequest, because in the absence of such a grant of a power of selection the legacy would fail for uncertainty. The power might have been given to persons in succession; or the first acceptor or body of accepting trustees might have been empowered to name successors in the trust. In such a case the elected or assumed trustees derive their authority to select the objects of the charity from the testator, and in principle their position is not distinguishable from that of the original trustees. But if we empower our factor to distribute the residue amongst charities his authority comes from the Court, because it is quite certain that under this will no power of selecting objects of charity is given to a nominee of the Court of Session, or indeed to anyone excepting the persons nominated by the testatrix herself.

There may be cases where a testator has provided for the delegation of a power of selecting objects, and where from supervening circumstances the delegation cannot be carried out in the manner provided in the will. If it appears plainly that a testator did not mean to confine the selection of objects to persons nominated by himself, but only to take measures for ensuring that the selection of objects of his charity should be entrusted to competent persons possessed of the necessary local knowledge, I do not say that it would not be within the powers of the Court to supply a vacancy in such a trust.

But in such cases I think that our jurisdiction would be best exercised by appointing new trustees, and if need be, approving of a scheme, as was done in the case of the *Alexander Mortification*, August 3, 1881, 8 R. (H. of L.) 140, and in other cases. The difference between this kind of jurisdiction and that which we are desired to exercise is not merely formal. Trustees appointed by the Court, if they accept the office, must administer the trust on their own responsibility, and they are liable to be called to account by the heir, or by persons having a recognised interest. But a judicial factor is the agent of the Court, and responsible only for carrying out the instructions of the Court. Now, I must say that I think it is outside the powers and duties of a court of justice that it should undertake the administration of a charity through a factor judicially appointed, and this consideration, I think, is an insuperable obstacle to the proposed administration of this bequest.

It is a significant circumstance that no precedent can be found for the proposed judicial administration. The nearest cases to the present are cases of family trusts, where, after the failure of the trustees originally appointed, the Court has been asked to authorise assumed trustees or a judicial factor to exercise a discretionary power to the effect of giving an increase of interest to a beneficiary. Now, when the individual to be benefited is pointed out by name, and the discretion conferred on the trustees is merely a discretion to increase the income of the beneficiary, or to make over the

capital fund of which the beneficiary has enjoyed the income, this is a power which is presumably to be exercised with reference to the personal circumstances and wants of the beneficiary which are capable of being ascertained, and therefore the devolution of such a discretion to new trustees or to a judicial factor may be represented as being an act of ordinary jurisdiction not involving the exercise of any arbitrary power by the Court, or the conferring an arbitrary discretion on the administrators of the trust. Yet, so far as I can find, this has only been done in cases where the testator has provided that the discretionary power might be exercised by assumed trustees not chosen by himself. There are three cases, the first being the case of *Allan*. When this case first came before the Court (5 Macph. 1004), the application for a direction to the judicial factor to increase the annuity payable to the truster's daughter was refused as incompetent. But on a second application, which was presented by the judicial factor himself, with the consent of the other beneficiaries, the authority was granted (8 Macph. 139), the decision being rested on three considerations—first, that the testator had empowered his trustees to increase the annuity; secondly, that all parties having an adverse interest consented; and thirdly, because these were accumulations of income which in the opinion of the Lord President might have been claimed by the truster's daughter as being the person entitled under the Thellusson Act to the surplus accumulations.

In the next case—*Hill*, 2 R. 68—the truster bequeathed a share of residue to the children of her daughter, and empowered another daughter, her sole trustee, to apportion this fund. The trust-deed did not contain a power of assumption, and the decision was that the power of apportionment was personal to the original trustee, and could not be exercised by the acting trustees, who seem to have come into office under the provisions of the Trusts Act. Lord Moncreiff in his opinion draws this distinction. He says—"Where there is a manifest *delectus personæ* and intention to entrust such a power (as here) to a particular person, the Court might hesitate to transfer the power to another. . . . Where a discretionary power is conferred upon ordinary trustees not implying *delectus personæ*, the Court might more readily confer these powers on new trustees."

Lastly, there is the case of *Simpson*, 10 R. 540, where a trust was constituted in favour of trustees named, with powers of assumption in the usual form, and in relation to the gift of an annuity to one of the beneficiaries it was provided that the trustees should have the power of advancing the whole or any part of the capital, it was held that this was a power given to trustees for the time being, and accordingly an application at the instance of a judicial factor for authority to make an advance of capital for the purchase of an annuity for life for the beneficiary was sustained, and the authority granted. The Lord President was careful to point out that the frame of the trust was such as to exclude the supposition of *delectus personæ* in relation to the original trustees.

It appears to me that these decisions are distinctly adverse to the view that a power of selecting charitable and religious purposes to which an executry estate is to be applied can be exercised by a nominee of the Court. My opinion is that as regards the undistributed part of this estate the trust has failed, and that the second parties, who are admitted by the judicial factor to be the next-of-kin of the testator Miss Helen Robbie, are entititled to the sum in dispute.

In this view, the first question falls to be answered in the negative, and the second question to be answered in the affirmative.

LORDS ADAM, KINNEAR, and the LORD PRESIDENT concurred.

Counsel for the First Party—Crabb Watt. Agents—Reid & Guild, W.S.

Counsel for the Second Parties—C. S. Dickson — Grainger Stewart. Agent — A. Stewart Gray, W.S.

Saturday, February 4.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

BOWMAN *v.* MACKINNON AND OTHERS.

Process—Proof or Jury Trial—Reduction of Two Trust-Deeds on Ground of Testator's Insanity.

A testator died leaving two trust-dispositions and settlements. In the first, dated in 1882, he left his whole means and estate equally among four foreign mission agencies; in the second, dated in 1890, he revoked the first and left his whole means and estate to the Mildmay Mission to the Jews, of which a clergyman in London was the sole founder, treasurer, and director, to be expended in aid of its objects.

An action of reduction of both deeds was raised by a niece of the testator as one of his next-of-kin, on the ground that he was not of sound disposing mind when he executed the said deeds. When issues were lodged for the trial of the cause, counsel for the Mildmay Mission to the Jews moved that the case should be tried by proof before a judge instead of by jury trial, because (1) the matter was complex, the question at issue being the mental condition of the truster during a period of eight years; (2) there was always a natural prejudice in the mind of a jury against the whole estate of a testator being left to a mission such as this; and (3) because a large part