to expenses. This decision appears contrary to the rule laid down in former cases, but we cannot go back on it now. I therefore am of opinion that we should decern against the defender for £40, and find neither party entitled to expenses.

LORD YOUNG—I am not at all disposed to dissent, because I think it is a useful practical lesson that, where an accident of this kind occurs and a substantial offer is made by the employer, it should not be hastily or immediately rejected, as I think it was here.

I do not think that the rule of this Court in the matter of tender is very satisfactory, and I think it would be well if it was altered, even although it might require legislation to do so. It presents this feature, which is very awkward. A party tenders a sum of money. The tender is not accepted, and the case goes to trial. The battle between the parties is whether anything is due at all or not, and the defender who has made the offer puts in a plea that the Court should hold that nothing is due by him. But he fails, and something is found to be due to the pursuer. Yet in such circumstances the defender, who was entirely unsuccessful in his plea, gets all the expenses of the controversy. That is not satisfactory to my mind. The rule which prevails in England with regard to expenses in such cases is more satisfactory. According to that rule, where a defender has made a tender by paying money into Court, his liability is admitted up to that amount, and the only question remaining to fight about is whether or not the pursuer has suffered damage in excess of that sum, and he only receives expenses if a further sum is awarded to him, otherwise he is liable for the expenses incurred.

I make these observations as there have been indications of a desire on the part of Judges in the other Division of this Court to modify the rule which prevails in Scotland, and I think it is desirable that it should be altered either by Act of Sederunt or if necessary by Act of Parliament.

LORD RUTHERFURD CLARK—I agree with your Lordship.

LORD TRAYNER—The rule of our Courts on the question of tender has been placed in an unfortunate position by the decision in the case of *Critchley*. I am still of opinion that the decision in that case on this point was unsound, but as it stands in the books as a precedent, and I am unable to distinguish this case from it, I am compelled to adopt the decision.

The Court found neither party entitled to expenses.

Counsel for the Pursuer — Watt — Orr. Agent—George Inglis Orr, S.S.C.

Counsel for the Defender — Jameson — Moncreiff. Agents — Drummond & Reid, S.S.C.

Thursday, May 23.

SECOND DIVISION.

BUCHANAN BEQUEST TRUSTEES v. DUNNETT.

Trust — Charitable Bequest — Construction —Liability to Account.

A testatrix directed her trustees, after the lapse of ten years from her death, to make over the whole of certain lands to the Provost and Magistrates of Kilmarnock, the ministers of the Established Churches of Scotland in Kilmarnock, and the minister of the parish of Riccarton, and their successors in office, and to themselves during their lifetime, to the end that they might hold the same for the execution of the several purposes mentioned, and, *inter alia*, for payment of the residue of the income "equally between the parishes of Kilmarnock and Riccarton, to be paid to and expended by the ministers of said respective parishes in charitable and benevolent purposes connected therewith." *Held* that the ministers of the parishes of Kilmarnock and Riccarton were not bound to render accounts of the disposal of the money paid to them to the trustees.

Upon 8th July 1861 Misses Margaret, Jane, and Elizabeth Buchanan, of Bellfield, in the parish of Riccarton and county of Ayr, executed a trust-deed in order to regulate the disposal of the heritable and moveable estate which might come to be vested in the survivor of them after the death of such survivor. Miss Elizabeth Buchanan was survivor of the said ladies. In exercise of powers of revocation and alteration reserved to her by the said trust-deed, Miss Elizabeth Buchanan executed a codicil thereto, dated 11th May 1871, whereby she altered in certain respects the provisions of the trust-deed.

By the third purpose of the said codicil Miss Elizabeth Buchanan stated that it was her will and desire that the whole lands and heritages thereinafter specified (the lands and estate of Bellfield) should be devoted in all time coming to certain uses and purposes therein set forth, and that the trust in connection therewith should be called "The Buchanan Bequest." She therefore ordained and appointed her trustees to hold the said lands for the period of ten years from and after the first term of Whitsunday or Martinmas occurring six months after her death, and to apply the annual rents and proceeds thereof, and the rents or lordships which might be derived from coals or minerals, for the purposes therein set forth.

On the lapse of said period of ten years, the testatrix ordained and directed her trustees to dispone, assign, and make over the whole of said lands, heritages, and others, and all and whatever accumulations of rents and others which might then be in

their hands, to and in favour of the Provost and Magistrates of Kilmarnock, the ministers of the Established Churches of Scotland in Kilmarnock, and the minister of the parish of Riccarton, all for the time being, and their successors in office, and to her trustees themselves during their lives as trustees in trust, to the end that they might hold the same in all time coming for the execution of the several purposes aftermentioned of the Buchanan Bequest; and she appointed and directed the trustees of the Buchanan Bequest to pay and apply the whole annual revenue and income to be derived from the said lands and heritages, and from the capital funds of the Buchanan Bequest, and to and for the purposes following:—(1) For payment of the costs and charges of administration and management; (2) for continuing the payment of the respective annual sums thereinbefore directed to be paid by her trustees, viz., £5 to the Ragged School of Kilmarnock, £3 to the Kilmarnock Fever Hospital and Infirmary, £10 to the minister of the parish of Riccarton, and £130 to a missionary for said parish; (3) for payment of the annual expenditure connected with the library of the Buchanan Bequest; (4) for payment of the annual expenditure for maintaining the policies and garden of Bellfield House as a place of recreation for the public of Kilmarnock and Riccarton; (5) for payment of the expenses connected with an asylum in the event of the same having been formed; (6) "for payment of the balance or residue of the said revenue or income equally between the parishes of Kilmarnock and Riccarton, to be paid to and expended by the ministers of said respective parishes in charitable and benevolent purposes connected therewith."

Miss Elizabeth Buchanan died on 23rd April 1875, and her trustees for ten years administered her estate as directed in the codicil. Thereafter they made over the trust estate to the Provost and Magistrates of Kilmarnock, the ministers of the Established Churches of Scotland in Kilmarnock (*vide* 14 R. 284), the minister of the parish of Riccarton, and to themselves, as trustees for carrying out the objects of the trust; and in accordance with a direction in the codicil, the trustees of the Buchanan Bequest obtained a Royal Charter incorporating themselves under the title of "The Trustees of the Buchanan Bequest."

Thereafter a question arose between the Buchanan Bequest trustees and the Church of Scotland ministers of Kilmarnock and Riccarton as to the meaning of the sixth purpose of the codicil. The trustees maintained that the ministers were bound to submit to them accounts showing how the balance or residue of the revenue paid to them in terms of that purpose had been applied, and mentioning the names of the recipients, with the amount given to each in cash, goods, or clothing. The ministers maintained that the trustees were not entitled to such accounts. The balance or residue of the revenue paid to and expended by the ministers amounted to about £220 per annum.

For the decision of this question a special case was presented by (1) the trustees and (2) the ministers.

The questions of law were—"(1) Are the second parties and their successors in office bound annually to render to the first parties accounts showing how the money paid to the second parties by the first parties, from the income of the Buchanan Bequest, to be expended on charitable and benevolent purposes connected with the parishes of Kilmarnock and Riccarton, has been applied, mentioning the names of the recipients, with the amounts given to each in cash, goods, or clothing? or (2) Are the second parties and their successors in office bound annually to render to the first parties any, and if so what, accounts of the disposal of the said money?"

Argued for the first parties—They were entitled to receive such an account in the form desired by them or an account in such other form and giving such particulars as the Court might determine. The import of the provision in Miss Buchanan's codicil was to the effect that certain specified members of the body of trustees would undertake a particular department of the trust administration, and such trustees were not thereby exonerated from the ordinary duty incumbent on trustees to preserve and exhibit to their co-trustees accounts of their administration—in no way to be made public.

Argued for the second parties—The legacy being expressly bequeathed to the parishes of Kilmarnock and Riccarton, and it being expressly provided that the residue was to be paid to and expended by the ministers of these parishes, it was as ministers of their respective parishes and not as trustees of the Buchanan Bequest that they were entitled to intromit with the respective shares of residue falling to be paid to them, and they were not bound to give, and the first parties were not entitled to demand, such an account, or any account. The duties imposed upon the trustees of the Buchanan Bequest by the said codicil ended with the payment to the second parties, and to give effect to the contention of the first parties would be to defeat the purposes of the trust, and to render it impossible for the second parties properly to carry out the intention of the truster. The parties who chiefly benefited, and those whom the truster desired to benefit, were needy and deserving persons, and in so far as the money was distributed to persons, the most deserving would decline to receive the benefit if their names were disclosed as being the recipients of charity, and the consequence would be that the benefits of the bequest would go to less deserving persons—*Turbyne* v. *Kirk-Session of Leuchars*, October 15, 1875, 3 R. 10.

At advising—

Lord Justice-Clerk—This case relates to a trust which is perpetual in character; the funds are to be held "in all time coming for the execution of the purposes of the trust." One of these purposes is the "pay-

ment of the balance or residue of the said revenue or income equally between the parishes of Kilmarnock and Riccarton, to be paid to and expended by the ministers of said respective parishes in charitable and benevolent purposes connected therewith." The question is, Whether under that clause the ministers are to receive the money to be paid to them and thereafter to administer it at their discretion, the trustees being exonerated from all liability after they have paid over the money and got a voucher therefor from the ministers?

It is maintained by the trustees that the ministers are the administrators of the fund but that they are bound to account to the principal trust as to their mode of spending the money. We are not dealing with any question of maladministration, there is no suggestion that the ministers are defeating the intentions of the testatrix, or applying the money to purposes different from those which she intended it to be applied to. The only question is whether the main body of trustees are entitled to demand from the ministers an account of the way in which they have discharged their duty by expending the money, upon the footing that they have paid to proper recipients. It is purely a question of construction, and my opinion is that, under this deed, after the money has been paid over and duly vouched for by the ministers, the trustees are exonerated and are not entitled to call on the ministers to account as to their mode of administration or its details.

LORD YOUNG—I am substantially of the same opinion. The legal question before us is, whether it is the legal right of one party to demand from the other, and the duty of the other party to make to the first, an annual account of their administration. I am of opinion on the case that there is no such right and duty. The case is substantially the same as if a testator directed his trustees to hand over annually during a limited period or during a general period a sum to the minister of a parish or church to be expended by him, according to his discretion, on charitable or benevolent purposes connected with the parish or church. Trustees so directed would discharge their duty by handing over the sum to the specified recipient to be applied by him according to his discretion, and it would be no part of the latter's duty to give details of the objects of his charity or the mode in which he exercised his judgment. The present case is in exactly the same position. The deed indeed does not say that the ministers are to apply the fund "in exercise of their judgment and discretion," but I am of opinion that these words are implied though not expressed.

The only thing I wish to add, is that I should not at all approve—indeed I should disapprove—of the conduct of any one of these ministers who maintained an absolute secrecy as to what he did. I think that would be exceedingly indiscreet, and if any case were presented to this Court indicating that such concealment was practised in order to hide a questionable exercise of discretion in the matter, I think this Court would give all the aid requisite to let in all the light needed to have the charge cleared up, and, if necessary, to see that the money was rightly expended. But there is no suggestion of that kind here, and I assume that there is no reason for supposing that these ministers were expending the money in any other way than was reasonable according to their discretion.

I agree in the opinion that these questions submitted to us should be answered in the negative.

LORD RUTHERFURD CLARK—I am not by any means free from doubt as to the proper course to be followed in this case. But as all your Lordships are of opinion that there is no obligation to account, I shall not dissent.

LORD TRAYNER—I take these questions as questions of construction of the terms of the deed. I am of opinion that there was no duty on the part of the ministers entrusted with the direct duty of spending the money to account for the exercise of their discretion, either in a general or detailed manner, to the trustees. I therefore agree that the questions should be answered in the negative.

The Court answered the questions in the negative.

Counsel for the First Parties — Asher, Q.C.—C. S. Dickson. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Second Parties—Salvesen—Guy. Agents—Wallace & Pennell, W.S.

Wednesday, May 29.

SECOND DIVISION.

[Sheriff of Lanarkshire.

PINI & COMPANY *v.* SMITH & COMPANY.

Contract—Sale—Timeous Rejection.

A manufacturer, from whom a quantity of iron pipes had been ordered by a merchant in London, delivered them, as required by his contract, to the shipping agent of the buyer at Glasgow, and forwarded the invoice to London. The merchant having objected that the goods described in the invoice were not the same as had been ordered, the London agent of the manufacturer wrote a docquet upon the invoice to the effect that the goods were "in every respect the same as ordered," and the merchant then paid the contract price. The pipes were sent by sea to Liverpool, transshipped there, and forwarded to Buenos Ayres. No examination of the pipes was made either at Glasgow or Liverpool. When they arrived at Buenos Ayres they were rejected by the cus-