the canse is an Exchequer cause commenced by a subpœna, or where the process is in the Inner House, or in the case of petitions before the Junior Lord Ordinary under 20 and 21 Vict. c. 55, in none of which cases a process falls asleep.

"I am also informed that the point now under discussion was raised before Lord Kincairney some five years ago, and that his Lordship after consultation with the other Judges held that a sisted process after a year's repose required wakening, and I also discover that in most if not all of the Courts of the other Lords Ordinary the same practice has prevailed. I am also informed that Lord Low some years ago decided the question in the same way in a teind process.

"I think the change of practice may be accounted for and justified on several grounds. By section 95 of the Court of Session Act 1868 a new and very cheap and easy procedure was introduced in place of actions of wakening, and thereafter by the Act of Sederunt of 22nd January 1876, section 2, it was provided as follows:—'That every unextracted process now remaining and that may hereafter be in the keeping of Clerks of Court shall be transmissible to the department of the Lord Clerk Register on the expiration of one year from the date of the last interlocutor pronounced in the cause, or from the date of the calling if no interlocutor shall have been pronounced.' It will be observed that under this section there is no exception made of processes in which a sist has been pronounced, and although the Act of Sederunt seems to have been passed mainly in the interest of the convenient arrangement of the offices in the Register House, yet it undoubtedly has the effect of removing all processes after the expiration of one year after the last interlocutor in the cause from the office of the Lord Ordinary before whom they are depending, and manifestly no motion could be made in any such process without getting it back from the office of the Lord Clerk Register to the office of the Lord Ordinary before whom it depended, and it appears that this re-transference has in practice been combined with the procedure for wakening a process. Finally, there seems a certain convenience in having a general rule as to the necessity for wakening applicable to all processes in which a year has expired from the date of the last interlocutor pronounced in the cause whether there has been a sist or not. In all causes there seems to be an equal necessity for the Court being satisfied that formal notice has been given to all parties interested that the cause is to be proceeded with, and it is best that this should be done by one and the same form of process in all cases instead of as suggested by the pursuers having it done in sisted causes by a mere notice to the other parties' agents of an enrolment of the cause in the motion roll for recall of a sist.

"I therefore hold, in conformity with what I understand to have been the practice for many years in the Outer House, that the statutory procedure for wakening the cause ought to be resorted to in all cases, with the exceptions hereinbefore noted, where a year has elapsed since the date of the last interlocutor or proceeding in the cause, and that whether during the whole or a portion of the period the cause shall have been sisted under an order of the Court.

"I may add that, on the ground of its being the practice of the Court, my brethren in the Outer House agree with me that this is the course which ought to be followed.

"I accordingly refuse the motion for recall of the sist and further procedure until the process shall have been wakened in one or other of the methods prescribed by the Act of 1868."

His Lordship refused the motion.

Counsel for the Pursuers—Horne. Agents - J. K. & W. P. Lindsay, W.S.

Counsel for the Defenders — Hon. W. Watson. Agents — Webster, Will, & Co., S.S.C.

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*Friday, December 7.*

## SECOND DIVISION.

[Lord Johnston, Ordinary.

## MURDOCH'S TRUSTEES *v.* WEIR AND OTHERS.

*Succession — Trust — Uncertainty — Charitable Bequest - Bequest to Persons who have Shown Practical Sympathy in the Pursuits of Science.*

A testator directed his trustees to employ the whole residue of his estate "in instituting and carrying on a scheme for the relief of indigent bachelors and widowers, of whatever religious denomination or belief they may be, who have shown practical sympathy either as amateurs or professionals in the pursuits of science in any of its branches, whose lives have been characterised by sobriety, morality, and industry, and who are not less than fifty-five years of age, or of aiding any scheme which now exists or may be instituted by others for that purpose."

*Held* (*reversing* Lord Johnston)—*dub.* Lord Kyllachy—that the bequest was not void by reason of uncertainty.

John Murdoch, who latterly resided at the Edinburgh Hydropathic Establishment, Craiglockhart, Mid-Lothian, died there unmarried on 8th December 1901, leaving a trust-disposition and settlement dated 17th July 1897, by which he assigned, disponed, and bequeathed his whole means and estate to and in favour of Peter Guthrie Tait, then Professor of Natural Philosophy in the University of Edinburgh (now deceased), Alexander Crum Brown, Professor of Chemistry in the said University, James Geikie, Professor of Geology in said University, and Thomas Hector Smith, manager of the National Bank of Scotland, Limited,

in Edinburgh, and to the acceptors and acceptor of them, the major number acting and resident in Great Britain being always a quorum. He also appointed his trustees to be his executors, and on the death or resignation of any one of his trustees he directed the remaining trustees to assume a suitable person to act in his place.

The first three purposes of his settlement provided for payment of debts, legacies, annuities, &c. The fourth and only other purpose was in the following terms—"(*Fourth*) I direct my trustees to employ the whole residue of my said estate, means, and effects in instituting and carrying on a scheme for the relief of indigent bachelors and widowers, of whatever religious denomination or belief they may be, who have shown practical sympathy, either as amateurs or professionals, in the pursuits of science in any of its branches, whose lives have been characterised by sobriety, morality, and industry, and who are not less than fifty-five years of age, or of aiding any scheme which now exists or may be instituted by others for that purpose; and I confer on my trustees the fullest and most ample powers, both in regard to the selection of the persons who are to receive the benefit of the proposed scheme and the mode in which the scheme itself is to be carried out, and without in any way detracting from the powers hereby conferred on my trustees, I suggest that, they should, if they deem it expedient, purchase land situated within 10 miles of Edinburgh, of suitable extent, and erect thereon, furnish, and maintain an institution to be known by the name of 'Murdoch's Rest,' where such persons as are before mentioned might end their days in comfort; at the same time I am well satisfied that when such persons have kind and suitable friends willing to receive them they are better with them than gathered together in numbers; but in the event of my trustees deciding to adopt my suggestion as to an institution, I would recommend that the buildings to be so erected should be constructed after the cottage system, and of a substantial but not expensive character, and I would further recommend that my trustees should provide and pay for the board of each of the inmates in the before-mentioned institution at a cost of, if possible, not exceeding £36, 15s. per annum; and with reference to the selection of the persons who should benefit under the said scheme, in whatever way it may be carried out by my trustees, I would suggest that the first three persons should be either natives of or resident in the county of Edinburgh, and thereafter one person, whether a native or resident, should be chosen from each county in Scotland in alphabetical order, until such requisite number as my trustees may decide shall be reached, and on the death or removal from the benefit of the scheme of any person so chosen, that a person should be selected in his place from the county next in alphabetical order to that from which the last selection was made; and in the event of no eligible application being received by or on behalf of any person in a county in its order, that a person should be chosen from the county next in order, but that on the occurrence of the next vacancy a person should be chosen from such county from which no eligible application was received; and I would also recommend that my trustees should, in making elections to the benefit of the said scheme, consider with care and sympathy any application which may be recommended by the provost and magistrates of any Scotch burgh, and I declare that, notwithstanding any of the suggestions or recommendations herein contained, my trustees shall have the sole power of selecting a site for the before-mentioned institution, should they deem its erection advisable, and determining its style and extent and of selecting all applicants and removing at their discretion those admitted to the benefit of the said scheme."

A question having arisen as to whether the above purpose was void from uncertainty, an action of multiplepoinding, in which the fund *in medio* was the residue of the estate, was raised by the trustees, in which claims were lodged by them and by the testator's next-of-kin.

The trustees claimed "to be ranked as preferred as trustees foresaid to the whole fund *in medio*, to be administered by them in terms of the directions contained in the fourth purpose of the trust-disposition and settlement of the said deceased John Murdoch;" and pleaded "The directions for disposal of residue contained in the fourth purpose of Mr Murdoch's settlement being valid and effectual, the claimants are entitled to be ranked and preferred in terms of their claim."

The next-of-kin claimed—"(1) The claimants as the sole next-of-kin of the deceased John Murdoch claim to be ranked and preferred in equal shares to the whole residue of the trust-estate forming the fund *in medio*. (2) Alternatively, the claimants as next-of-kin foresaid claim to be ranked and preferred in equal shares to the surplus revenue on said residue which has accrued and which may hereafter accrue." They pleaded—"(1) The claimants, as the sole next-of-kin of the deceased John Murdoch, are entitled to be ranked and preferred in terms of the first alternative claim, in respect that the directions as to the application of the residue contained in the fourth purpose of said trust settlement are vague and uncertain and of no effect in law, and that the said residue forms intestate succession of the truster. (2) Or otherwise, the claimants, as next-of-kin foresaid, are entitled to be ranked and preferred in terms of their second alternative claim, in respect that the said surplus revenue accrued, and which may hereafter accrue, forms intestate succession of the truster."

On 2nd February 1906 the Lord Ordinary (JOHNSTON) pronounced an interlocutor finding that the bequest of residue contained in the fourth purpose was void from uncertainty and sustaining the claim for the next-of-kin.

*Opinion.*—"The question at issue in this case between the trustees of the late John Murdoch and his next-of-kin is, whether the directions in the fourth or residue clause of his settlement are void from uncertainty. The question is important, as the residue of Mr Murdoch's estate amounts to a very considerable sum, and it has been ably argued.

"Mr Murdoch has directed his trustees to employ the whole residue of his estate 'in instituting and carrying on a scheme for the relief of indigent bachelors and widowers, of whatever religious denomination or belief they may be, who have shown practical sympathy, either as amateurs or professionals, in the pursuits of science in any of its branches, whose lives have been characterised by sobriety, morality, and industry, and who are not less than fifty-five years of age, or of aiding any scheme which now exists or may be instituted by others for that purpose.' Mr Murdoch further confers ample powers on his trustees both in regard to the selection of the persons to be benefited and the mode in which the scheme itself is to be carried out. But without in any way tying them down he suggests the establishment of an institution or home in the neighbourhood of Edinburgh where such indigent persons might be boarded, and he also suggests the selection of the individuals from the counties of Scotland in their turn. But I do not think that those ancillary directions affect the question. Its determination depends upon the passage I have quoted.

"A great many cases have been before the Courts where analogous questions have been raised, both recently and in earlier times. But I do not think that I need examine them in detail. The following points appear to be well settled—"(*First*) The law does not allow a testator to delegate to others the making of a will for him, but (*Second*) the law does allow a testator 'to point out particular classes of persons and objects which are intended to be the object of his favour, and then to leave it to an individual or a body of individuals after his death to select out of those classes the particular individuals or the particular objects' to whom his bounty is to be applied (*Crichton's* case, 3 W. & S. at 338). (*Third*) Though a general bequest for charitable purposes is in its conception sufficiently general and vague, still, from a natural inclination to favour charity, the Court has by a series of decisions determined that such a bequest is to be sustained. And testators are now entitled to rely upon this. But this is of the nature of an exception to a general rule, and the decisions on this branch of the subject are not to be appealed to in support of bequests in favour of other vague and uncertain objects.

"The question therefore in relation to every such bequest which is not for charitable purposes merely, is, whether the class of persons or objects is defined with sufficient *particularity* to avoid vagueness and uncertainty.

"In the present case the contentions of the rival claimants were based upon two opposite views of what is the keynote of the testator's direction. The trustees maintain that the ruling idea of the testator, or the keynote of the bequest, is the relief of indigence, and that everything else is of the nature of ancillary limitations. And they therefore contend that the bequest is a bequest for charitable purposes, and should receive the benevolent construction with which it is now fixed that such bequests are to be regarded. It is maintained, on the other hand, by the next-of-kin that the root idea or keynote is practical sympathy in the pursuits of science, and that all else in the testator's direction is of the nature of ancillary limitation.

"I am of opinion that the latter is the correct view. The class of persons which the testator desires to benefit are the practical sympathisers in the pursuits of science in any of its branches. But they are to be in indigent circumstances. They are to be single men, whether bachelors or widowers. Their religious beliefs are to be disregarded. They may be either amateurs or professionals. They are to be of sober, moral, and industrious lives. And they are to be not less than fifty-five years of age. But all these conditions are limitations of the class, and the question remains, Is the class itself so *particularly* defined as to avoid the charge of vagueness and uncertainty? That the purpose by which the testator was actuated was the relief of their indigence will not excuse the defining of the class to be relieved, nor justify striking the word '*particular*' out of the second canon of construction to which I have referred. The testator intended indeed charity, but, as it appears to me, a *particular* charity, and the question remains whether he has truly made his charity '*particular*,' or intending to make it '*particular*' has left it too vague and indefinite to receive effect.

"After a careful consideration of the terms the testator has used, I have come to the conclusion that the bequest is void by reason of its vagueness. The counsel for the next-of-kin put these three pertinent questions—(1) What is science? (2) What is sympathy with science? and (3) What is practical sympathy with science? And to none of the questions can a reasonably definite or intelligible answer be given.

"In the first place, I do not know what the testator means by 'science,' or rather, I may say, what he does not mean to include in 'science.' The word 'science,' according to its original derivation, means simply knowledge. In university or educational parlance it has come to be restricted to certain branches of knowledge, where for convenience science is distinguished from languages, divinity, and even from mathematics, though I imagine that by most people mathematics would be regarded as pre-eminently a science. But I do not think there would be any justification for confining the testator's bequest to the professors and amateurs of science in the university sense. At least, I think there would be as little justification for this restriction as for confining the term religion

to the Christian religion. Where, then, is it to stop? The devotees of every cult appropriate the term to the subject of their devotion, from the phrenologist and the believer in Christian science to the patron of the prize ring. I am unable therefore to say that science is a less indefinite, vague, and uncertain term of differentiation than religion—*Grimond's* case, 6 F. 285, and L.R. 1905, A.C. 124.

"But even could I give a definite and limited meaning to science, I should find myself unable to tell what the testator means by 'sympathy in the pursuits of science,' and I should find it by no means easier, but, on the contrary, much more difficult, to know what he means by 'practical sympathy in the pursuits of science.' I am not sure that the difficulty is not increased by his use of the word 'pursuits' in the plural. But I do not think it necessary to prosecute that point. It is quite possible that what he really meant was to define as the objects of his benefaction the class of persons who have done something for the advancement of science in the more limited sense of that term, but he has not said so. I cannot limit the expression 'who have shown practical sympathy in the pursuits of science' to those who have practically devoted themselves to the advancement of science. 'Practical sympathy' appears to me to be an altogether nebulous phrase. It will include the devotion of a life to the search for some yet undiscovered mineral, or to the prosecution of observations in anything from astronomy to bacteriology. Those who show it will include the man who endows a scholarship in the faculty of chemistry, or who subscribes in aid of a new Arctic expedition, but will also include the man who attends a Royal Society lecture, though he never read a word on its subject or could venture to open his mouth regarding it. They will even include the man who, without any inclination to the pursuits of science himself, relieves the necessities of a devotee of science, whose devotion has not produced him a living. I do not need to multiply illustrations. I have said enough to indicate that, to the best of my judgment, while 'science' is a term of no definite or 'particular' meaning, 'those who have shown practical sympathy in the pursuits of science' is a definition altogether vague and uncertain. I shall therefore find accordingly, and sustain the claim for the next-of-kin of the late Mr Murdoch to the residue of his estate."

The Trustees reclaimed, and argued—The fact that the testator's object was concerned with the relief of indigence was, *per se*, sufficient to make this a "charitable" bequest, not only within the liberal meaning of the word "charity," as applied by the Courts in Scotland, but even in the somewhat narrower sense which had sometimes been given to it in England. The farther fact that his object was also combined with a desire to benefit science could not detract from its "charitable" nature, so that the Lord Ordinary's attempt to discover whether the bequest was mainly charitable or mainly scientific was meaningless and irrelevant. Now charitable bequests were viewed by the Court with special favour, and an attempt was always made to give effect to them when practicable, if not in the precise shape provided for by the testator, at anyrate on the principle of *cy près*, in some way as closely resembling it as possible—see *Andrews, &c.* v. *Ewart's Trustees*, May 27, 1885, 12 R. 1001—so that the present bequest was not void merely because there might be difficulty in the way of its exact application, provided the testator's general intention was reasonably plain. The following were cases where charitable bequests—many of them far vaguer than the present—had been sustained—*Hill, &c.* v. *Burns*, April 14, 1826, 2 W. & S. 82; *Crichton* v. *Grierson*, July 25, 1828, 3 W. & S. 329, see page 343; *Miller and Others* v. *Black's Trustees*, July 14, 1837, 2 S. & M'L. 866; *Dundas* v. *Dundas*, January 27, 1837, 15 Shaw 427; *Kelland, &c.* v. *Douglas, &c.*, November 28, 1863, 2 Macph. 150; *Milne's Executors* v. *Aberdeen University Court*, May 16, 1905, 7 F. 642, 42 S.L.R. 553; *Cobb* v. *Cobb's Trustees*, March 9, 1894, 21 R. 638, 31 S.L.R. 506; *Magistrates of Dundee* v. *Morris*, May 1, 1858, 3 MacQueen 134; *Bruce* v. *Presbytery of Deer*, March 22, 1867, 5 Macph. (H.L.) 20; compare also *Maclean* v. *Henderson's Trustees*, February 24, 1880, 7 R. 601, Lord Moncreiff at 611, 17 S.L.R. 457. The present case was distinguished from the following "disjunctive" cases in which the testatory purposes were charitable "or" otherwise within the option of the trustees, and which were not therefore really charitable bequests — *Blair* v. *Duncan*, December 17, 1901, 4 F. (H.L.) 1, 39 S.L.R. 212; *Grimond or Macintyre* v. *Grimond's Trustees*, 7 F. (H.L.) 90, 42 S.L.R. 466; *Shaw's Trustees* v. *Esson's Trustees*, November 2, 1905, 8 F. 52, 43 S.L.R. 21. The difficulty, however, of applying this bequest had been immensely exaggerated. "Science" had a well-known popular signification, and there were numbers of persons who clearly fell within the class intended by the testator. Their rights must not be sacrificed merely because there might be some doubt as to the rights of others. There was no case in which an undoubtedly charitable bequest had been found invalid on account of vagueness in the limitation.

Argued for the respondents—The Lord Ordinary was right in thinking that the first point to be decided was whether the testator's object was mainly charitable or mainly scientific, as on that depended whether the bequest was a "charitable" one in the technical sense of the term. The mere fact that incidentally a bequest might involve some element of charity did not bring it within the category if its essential objects were scientific. Applying the above test, the present bequest was not a charitable one, and, strictly construed, it admittedly was bad. Assuming, however, that it was a "charitable bequest," it was still too indefinite, because even in such a case the

necessity for a proper specification of the objects of the bequest had not been relaxed. A testator must clearly indicate the classes or objects of his bequest, although he might delegate the choice of individuals to others —Lord Lyndhurst in *Crichton* v. *Grierson*, *cit. sup.* As to the cases founded on by the reclaimers, they were all cases in which the objects were sufficiently ascertained—see *e.g. Dundas*, *cit. sup.* at p. 428; *Magistrates of Dundee*, *cit. sup.* at p. 166; *Hill*, *&c.* v. *Burns*, *cit. sup.* at p. 91. Thus if here the bequest had been to charities generally it would have been good, because the object though wide would have been certain; but an attempt having been made to limit the object, and the attempt having failed, the bequest was bad. The doctrine of *cy près* postulated an object to which some approximation might be made—*Ewen* v. *Ewen's Trustees*, November 17, 1830, 4 W. & Sh. 346, see at 352; *Whicker* v. *Hume*, July 16, 1858, 7 Clark's H.L. Cases 124; *In re Rhymer*, [1895] 1 Ch. 19 at 31; *Clark* v. *Taylor*, (1853,) 1 Dewry 642; *Robbie's Judicial Factor* v. *Macrae*, February 4, 1893, 20 R. 358, 30 S.L.R. 411; *Goudie* v. *Forbes*, 1904, 12 S.L.T. 377; *Williams* v. *Kershaw*, (1835), 5 Cl. & Fin. 111. [The respondents offered no argument in favour of the second alternative of their claim and second plea-in-law.]

LORD JUSTICE-CLERK—This case turns upon the question—(1) whether the bequest to which it refers falls within the category of charitable bequests; and (2) whether it is sufficiently definite in object or must be held bad from vagueness and uncertainty.

The purpose of the trust is declared to be to institute and carry on a scheme for the relief of "indigent bachelors and widowers" regardless of religious denomination, who "have shewn practical sympathy, either as amateurs or professionals, in the pursuits of science in any of its branches," under certain conditions as to character and age, and an alternative power is given to aid "any scheme which now exists or may be instituted by others for that purpose."

In giving instructions to his trustees he suggests, subject to their discretion, the founding of an institution for housing and boarding the persons selected for the benefits of his gift.

The first thing that strikes one in considering the intention of the testator is that he wishes his bounty to reach indigent persons. It is solely for persons who are indigent that the bequest is made. This, I think, stamps it with the character of charity, the giving of relief to persons in circumstances of poverty. The trust as expressed plainly involves that no one can consistently with its terms be allowed to participate in its benefits who is not an indigent person. The intention being thus on the face of it charitable, can any limitation which the testator prescribes by which the class of persons to be selected is limited, deprive the gift of its charitable character? I do not think so. The first question the trustees have to consider in any case brought before them is—Is there indigence? For if there is not, then all other qualifications, however in accordance with the requirements of the testator, cannot justify a grant from the fund. The substantial test of indigence must come first, to give a basis for inquiry into more particular qualifications. The first question must in my opinion be answered in the affirmative.

As regards the second question I have had more difficulty. The term "science" is one which may be read in many ways, and there are certain branches of learning which some would call scientific and others would hold not to fall within the category. In seats of learning the word "science" is sometimes appropriated to a particular branch, and the degrees of Doctor of Science and Bachelor of Science have a definite application to what may be called "physical science." But while it is true that the exact application of the word may be open to discussion, I do not feel that it is in a true sense so vague and uncertain as to justify the setting aside of a testator's will. The question really is whether those who have to carry out the trust have sufficient indication of the general intention of the testator to enable them in selecting objects for the benefit of the fund to do reasonably what he desired. They have to find persons who, being indigent, have in the past given of their time and their talents to advance science. I am unable to hold that there is any such vagueness in the purpose as to cause the bequest to fail, seeing that in such a case as this the benignant construction must prevail if that be reasonably possible. If a bequest expressed in the simple words "to be laid out on charities" is not void from vagueness, there seems no ground for holding that a bequest limited to a certain range should be held too vague. It does not seem more difficult for trustees to select within the range of persons who have done something to advance science than to discriminate between objects which may be held charitable and others which are not charitable in their nature. It is in charitable bequests as distinguished from others of a more general public character that the law has always favoured the testator's intention, if he leaves selection to those whom he vests with the trust.

On these grounds I am of opinion that the interlocutor of the Lord Ordinary should be recalled.

I have not gone into a special consideration of the cases referred to at the debate, as I have had an opportunity of considering an opinion of Lord Stormonth Darling, in which he reviews the authorities and in which I concur.

LORD KYLLACHY—In this case if I had been sitting alone I should have been disposed to concur with the Lord Ordinary, for I have not been able to satisfy myself that in this, perhaps somewhat eccentric, bequest the favoured class is sufficiently ascertained or ascertainable. In other words, I am not satisfied that the limits of the class are workably defined by any workable definition. But your Lordships have, I know, fully considered the matter in

all its aspects, and I do not feel such confidence in my personal view as to induce me formally to dissent from what I understand is your Lordships' conclusion.

LORD STORMONTH DARLING—I cannot agree with the Lord Ordinary's conclusion that the late Mr Murdoch's bequest of residue is void from uncertainty. On the contrary, I am of opinion that the claim of his next-of-kin should be repelled and the claim of his testamentary trustees sustained.

The testator's direction to his trustees is to employ the whole residue of his estate "in instituting and carrying on a scheme for the relief of indigent bachelors and widowers, of whatever religious denomination or belief they may be, who have shewn practical sympathy, either as amateurs or professionals, in the pursuits of science in any of its branches, whose lives have been characterised by sobriety, morality, and industry, and who are not less than fifty-five years of age, or of aiding any scheme which now exists or may be instituted by others for that purpose." Mr Murdoch goes on to confer on his trustees the fullest and most ample powers, both in regard to the selection of the persons who are to receive the benefits of the proposed scheme, and the mode in which the scheme itself is to be carried out, and then he makes certain detailed suggestions or recommendations to his trustees (but only as suggestions to be followed or not according to their discretion) for the erection and maintenance of an institution within ten miles of Edinburgh where such persons might end their days in comfort. The testator, about whom very little apparently is known, and who had no relatives nearer than grandchildren of an aunt, died in 1901, leaving estate (which was entirely moveable) of over £67,000. The trustees have not in the meantime resolved on the erection of the institution suggested by the testator, but they have at present on their list of recipients of charity, twenty-eight persons to whom they make annual payments, and they have accumulated income besides, so that the present value of the residuary estate in their hands is £59,000 or thereby.

The Lord Ordinary states three propositions as deducible from the long series of decisions on this branch of the law. I have no fault to find with any of them, unless it be that his Lordship's remark that "the decisions on this branch of the subject are not to be appealed to in support of bequests in favour of other vague and uncertain objects" seems to assume that this is not a charitable bequest. The same train of reasoning leads him to reject the trustees' contention that the key-note of the bequest is the relief of indigence, and to accept the rival view that the key-note is to be found in practical sympathy in the pursuits of science. Now, this attempt to determine which of two equally essential conditions is to be reckoned the chief seems to me beside the question. The recipients of the testator's bounty must have shown "practical sympathy in the pursuits of science," but not the less must they be "indigent bachelors or widowers." The two requirements are co-ordinate, and the trustees could not ignore or belittle either requirement without a breach of trust. The bequest therefore seems to me in the strictest sense of the phrase a "charitable bequest," and that without reference to the question which has given rise to considerable difference of high judicial opinion, viz., whether the word "charity" has the same (or a similar) technical meaning in Scotland which it has in England. We are fortunately relieved from considering that question, because, in any possible view of this bequest, it is a bequest for the relief of poverty, and therefore entitled to that "benignant construction of charitable bequests" which Lord Chancellor Chelmsford adopted "as a guide" in the *Morgan Hospital* case (3 Macq. 134), although the word "charity" did not occur in that case. For the question whether a bequest is to be reckoned as charitable does not, either in Scotland or England, depend on the use of any single word, but on the substance of the bequest itself. And the Lord Ordinary himself admits that the testator here "intended charity."

But then the Lord Ordinary states the question as being whether the testator "has truly made his charity particular, or, intending to make it particular, has left it too vague and indefinite to receive effect." And he reaches the conclusion that the bequest is void by reason of its vagueness, because you cannot define what is science, and still less can you define what is practical sympathy with science.

Now even without the aid of that benignant construction to which I think this bequest is entitled as a charitable bequest, I could not agree that "science" and "practical sympathy in the pursuits of science" are indefinable. It is true that science in a university sense, *i.e.*, the subjects included in the "Faculty of Science," and in which degrees in science are given, may not be an exhaustive enumeration of the sciences, although they are certainly very wide, and they include in the university with which I am best acquainted the subject of mathematics, which the Lord Ordinary thinks is excluded from all university science lists. It may be, however, that in some or even all universities the enumeration is not exhaustive. But this testator does not restrict his trustees to sciences in a university sense, and surely it cannot be maintained that a testator fails in doing what Lord Lyndhurst in *Crichton's* case says he may do, merely because he describes the particular class of persons and objects among which his trustees are to make their selection by some generic description wide enough to cover a large number of objects, instead of laboriously enumerating them one by one. It is enough, I apprehend, that he names the particular class of objects among which the duty of selection is to be performed by some sufficiently precise description as to be reasonably intelligible to the trustees who are to carry out that duty. It seems to me that the

trustees of Mr Murdoch can have no practical difficulty in determining either what are "the pursuits of science in any of its branches," or what persons have shown "practical sympathy" with these. I shall deal in a moment with *Grimond's* case, but I observe in the meantime that there is nowadays substantial agreement among scientific men as to the doctrines of at all events the leading sciences, and that these present no such startling differences of opinion as are to be found in religion. Again, "practical sympathy in the pursuits of science" may, as the Lord Ordinary points out, take various forms, but at all events it means something done actively in the cause and for the advancement of science.

Admitting, however, that every will presents a question of construction, the question always returns to this, Is that construction to be benignant or strict. And I have stated my reasons for holding that, inasmuch as this bequest is in substance for charitable purposes, its construction must be benignant. I ask, Is the Lord Ordinary's construction benignant? For if it is not, what comes of those cases where, out of favour for charities, bequests have been sustained where there has been no attempt by the testator to localise or define the class out of which the selection was to be made, but everything has been left general and vague? Of such a will the best example in Scotland is afforded by the case of *Dundas*, 15 S. 427, where the direction to the executor was simply contained in the words "any money left after paying all expenses I wish may be laid out on charities." There the First Division in 1837, adhering to the judgment of Lord Fullerton, found "that the bequest to 'charities' is not void on the ground of uncertainty or indistinctness, but does, when combined with the terms of the appointment of the defender as executor, import a discretionary power on his part to select the charities on which the benefit is to be conferred." There have been cases quite as strong in England (*e.g.*, *Whicker* v. *Hume*, 7 Clark's H.L. Cases 124, where the bequest sustained was "for the advancement and propagation of education and learning all over the world," that being a charitable bequest according to English law). If these cases were rightly decided it would have been difficult to deny effect to a bequest in favour of "indigent men of science to be selected by my trustees," and if that would have been good I fail to see why the bequest should lose its effect because the testator here added some words with the view of making his meaning a little more specific. Cases like *Dundas* in Scotland and *Whicker* in England go to confirm the accuracy of Lord Chelmsford's conclusion in the *Morgan Hospital* case (*supra cit.*), where he says, "I cannot discern that there is any great dissimilarity between the law of Scotland and the law of England with respect to charities." If there was at any time any dissimilarity at all, it lay (so said Lord Lyndhurst at 3 W. & S. 343) in the greater strictness of the law of England, *i.e.*, its less benignant construction of bequests for charitable purposes.

If, then, a different canon of construction is to be applied to a bequest according as it is to be read as charitable or non-charitable—that question depending not on the use of particular words, but on the meaning and substance of the bequest—I apprehend that the Lord Ordinary's reasoning must fail, because he has applied the wrong canon, *i.e.*, the canon which is applicable to a non-charitable bequest. The difference in practical result is well expressed by the late Lord Shand in *Blair* v. *Duncan* (L.R., 1902, App. Cas., at p. 42), where he refers to bequests for charitable and benevolent purposes as "objects of peculiar favour in the law both of Scotland and of England," and then goes on to say that "a bequest for public purposes to be selected by a person or persons named by the testator, *unlike a bequest expressly limited to a charitable purpose*," is not sufficiently definite, "but is too vague and wide to form the subject of a valid bequest." Similarly Lord Davey (at p. 43) says that "whatever may be the legal definition of the expression" (*i.e.*, charitable purposes) "the Courts of Scotland will give effect to a disposition in favour of charitable purposes to be selected by a named individual. In other words, such a trust is treated as being sufficiently definite to be the subject of a valid disposition." To the same effect I read Lord Robertson's opinion that "the proper inference from those cases (viz., the cases about charitable purposes) is, not that the law that the testator must select a particular class or particular classes of objects before he can leave it to a trustee to select the object of the bequest is relaxed, but merely that it is settled that charitable purposes form such a particular class." It is evident that if the words in that case had been "charitable and public purposes" effect might have been given to them, the words being construed to mean charitable purposes of a public character; but the actual words being charitable *or* public purposes had to be read disjunctively, with the result that it would have been in the power of the trustees to apply the whole of the fund for purposes which were not charitable though they might be of a public character. The opinions of every one of the noble and learned Lords make it plain that this was the real ground of judgment. The same is true of *Grimond's* case, L.R. 1905, App. Cas. 124, for there the disjunctive use of the words "charitable *or* religious institutions or societies" left the trustees quite free to devote the whole fund to religious purposes, so that not a penny might go to the relief of poverty. Here, on the other hand, if the trustees do their duty (which must always be assumed *ab ante*) every penny must go to the relief of poverty, or "indigence," which is the same thing. The trustees in their search for bachelors or widowers who have shown practical sympathy in the pursuits of science in any of its branches are not in the least relieved of the equally stringent

duty of satisfying themselves of the beneficiaries' need of assistance. The bequest, therefore, is, in truth and substance, a charitable bequest, and ought, in my opinion, to receive a benignant construction. That seems to me sufficient to turn the scale in favour of the validity of the bequest.

LORD LOW—After hearing the argument in this case, I at first thought that the interlocutor of the Lord Ordinary should be affirmed, because my impression was that the description of the class which the testator desired to benefit was so vague and uncertain that no rule sufficiently definite for the practical administration of the trust could be gathered from it.

Upon reconsideration, however, I have come, although with much hesitation, to be of opinion that, considering that the trust is undoubtedly for charitable purposes, the description of the class within which the trustees must select the persons to be benefitted is not so uncertain as to justify the conclusion that it is impracticable to carry out the wishes of the testator.

There can be no question that charitable bequests must receive what is called a "benignant construction," by which I understand that if it be reasonably possible to spell out of the testator's directions an intelligible purpose the bequest must receive effect.

No stronger example of the application of that principle could be imagined than the judgment of the House of Lords in the *Morgan Succession* case—*Magistrates of Dundee* v. *Morris*, 19 D. 918, 3 Macq. 134—to which Lord Stormonth Darling has referred.

Turning to the precise terms of the bequest, the only words which create a difficulty are those in which the testator limits the objects of his bounty to persons "who have shown practical sympathy, either as amateurs or professionals, in the pursuits of science in any of its branches."

Now I think that it is important to observe, in the first place, that there are many persons who without any doubt fall within that description, and if any of such persons should be so unfortunate as to become indigent after they attained fifty-five years of age they would be proper objects of the testator's bounty. I think that that consideration in itself makes it extremely difficult for the Court to declare that the bequest is altogether void from uncertainty, because if there may be persons who without doubt answer to the description (although their number may be small) it is difficult to see why they should be deprived of the benefits intended for them.

In the next place, I imagine that the majority of people would quite clearly not fall within the description, and the main question seems to me to be whether the description supplies the trustees with a rule sufficiently definite and certain to enable them to make a selection from the intermediate class lying between those who clearly answer to the description and those who clearly do not do so.

It is therefore necessary to examine the precise phraseology used by the testator. I shall take in the first place the last term in the description of the persons whom he desires to benefit. That is the word "science." I agree with the Lord Ordinary that the chief difficulty in regard to that word is to say what the testator did *not* mean to include in it. I do not think, however, that that difficulty goes very deep. In the language of everyday life the word "science" is used without any very precise meaning being attached to it, but there are certain branches of knowledge — and very many of them— which everyone would admit to be included in the term "science" as popularly used, which I take to be the sense in which the testator uses it. And I do not see why the scheme should be regarded as unworkable because it may be difficult or even impossible to determine, with anything approaching certainty, whether this or that branch of knowledge to which the designation of "science" is claimed to be applicable is, or is not, truly included in that term as used by the testator. I think that the trustees would be entitled to keep themselves safe by refusing any application where the branch of knowledge, in connection with which a claim was made, was not one which a man of average intelligence and education would recognise as certainly falling within the term science in the popular sense.

There is, in the next place, the word "pursuits," or rather the collocation of words "the pursuits of science." I imagine that the use of the plural number (pursuits) is not material, and that the meaning would have been the same if the singular (pursuit) had been used. I think that what the testator intended was that the "practical sympathy" which those whom he favoured were required to exhibit, was practical sympathy in the pursuit of science itself, and not the application of scientific knowledge for some ulterior purpose. To illustrate what I mean—A pharmaceutical chemist must have a competent knowledge of the science of chemistry to enable him to compound and dispense drugs, but the application of his scientific knowledge for the purpose of earning his living could hardly be described as the "pursuit of science." In short, I read the phrase "pursuits of science" as substantially equivalent to scientific investigation or research. That, I think, is the natural meaning of the phrase, and if so, it is sufficiently definite in my opinion for the practical work of administration.

The words remaining to be construed are "practical sympathy." I imagine that everyone knows what sympathy means according to the ordinary use of the expression, but if the word had stood alone, I think that it would have been very difficult to hold that the testator had given a sufficiently clear indication of his intention. Very likely it was because he recognised that that would be the case that he prefixed the adjective "practical." The Lord Ordinary thinks that the addition of that word only increases the ambiguity. That

is not how it strikes my mind, because what I understand by "practical sympathy" is, that sympathy with the pursuits of science must be evidenced by some patent and tangible act. Thus, if a man had contributed money to a fund raised for the purpose of enabling some particular scientific inquiry to be carried out, or if he had set up a laboratory and thereby devoted time and means to the object of solving some problem in chemistry, in both cases sympathy with these particular pursuits of science would be shown to be of a very practical nature.

No doubt it might often be very difficult to say whether the act upon which a claimant relied did, or did not, amount to evidence of "practical sympathy," and I recognise that the same kind of difficulty may arise in regard to every term in the description. But the trustees would not be bound to spend all the funds under their control. On the contrary, they would not be entitled to spend one penny unless they were satisfied that the object of the expenditure might reasonably and without unduly straining the language used, be regarded as falling within the description given by the testator.

It may be that the trustees will find that there are but few persons falling within the testator's description with sufficient certainty to justify a recognition of their claims as falling within the scope of the trust, and the result may be that only a comparatively small part of the large fund in the hands of the trustees will be required to carry out the testator's wishes. In such an event, or if, for some other unforeseen reason, the carrying out of the trust should be found to be impracticable, it would be open to the trustees, or to those who would have right to the fund in the event of the trust purposes failing, to bring the matter again before the Court. But in the meantime I am of opinion, for the reasons which I have given, that the trust must be allowed to go on. I therefore think that the interlocutor of the Lord Ordinary should be recalled, and that the trustees should be ranked and preferred in terms of their claim.

The Court pronounced this interlocutor—

"Find on a sound construction of the trust-disposition and settlement of the late . . . that his bequest of residue contained in the fourth purpose thereof is not void from uncertainty: Therefore repel the claim of . . . the next-of-kin . . . sustain the claim of . . . the trustees. . . ."

Counsel for Reclaimers—Dean of Faculty (Campbell, K.C.)—Cullen, K.C.—Gillon. Agents—J. & J. Turnbull, W.S.

Counsel for Respondents—M'Lennan, K.C.—C. D. Murray. Agents—Murray Lawson & Darling, S.S.C.

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*Saturday, December 8.*

## FIRST DIVISION.

[Sheriff Court at Glasgow.

## GRANT *v.* M'CLAFFERTY.

*Reparation—Landlord and Tenant—Negligence—Defective Stair—Promise to Repair—Volenti non fit injuria—Relevancy.*

A sustained injury by falling down the common stair leading to the house of which her husband had been tenant for about four years under a yearly tenancy. In an action of damages against the owner of the house, she averred that the accident, which occurred on 5th July, was due to the defective and dangerous condition of the stair, which had deteriorated since the commencement of the tenancy, and was badly lit and very dark; that in the end of May her husband had complained to the defender's factor of the dangerous state of the stair; that the factor had then promised to repair it; and that relying on the factor's promise to do so they had stayed on.

*Held* that the pursuer's averments were relevant, and an issue *allowed.*

Elizabeth Grant, wife of and residing with Robert Grant, 248 Paisley Road, Glasgow, raised an action of damages for personal injury against John M'Clafferty, the proprietor of the house in which she and her husband resided, and of which her husband was tenant under a yearly tenancy.

The pursuer averred—(The words printed in italics were added by way of amendment in the Inner House)—"(Cond. 1) Pursuer resides with her husband at 248 Paisley Road, Glasgow, in a house of which defender is the proprietor. *The pursuer's husband has been tenant of the said house for about four years. The tenancy is a yearly one, and under it the rent is payable quarterly.* It is on the second storey, and is approached by a close and a common stone stair. (Cond. 2) On 5th July 1905 while pursuer was descending said stair she fell and sustained a fracture of her leg. Said accident was brought about by the defective condition of the stair, one of the steps of which was broken and greatly worn away at the point where pursuer fell, and in a dangerous condition, the stair being badly lit and very dark. Since the date of pursuer's entry to said house (about four years ago) said stair has much deteriorated. (Cond. 3) Pursuer's husband had previously complained to the defender's factor at or about the end of May 1905, in the said house, of the defective and dangerous condition of the said stair, and he had then promised to repair it. Relying upon this promise pursuer remained on in her house, but the defender failed to fulfil his promise and left the stair in its defective and dangerous condition until the accident occurred to pursuer. Defender's factor was negligent in failing to repair said