deposits the liability of which was taken over, or about £1100 of the agreed-on price of the lands, of £1800. If such a case had been made out it might have been sufficient, but there is no such case made out.

Therefore, upon the whole matter, I am of opinion there was no original liability upon the son when he succeeded his grandfather or when his father died, and that no such liability was subsequently put upon him either by his guardian during pupilarity, or by his curators, with his consent, after he emerged from pupilarity into the condition which we term minority, when a minor may, if there is no lesion to him, come under obligation with the consent of his curators.

That disposes of the whole case. It is an action against him as under liability, either original or subsequently assumed, or put upon him to this depositor for £80. I think there was no such original liability, and that the liability was subsequently put upon him or assumed by him.

My opinion therefore is, that upon findings to that effect we should alter the judgment of the Sheriff, and sustain the defences to the present action.

LORD RUTHERFURD CLARK, LORD TRAYNER, and the LORD JUSTICE-CLERK concurred.

The Court pronounced this interlocutor:—

"The Lords having heard counsel for the parties on the appeal, Find that the sum of £80 sued for consists of sums deposited with the liferenter of the lands of Melby, the defender's father, between the year 1854 and the year 1875: Find that the defender's said father died in 1875, at which date the defender was a pupil: Find that thereupon the defender, the fiar of said lands, came into possession thereof: Find that the defender did not succeed to any estate through his father, and does not represent him: Find that the pursuer, after the defender attained minority, obtained from James Garriock, factor for the curators, the receipt for £90, contained in the document No. 2 of process: Find that the defender, after attaining majority wrote to the pursuer the letter No. 3 of process, dated 8th October 1887: Find that his agent sent to the pursuer and other creditors claiming in the defender's sequestration the circular dated 9th November 1887, No. 15 of process: Find that the pursuer did not accede to the request contained in said circular: Find in law that the defender was not liable at the time of coming into possession of said lands for payment of said deposited sums, that liability therefor was not validly undertaken therefor by his curators, that the said letter and circular do not import an adoption by the defender of liability for said sum sued for: Therefore sustain the appeal; recal the interlocutor of the Sheriff and Sheriff-Substitute appealed against; assoilzie the defender from the conclusions of the summons, and decern: Find him entitled to expenses in this Court and in the Inferior Court," &c.

Counsel for the Pursuer — Salvesen — Greenlees. Agent—Thomas M. Horsburgh, S.S.C.

Counsel for the Defender—Comrie Thomson—Sym. Agents—A. P. Purves & Aitken, W.S.

Saturday, March 12.

FIRST DIVISION.

THE TRUSTEES OF CARNEGIE PARK ORPHANAGE.

Charity—Trust—Nobile Officium.

A testator left certain heritage and the residue of his estate to trustees, directing them to accumulate the annual proceeds of the heritage until with the residue they amounted to the sum of £6000, which was then to be applied in founding an institution for the education of orphans of a specified class between the ages of eight and fourteen. The value of the estate having turned out to be much greater than the testator had anticipated, the trustees found that the resources of the trust were not exhausted in carrying out the directions of the testator. They therefore petitioned the Court to authorise them to receive children into the institution at the age of five, subject to the condition that they should always give a preference to children between eight and fourteen. The Court *granted* the authority craved, *holding* that the proposed extension of the benefits of the trust was in substantial accordance with the intentions of the testator.

James Moffat died on 16th February 1884, leaving a trust-disposition and settlement, dated 24th September 1870, by which he disponed his whole estate, heritable and moveable, to certain trustees for the payment of the legacies and bequests therein set forth.

By the said settlement the testator, *inter alia*, on the narrative that he had for some time past determined to found an institution "for the education and upbringing of orphan children of the age after mentioned, belonging to or resident in the Lower Ward of Renfrewshire, and who are not chargeable to the parochial board," directed and appointed his trustees to make over to and in favour of the Provost and Bailies of Port-Glasgow, the Provost and Senior Bailie of Greenock, and the Sheriff-Substitute of the Lower Ward of Renfrewshire, and their successors in their respective offices for the time being, as trustees, to be known as the Trustees of Carnegie Park Orphanage, All and Whole his lands and estate of Carnegie Park, and also the whole residue and remainder of his other means and estate,

in perpetual trust, subject, *inter alia*, to the following conditions—"*Primo.* The said trustees of Carnegie Park Orphanage shall hold the said lands and estate of Carnegie Park . . . and shall accumulate the annual proceeds until the free amount thereof shall, along with the said residue and remainder of my other heritable and moveable, real and personal estate, and the proceeds thereof, amount to the sum of £6000 sterling. *Tertio.* The said trustees of Carnegie Park Orphanage shall, as soon as they conveniently can, after having accumulated the said sum of £6000, cause to be erected on a portion of the upper part of the said estate of Carnegie Park such homes or buildings, of a plain substantial character, and free from ostentation, not exceeding in cost the value of £2000 (unless it shall be afterwards found necessary to extend them), and to be called the 'Carnegie Park Orphanage,' as shall in their opinion be sufficient to accomodate such a number of male and female orphan children between the ages of eight and fourteen years, as the said trustees of the Carnegie Park Orphanage shall consider the free yearly proceeds of the fund under this trust capable of maintaining; and from and after the erection of such orphanage the said trustees of Carnegie Park Orphanage shall apply the free annual proceeds of the balance of the said accumulated fund, and of the said lands and estate of Carnegie Park, or the sum or sums realised for the same, or any part thereof, towards the boarding, clothing, lodging, and educating the said orphans as hereby directed. *Quarto.* The orphans to be admitted shall be natives of or residents for the period of not less than twelve calendar months in the Lower Ward of Renfrewshire previous to their application for admission, who have not been chargeable on any parochial board, whose parents were Protestants, and who have been brought up as such, and who shall also, when admitted, be free from any cutaneous disease, or any other complaint which might tend to imperil the health of the other orphans, and such orphans shall not be admitted under eight years of age, and shall not be allowed to remain in the orphanage after they have attained fourteen years of age." In the fifth place the testator gave certain directions as to the education of the orphans admitted to the homes.

On 23rd February 1892 the Trustees of Carnegie Park Orphanage presented a petition to the Court, in which they made the following statements—"On the death of Mr Moffat, his testamentary trustees administered the estate and made over to the petitioners the lands of Carnegie Park and the residue of the testator's effects. The residue was found to exceed largely the sum of £6000 mentioned by the testator, the total value of the residue, together with the lands of Carnegie Park, being estimated at over £40,000. The funds at the disposal of the trustees were much larger than the testator had contemplated, and were amply sufficient for the support of a large number of orphans. The trustees accordingly erected two Cottage Homes, one to contain about thirty orphan boys and the other the same number of orphan girls. They also built a separate building containing an hospital and other accommodation for the institution, all on the Carnegie Park estate. The present income of the trust is about £1250, and the expenditure last year was about £800. The homes were opened for the reception of orphans in January 1889, and every means taken of making known to the public the advantages of the institution, particularly in the Lower Ward of Renfrewshire to which the bequest specially applied. The trustees sent a circular calling special attention to the institution, along with a small book containing the terms and conditions for admission of orphans as stated in said trust-deed to all the Protestant clergymen having charges in the Lower Ward of Renfrewshire, and also to all the medical men and public officials, in the various parishes in the said district, inviting their co-operation and assistance in sending orphans to the institution. At the opening of the institution and on several occasions since, the local newspapers also have given full publicity to the purposes of the institution. Notwithstanding the publicity thus given to the objects of the institution, the accommodation of the homes and the resources of the trust have not been taken advantage of to anything like the full extent. The number of orphan boys admitted since the opening of the homes is only thirteen, and the number of orphan girls six. There are at present only ten boys and five girls in the homes. The homes are capable of accommodating about sixty boys and girls, and as the fixed expenses are nearly the same whether the homes are fully occupied or not, a largely increased number of children could be supported with the present income. The petitioners are satisfied that the present position of the charity is largely due to the fact that they are not entitled to receive orphans under the age of eight, or those who have been chargeable to any parochial board. It is found that in many cases where the relatives of orphan children have taken charge of them until they are eight years of age they are unwilling to allow them to enter the institution. Also, where children are left orphans under the age of eight they very generally become objects of parochial relief and thereby become ineligible for the benefits of the institution. The age limit has thus been found to lead to the breaking up of families, which the friends and relatives are unwilling to do, and to the entire exclusion of the younger members from the benefits of the charity. The trustees have experienced the further difficulty in connection with the age of admission being fixed at so high a limit, viz., that the children in many cases having been neglected in their infancy have formed objectionable habits of which it is very difficult to cure them, and which are apt to be communicated to the other children in the homes. The petitioners are of

opinion that were the age of admission reduced so that children of five years and upwards would be eligible for admission, the trustees at all times giving a preference to orphans of eight years of age and upwards, so long as they can be found in such numbers as to fill the homes, the institution would be much more largely taken advantage of, and the aims and wishes of the testator still efficiently carried out."

The petitioners therefore craved the Court "to reduce the limit of age of orphans for admission to said institution from eight years to five years, and to authorise the trustees to receive into said institution children of the age of five years and upwards, the trustees at all times giving a preference to children of the age of eight years and upwards in the event of children of the latter age being found in sufficient numbers to fill said institution."

The petitioners referred to the following authorities — *University of Aberdeen*, v. *Irvine*, July 20, 1869, 7 Macph. 1087; *M'Dougall*, July 29, 1878, 5 R. 1014.

At advising—

LORD PRESIDENT—I think the case made out by the petitioners is abundantly sufficient to justify us in doing what the petitioners propose. The truster directed his trustees to accumulate the funds left by him until they reached the sum of £6000, and then on that basis he proceeded to deal with these funds and appointed the trustees to put up an institution for the accommodation of children of a specified class between the ages of eight and fourteen. Now it has turned out that the truster's estate amounts not to £6000 but £40,000, and the trustees have erected a building capable of accommodating 60 children, and it is perhaps not suprising to find that, there being this redundancy of money over the estimated amount, it is now discovered that there are not a sufficient number of children of the specified ages to exhaust the benefit provided by the testator for their particular class. The trustees, we find, have from the opening of the institution admitted 13 boys and 6 girls, and there are at present 10 boys and 5 girls in the homes. It is therefore plain that to a large extent the intended benefaction has been unused. The trustees state that they have done their best to make known the benefits of the institution to the class for whom they were intended, and that they are not able, owing to the age limit imposed by the testator, to make full use of the estate made over to them. They therefore propose that the Court should reduce the age limit, and authorise them to receive into the institution children between the ages of five and eight years, but with the restriction that they shall only apply for the benefit of such children the surplus funds remaining after provision has been made for all children between eight and fourteen, as directed by the testator. Now, this appears to me to be a legitimate proposal, because it will merely lead to the application of the scheme to a larger number of the same class as the truster desired to benefit, and the restriction prevents any violence being done to the intentions of the testator. Mr Reid has also shown that advantageous results may be expected from having the younger as well as the older children in the institution, but the salient feature of the petitioners' proposal, in my view, is that it only applies to the surplus funds remaining after the testator's intentions, as these are specifically expressed, have been fully carried out.

LORD ADAM—I have no doubt that the proposal made by the petitioners is a very excellent one, and that, looking to the cases, especially the case of *The University of Aberdeen* v. *Irvine*, it is competent for the Court to do what is asked.

LORD M'LAREN—It is a general principle of charity law and administration that where it is not possible to carry out the intentions of a testator in the precise manner directed by him, either from a failure in the objects of the charity or from an increase in the trust funds beyond the sum required for the prescribed purpose, it is within the power of the Court to direct that the funds shall be applied to other purposes as near as possible to those prescribed by the testator. There are traces of the application of this principle in some of the older cases, but in recent times it has been applied unequivocally in more than one important case. In addition to the cases cited to us, I may mention the case of the *Trinity Hospital*. That case was twice appealed to the House of Lords, and it was under a remit from the House of Lords in disposing of the first appeal that the Court of Session adjusted a scheme for the administration of the charity. Now, this scheme so far altered the purposes of the charity that the hospital was suppressed, and the pensioners instead of being maintained in an hospital received out-door relief in the shape of annual pensions. This was a strong assertion of the principle of "cy-pres" administration as we may term it—the principle of approximation. The scheme adjusted by the Court of Session was taken to the House of Lords and was approved there—*Magistrates of Edinburgh* v. *M'Laren*, 8 R. (H. of L.) 140.

I have no doubt in the present case that the power sought will be beneficially exercised, and substantially in accordance with the intentions of the testator. The removal of an age limit will in general be doing the least possible violence to the testator's intentions; because we are at liberty to suppose that if the funds available had been greater, the testator would have extended the limit.

LORD KINNEAR—I have no doubt as to the expediency of the proposal made, or the power of the Court to give it effect.

The Court granted the prayer of the petition.

Counsel for Petitioners — James Reid. Agents—Carment, Wedderburn, & Watson, W.S.