tained as a sufficient reason for refusing an order to cite, it would place an impediment in the way of sequestration with the benefits which it confers in the way of cutting down or preventing the acquisition of preferences which would be most unfortunate. It seems to me therefore that the Lord Ordinary should have granted a warrant to cite the debtor, seeing that there was no instant verification of anything which would be a ground for refusing that order.

LORD ADAM—I had occasion to express my opinion upon this question in the case of *Hope* v. *Macdougall*, and I remain of the opinion, which was the opinion of the Court, that the proper course in such circumstances as were present here was to pronounce an order for service.

LORD M'LAREN—I concur.

LORD KINNEAR—I agree. I think the procedure prescribed by the statute is peremptory. It may turn out that this petition for sequestration is not competent or not sufficiently supported, but meantime the statutory course must be followed. It may be that if the petitioning creditor fails to produce any account or vouchers as required by the 21st section the petition may be dismissed *de plano*. But if a question arises as to the sufficiency of vouchers actually produced it cannot be decided or considered until after citation.

The Court allowed the minute for William Charles Steven to be received, recalled the interlocutor reclaimed against, and remitted to the Lord Ordinary on the Bills to grant the usual order of citation of William Charles Steven, and to proceed as might be just.

Counsel for the Reclaimer—W. Thomson. Agent—A. W. Gordon, Solicitor.

Counsel for the Respondent—M'Lennan—Munro. Agents—Macdonald & Stewart, S.S.C.

Wednesday, November 16.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

MARQUESS OF BUTE'S TRUSTEES *v.* ROMAN CATHOLIC BISHOP OF ARGYLL.

Succession—Trust—Bequest—Conditional Bequest for Building Churches—Literal Fulfilment of Conditions Impossible Owing to Lack of Endowment—Intention of Testator—Cy-près—Proposal to Accumulate Held ultra vires—Lapse of Bequest.

A testator directed his trustees to expend two sums of £20,000 each upon the erection of two Roman Catholic churches or monasteries, or "such smaller sum or sums as may be necessary . . . my intention being merely to have such church and church or monastery completed although it may be at a less cost than £20,000 each." Any unexpended balance was to revert to the residue of his estate. Except for a provision of £10,000 for the endowment of one of the two churches the trust-disposition and settlement contained no provision for endowment. Upon the completion of the buildings the trustees were directed to convey them, on certain specified conditions, to trustees to be appointed by two Roman Catholic Bishops named.

After the death of the testator the Bishops, who were the ecclesiastical authorities by whom the conditions could alone be carried out, stated their inability to accept the bequests under the conditions specified, on the ground that owing to lack of endowment the conditions could not be implemented. The Bishops proposed that the testamentary trustees should either accumulate the funds till they amounted to a sum sufficient to build and endow the churches, or immediately expend a portion of the funds on the erection of the buildings and set aside the remainder to form an endowment fund. The trustees were willing to accede to this proposal if authorised by the Court.

Held (*rev.* judgment of Lord Kyllachy, Ordinary) that the proposal was contrary to the truster's intention and *ultra vires*, and that the bequests having lapsed owing to the refusal of the Bishops to accept them on the conditions specified, the two sums of £20,000 reverted to residue.

The Marquess of Bute died on 9th October 1900, leaving a trust-disposition and settlement dated 13th July 1894. By it he bequeathed, *inter alia*, "to such trustees as may be named for the purpose by the Right Reverend George John Smith, Roman Catholic Bishop of Argyll, whom failing, by his successor in that office for the time, a sum of £10,000, the income of said sum to be applied by them for the upkeep of daily Roman Catholic Cathedral service at Oban in the church to be built there by my trustees, or elsewhere in Oban. . . . To my trustees the sum of £40,000 (in lieu of a sum of £60,000, which I have now reduced by £20,000, being the sum which I have undertaken to provide in connection with the transference of Blairs College to St Andrews), and that for the purpose of erecting and completing by themselves, or in conjunction with others, according to plans to be approved of by my trustees, a Roman Catholic church at Oban and a Roman Catholic church or monastery at Whithorn (the said church at Oban and church or monastery at Whithorn to be built by my trustees at the said places in the order in which they are above named, and that at a cost to my trustees of not more than £20,000 for said church at Oban, and £20,000 for said church or monastery at Whithorn, but my trustees shall not expend in these erections or either of them more than £10,000 in any one year; and they shall build said church or monastery

at Whithorn on the land recently purchased by me from the Earl of Galloway): And in the event of my having given the whole or part of the cost of erecting and completing either or both of the said church and church or monastery, and the same having been completed during my life, the sum or sums so given by me shall be held to be payment in full of the legacy hereby bequeathed for the purpose of completing said church and said church or monastery, and in the event of such church and church or monastery having been commenced but not completed during my life, any sum or sums given or paid by me towards the erection of such church or church or monastery shall be held to be payment *pro tanto* of the sum or sums hereby bequeathed towards such erection, and my trustees shall pay the balance only of such sum or sums or such smaller sum or sums as may be necessary to complete such church or church or monastery, my intention being merely to have such church and church or monastery completed, although it may be at a less cost than £20,000 each: And when each of the said church and church or monastery has been completed, my trustees shall denude thereof in favour of my widow, whom failing, one of my descendants (one of whom when practicable shall always be selected to act as trustee by the remaining trustees), and such other trustees, not exceeding four in number, as may be named or appointed for the purpose by the Roman Catholic Bishop officiating in the respective districts for the time, and which four other trustees shall be laymen, with the exception of the Bishop himself, who may be one of said trustees, and one of them shall be a lawyer; and said trustees shall, as a condition of receiving a conveyance of said church and church or monastery, be bound to undertake to free and relieve my trustees and my trust estate of all future liability concerning the same, and my said trustees shall, before denuding of said church and church or monastery in favour of the trustees to be named or appointed as aforesaid, either exact from said Bishop a formal and sufficient deed, renouncing for himself and his successors in office, as an inherent condition of his and their trusteeship, all or any immunity which he or they as a Roman Catholic ecclesiastic may in any way have or claim from civil proceedings against him or them as trustee or trustees, or otherwise, as they may be advised by counsel learned in the law, shall in denuding of the said church and church or monastery, or either of them, make it an effectual inherent condition of the trust that such immunity shall not be pleadable by any trustee, whether a Roman Catholic Bishop or not: And further, my said trustees, in denuding of said church and church or monastery, or either of them, shall make it a condition of the conveyance thereof—(*First*) That each of the said churches shall be free and open, and that no charge for admission to or for presence in the building or any part of it, or for seats therein, shall be made on any occasion whatever; (*Second*) That each of said edifices shall be consecrated within eight days of the date on which it may be handed over to the new trustees, and that the whole of what is called 'The Divine Office' shall be publicly said or sung there every day, and other daily or occasional services shall be conducted as directed by the Rubrics: And I further direct that in the event of my trustees joining with other subscribers in erecting any one of the churches at the places above named, they must make it a prior condition of their doing so that the conditions hereinbefore enjoined with reference (*first*) to the non-immunity of the Roman Catholic Bishop from civil proceedings as trustee, (*second*) the churches being free and open, (*third*) the consecration of the edifice, and (*fourth*) 'The Divine Office,' shall form an inherent part of the constitution of the church: And I hereby declare that in the event of the trustees who may be named in terms of the powers hereby conferred for carrying out the purposes of the trust to be constituted with reference to the said church at Oban, and the said church or monastery at Whithorn, declining to undertake the trust subject to the several conditions herein specified, or failing to carry out the said several conditions, the trusts in their favour, and such portion of the legacies as may remain unexpended, shall lapse so far as such trustees are concerned, and the edifices and balance of the legacies shall revert to my trustees, in order that they may give effect to my intentions as above indicated: And in the event of my trustees finding it unnecessary to expend the whole of said sums of £20,000 for each of said church at Oban and church or monastery at Whithorn, either by reason of payments made by me during my life, or by reason of money being available for the purpose from other sources, so that the full sums of £20,000 shall not be required to complete the said erections respectively, the balance unexpended by them shall revert to the residue of my estate."

Upon the death of the Marquess of Bute the trustees found themselves in difficulties with regard to the disposal of the two sums of £20,000, and on 25th November 1903 they raised an action of multiplepoinding in which the fund *in medio* consisted of the two sums of £20,000. Claims were lodged by (1) the trustees, (2) the Bishop of Argyll, (3) the Bishop of Galloway, (4) the Marquess of Bute, the heir and residuary legatee of the testator.

From statements made in condescendence by the various claimants it appeared that the Bishops of Argyll and Galloway while maintaining that the bequests were good and effectual, stated that they were unable to accept them if subjected to the exact terms of the conditions imposed by the testator. They averred, *inter alia*, that the funds at their disposal were not sufficient to provide for the upkeep of the fabrics and the daily performance of "the Divine Office," and that the churches could not be consecrated within eight days after completion, as provided for by the testator, because under the Canon law no church could be consecrated by

a bishop unless due provision had been made for the permanent upkeep of the fabric and the maintenance of the clergy. The Bishops accordingly proposed that the trustees should either hold the two sums of £20,000 for a number of years, and out of the interest accumulated form an endowment fund, or proceed immediately to expend a portion of each sum of £20,000 upon the erection of buildings, and set aside the remainder to form a permanent endowment fund. The trustees were willing to accede to the proposals of the Bishops if sanctioned by the Court. The Marquess of Bute maintained that on a sound construction of the trust-disposition and settlement the only power conferred on the trustees was the power to expend the money on buildings, and that they were not entitled to accumulate the income of the whole fund or to set aside the capital of a portion in order to form an endowment fund, and that the beneficiaries having declined to accept the bequests on the conditions under which they were given, the bequests had lapsed and fell to be dealt with as part of the residue of the estate. As residuary legatee under his father's trust-disposition and settlement he claimed to be ranked and preferred to the whole of the fund *in medio*.

On 20th May 1904 the Lord Ordinary (Kyllachy) pronounced the following interlocutor:—"Finds that the claim of the claimant the Marquis of Bute contains no averment, and that nothing appears upon record relevant in existing circumstances to infer a lapse to the said claimant as residuary legatee of the two bequests of £20,000 each now in question: Therefore repels *in hoc statu* the claim for the Marquis of Bute, and decerns: Finds, however, it is alleged and not disputed that there is at least a prospect that if the churches and monastery in question shall be built by the pursuers and real raisers as directed by the trust-settlement, the same may not be accepted by the trustees to whom they are directed to be handed over unless provision shall be at the same time made for the upkeep of the fabrics and the maintenance of religious services: Finds that in these circumstances the claimants other than the Marquis of Bute desire to have an opportunity of submitting to the Court a scheme or schemes for applying part of the said two bequests of £20,000 each to the said subsidiary purposes: Therefore before answer allows the said claimants to lodge *quam primum* such scheme or schemes as they propose with a view to their being reported to the Court: *Quoad ultra* continues the cause."

The Marquess of Bute reclaimed, and argued — The bequests had lapsed into residue, the beneficiaries having refused to accept them subject to the conditions attached. The proposals to accumulate or to use part of the fund for building and part for endowment were *ultra vires*, the testator having conferred no such powers upon his trustees. His bequest was a bequest of buildings, not of money. That he had no intention to provide endowment was clear from the provision that if buildings could be erected for a less sum than that specified the balance was to fall into residue. There was here no room for applying the doctrine of *cy près*, the purpose of which was to further not to frustrate a testator's intention and to meet unforeseen contingencies—*Young's Trustee* v. *Deacons of the Eight Incorporated Trades of Perth*, June 9, 1893, 20 R. 778, 30 S.L.R. 704.

Argued for the respondents—This was a clear case for the application of the doctrine of *cy près*. The only object of the testator was the building of the churches; he had no ulterior purpose in view for the money; the Court would accordingly carry out his intention although it might have to vary the mode—*Mills* v. *Farmer*, 1815, 19 Vesey 483. Until the buildings were erected, the beneficiaries, and not the residuary legatee, were entitled to interest—*Attorney-General* v. *Bowyer*, 1798, 3 Vesey 713a, and if it suited the beneficiaries to postpone building and accumulate interest for purposes of their own no one was prejudiced.

At advising—

Lord Justice-Clerk — I am unable to agree with the interlocutor of the Lord Ordinary, as my view is that the claimant the Marquis of Bute is entitled to judgment. The bequest of the late Marquis which is in dispute is quite clear in its terms, that his trustees are authorised and directed to provide church buildings at Whithorn and at Oban, at an expense of not more than £20,000 at each place, it being further expressed as his intention that if on the buildings being completed the whole sum of £20,000 has not been expended, the remainder is to revert to his estate, his "intention being merely" to have the buildings completed, although "at a less cost than £20,000."

He affixed to the bequest the conditions that a conveyance of the buildings to trustees was not to be given by his testamentary trustees except upon certain conditions, two of which were that the buildings should be consecrated within eight days, and that the "Divine Office" should be said or sung in the building every day.

The ecclesiastical authorities by whom these conditions could alone be carried out, viz., the Roman Catholic Bishops in Argyll and Galloway, state their inability to fulfil either of these conditions if the buildings are erected in terms of the bequest, because of the want of any endowment by which the conditions could be fulfilled.

The trustees accordingly have not proceeded with the erection of the buildings, and propose with the acquiescence of the Bishops to hold the funds so that by accumulation they may increase and thus provide for endowment as well as building.

I can find no authority for this being done. The late Marquis nowhere indicates that his estate is to provide any endowment, except one which he specifies, viz., £10,000 for the Oban Cathedral which he intended to be built. It seems to me to be very plain that he did not intend to provide

any other endowment, and that to keep up the money he left to raise an endowment fund would be to do what he has given no authority for doing.

Thus his purpose in the bequest for building has failed, as the circumstances are such that those to whom it would fall to consecrate the buildings and to carry on the services decline on the ground of inability to undertake that these conditions of the gift shall be fulfilled.

I feel constrained therefore to hold that the sums bequeathed fall back into the estate of the late Marquis, to be dealt with as the residue is required to be dealt with, and that the interlocutor of the Lord Ordinary should be recalled and the claim of the present Marquis sustained.

LORD YOUNG concurred.

LORD TRAYNER—The late Marquis of Bute directed his trustees to expend a sum of £40,000, or so much of that sum as might be found necessary, on the erection of two churches, one at Oban and the other at Whithorn. When completed these churches were to be conveyed to certain trustees to be nominated by the Roman Catholic Bishops for the time in Argyll and Galloway respectively. The churches, however, were only to be conveyed to the trustees so nominated on certain conditions, which are very clearly stated—about them there is, and can be in my opinion, no dubiety. I need not repeat here what the conditions are. It is enough to say that both the Roman Catholic Bishop of Argyll and the Roman Catholic Bishop of Galloway state in their claims that they cannot accept the legacy, that is, a conveyance of the churches on the conditions specified. That, in my view, is conclusive of their respective claims. The trustees of the late Marquis have no authority or right to build the churches, and would act unreasonably in doing so if they are certiorated that the churches when completed would not be accepted by the donees on the conditions on which alone they could take the benefit of the donation or legacy. One of the grounds on which the legacy is declined is that there would be no funds for maintaining the churches and the celebration of divine service therein. In aid of the reverend claimants the trustees (of the late Marquis) propose that they should be authorised to retain the £40,000 in their hands and accumulate the same with the interest thereon until the fund amounted to a sum sufficient to build the churches and also to endow them. I think this not only not authorised by the truster's settlement but directly opposed to his intention. The truster contemplated that by public subscription or otherwise the churches might be completed without the expenditure of the whole £40,000, and except the sum of £10,000 specially bequeathed for the maintainance of divine service in the church at Oban he neither gave nor intended to give any sum whatever towards endowment. His words are, "My intention being merely to have such church and church or monastery completed, although it may be at a less cost than £20,000 each." I gather it to have been the meaning and intention of the truster that he would provide the churches, but looked to his co-religionists to maintain them and the services therein. The proposal, therefore, of the trustees to accumulate funds for the purpose of endowment is not in accordance with any direction given to them, but contrary to the truster's wish and intention. What, then, is to come of the £40,000. This also is I think provided for. The truster directs that if his trustees find it "unnecessary to expend the whole" of the £40,000 "the balance unexpended by them shall revert to the residue of my estate." As it has turned out, it is not "necessary" for the trustees to expend any part of the £40,000, and therefore the whole of it (although the truster only anticipated a balance) in my opinion reverts to residue. The result in my opinion is, that the claim of the Marquis of Bute (the residuary legatee) should be sustained to the whole fund *in medio* and the other claims repelled.

LORD MONCREIFF was absent.

The Court pronounced this interlocutor—

"Recal the interlocutor reclaimed against: Repel the claims of the claimants other than the claimant the Marquess of Bute: Rank and prefer him to the whole fund *in medio* in terms of his claim."

Counsel for the Pursuers and Real Raisers, Claimants and Respondents, The Marquess of Bute's Trustees — Campbell, K.C.—Pitman. Agents—J. & F. Anderson, W.S.

Counsel for the Claimant and Respondent The Roman Catholic Bishop of Argyll—Campbell, K.C.—Graham Stewart. Agent—William Considine, S.S.C.

Counsel for the Claimant and Respondent The Roman Catholic Bishop of Galloway—Salvesen, K.C. — Scott Brown. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Counsel for the Claimant and Reclaimer The Marquess of Bute—Kincaid Mackenzie, K.C.—Blackburn. Agents—W. & J. Cook, W.S.

Friday, November 18.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

DURAN *v.* DURAN.

Husband and Wife—Constitution of Marriage — Proof — Mutual Declaration in Writing—Necessity of Proving Intention —Effect of Mental Reservation by One of the Parties.

A document constituting on the face of it an interchange of consent to marry is not *per se* proof of marriage without evidence as to the intention of the parties, but if there be such a document, and it is proved that it was signed by both parties in the knowledge of its terms,