mistakes, whether of soundness or unsoundness, than in the case of flesh. And it would appear as if claims for compensation under such sections of the Act as 18, 43, 103, and 109, would be equally subject to the limitations contained in section 166, if the appellants' construction of that section is correct.

I agree with your Lordships that the arbitration in question is not "an action, prosecution, or other proceeding" in the sense of the Public Authorities Protection Act 1893.

The LORD JUSTICE-CLERK concurred.

LORD DUNDAS was sitting in the First Division.

The Court adhered.

Counsel for Complainers (Reclaimers)—Clyde, K.C. — Fraser — Russell. Agents—Campbell & Smith, S.S.C.

Counsel for Respondents—Wilson, K.C. —D. M. Wilson. Agents — Patrick & James, S.S.C.

Wednesday, January 31.

FIRST DIVISION.

[Lord Cullen, Ordinary.

BURGESS'S TRUSTEES *v.* CRAWFORD AND OTHERS.

Charitable Trust—Bequest for Industrial School—Conditions Incapable of Fulfilment—Lapse—Cy près.

A testator directed his trustees, on the expiry of a liferent, to apply the residue of his estate "in founding, erecting, and endowing in Paisley an Industrial School for Females." At the date of the will the bequest could have been carried out, but by the time the liferentrix died it had, owing to supervening legislation, become impracticable. In a multiplepoinding raised after her death the trustees proposed to retain the residue and to administer it *cy près*.

Held that the bequest was one to take effect upon the happening of a condition which had failed, but the will evinced no intention to dedicate the money to charity independently of the particular *modus* indicated by the testator, and that accordingly the bequest had failed and could not be administered *cy près*.

On 4th July 1910 John Elliot Murray, bank agent, Paisley, and another, the trustees acting under the trust-disposition and settlement of the late Charles Burgess, manufacturer, Paisley, *pursuers and real raisers*, brought an action of multiplepoinding and exoneration against (1) W. G. Crawford and others, the beneficiaries under the settlement; (2) James Leonard and others, the testator's next-of-kin; and (3) themselves as trustees, *defenders and claimants*. They, *inter alia*, craved the Court to determine whether the bequest by Mr Burgess of the residue of his estate for the purpose of founding in Paisley an industrial school for females had lapsed or fell to be administered *cy près*.

The following *narrative* is taken from the opinion (*infra*) of the Lord Ordinary—"The question arising now for decision in this case relates to a charitable bequest contained in the trust settlement of the deceased Charles Burgess, manufacturer in Paisley. Mr Burgess died in 1860. He left his wife the liferent of the residue of his estate, providing that if it yielded less than £500 per annum it should be made up to that amount out of capital. He bequeathed a variety of legacies, including several to religious or charitable institutions. He further provided that after the death of his wife her niece Helen Gilchrist should enjoy the liferent of the residue, the fee to go at her death to her children. In the event of her leaving no lawful issue he made the charitable bequest of the residue now in question. It is in these terms—'In the event of her (the said Helen Gilchrist) dying without leaving lawful issue, I direct the said residue at her death to be applied by my said trustees in founding, erecting, and endowing in Paisley an Industrial School for Females, under such rules and regulations as my trustees may see fit to make, with power to them to name their successors, and to take the writs and title-deeds to themselves and such successors in such form, and with such powers and conditions, as they shall judge expedient, and to do every act and deed for the permanency and management of the institution which they may see cause to adopt as fully and freely as I could do myself: Declaring that if the said residue on a final apportionment and scheme of division of my estate shall not amount to the sum of £2000, then the principal sums of the legacies bequeathed as aforesaid to the said John Crawford, William Crawford, Elizabeth Crawford or Orr, William Gilchrist, Robert Gilchrist, John Gilchrist, James Burgess, Peter Macarthur, John Macarthur, Jean Macarthur, John Burgess, and Archibald Burgess, and their several foresaids, shall suffer a proportional diminution of their respective amounts, which shall be added to the said residue so as to bring up the same to the sum of £2000.'

"The estate left by Mr Burgess amounted to £7900. Encroachments on capital were necessary to provide his wife during her survivance with £500 per annum, which reduced the amount of the estate as at her death to £4900. The legacies amounted to £5600, and thus all the legacies had to suffer abatement, while those to the persons named in the clause already quoted were in order to provide the stated residue of £2000 further abated, so that these legatees received only 7s. 4½d. per £1. Helen Gilchrist died in 1903 without issue. The said residue, with accumulations of interest since her death, now amounts to £2125 or thereby.

"On the death of Helen Gilchrist without issue the directions for applying the residue in founding, erecting, and endowing in Paisley an industrial school for females came into force. In consequence, however, of the provision which since 1860 has been made by statute for the institution of industrial schools, it is not practicable to give effect to the truster's wish for the institution of such a school to be carried on by his trustees, and in any case the sum of £2000 would have been inadequate for that purpose. This is common ground. In these circumstances the question raised is whether the residue of £2000 falls to be devoted to some proximate object of charity under a scheme to be approved by the Court, or whether, on the other hand, it falls either (1) to the legatees whose legacies were abated in order to provide it, or (2) to the heirs *ab intestato* of the truster. The discussion which I recently heard was limited to the question whether the charitable bequest had altogether failed, the subordinate controversy between the legatees and the heirs *in mobilibus* being left over for the present."

The claimants the legatees pleaded—"(1) The foresaid bequest for the purpose of founding, erecting, and endowing in Paisley an industrial school for females having become incapable of fulfilment and having lapsed, the sum provided by the testator for said purpose reverts to the trust estate, and falls, with all income accrued thereon, to be divided among these claimants in terms of their respective claims by virtue of the directions contained in the foresaid trust-disposition and settlement. (2) The testator, on a sound construction of his said settlement, not having dedicated said sum to the purposes of charity generally, or preferred the general object of charity to the legatees named by him, the doctrine of *cy près* is inapplicable."

The claimants the next-of-kin pleaded—"The said bequest for the purpose of founding an industrial school having become impossible of execution, the sum so bequeathed falls into intestacy, and is payable to these claimants as next-of-kin of the testator."

The claimants the trustees pleaded—"The claimants, as trustees foresaid, being unable through the circumstances condescended on to carry out the testator's wishes in the terms expressed in his trust-disposition and settlement, and the terms of said bequest showing a general charitable intention to apply the residue for charitable purposes, are entitled to be preferred to the whole fund *in medio*, with a view to their applying to the Court to have the fund administered under a *cy près* scheme."

On 20th June 1911 the Lord Ordinary (CULLEN) pronounced the following interlocutor—"Finds (1) that it is admitted that it is impossible to give effect to the direction of the truster, the late Charles Burgess, relating to the fund *in medio* by applying it towards founding, erecting, and endowing in Paisley an industrial school for females; and (2) that the bequest of the fund has not thereby failed as a bequest for charitable purposes of a kind cognate to the aforesaid particular purpose prescribed by the testator: Remits to Mr Stair Agnew Gillon, advocate, to consider the cause and whole proceedings, and to meet with the parties or their agents and to adjust the draft of a scheme for the administration and application of the fund with a view to the same being reported to the Inner House in terms of section 16 of the Trusts (Scotland) Act 1867."

Opinion.—[*After narrating the facts ut supra*]—"A great number of cases, English and Scottish, were cited in regard to the scope of the *cy près* principle, as illustrating the rule that to admit of its application it is necessary that the testator shall have evinced, expressly or by implication, an intention to dedicate his money to charity independent of the particular *modus* in which he has directed it to be applied. I think it may be said generally that the Courts have favoured the maintenance of charitable bequests. Some of the earlier English cases went to a very great extreme in this direction—further, indeed, than the more modern practice of the Courts reflects. The general rule above mentioned has been stated by Lord M'Laren to be 'that unless there be an absolute dedication of the fund to the purposes of charity generally, or unless it can be affirmed that the truster has preferred the general object of charity to his residuary legatees, there is no room for the application of the principle of *cy près* or approximation. I understand by the "general object of charity" here referred to, not the mere word charity as denoting any beneficent purpose, but some definite general object at least. That would be quite sufficient. The indication of a definite general object, such as education or moral instruction, which could be carried out in another way, would be sufficient to let in the principle of approximation.' (*Young's Trustee* v. *Deacons of the Eight Incorporated Trades of Perth*, June 9, 1893, 20 R. 778, 30 S.L.R. 704).

"The difficulty is as to what is to be regarded as sufficient in the way of an indication of a definite general object or the dedication of the fund to the purposes of charity generally. It is not often that a testator, in addition to specifying a particular scheme for the application of his money which finds favour with him, explicitly says that he wishes his money to be applied to charity in any event. I gather from the cases that if the particular form prescribed for the application of the fund bequeathed represents only one mode of furthering a well-recognised branch of charitable effort which may be promoted in a variety of ways, the particular mode may be regarded as non-essential and only the most favoured method in the testator's eyes of furthering the general object which it subserves. Thus in the present case the spring of the bequest may be said to have lain in a desire on the part of the testator to benefit, morally and materially, the permanent class of the community he had in view, the mode of doing so which he

selected as most to his mind being the institution of an industrial school. But it is not disputed that the class of persons in question may be similarly benefited otherwise than through the medium of an industrial school carried on by the testator's trustees.

"I may refer to two authorities, one Scottish and one English, which, of those cited, seem to me to be most nearly parallel to the present case.

"The first of these is the case of *Grant* v. *Macqueen, &c.*, May 23, 1877, 4 R. 734, 14 S.L.R. 478. A testator who died in 1870 bequeathed a sum to trustees directing them to pay the 'clear annual interest or produce to the person officiating for the time as schoolmaster in connection with the Established Church' in a particular parish. After the passing of the Education Act of 1872 the school in question ceased to be maintained, and the question arose whether the bequest had lapsed, as was maintained by the residuary legatee under the will. It was held that it had not, because it was conceivable that the money might be required at some future period when there might be someone answering to the description of a schoolmaster in connection with the Established Church in the parish. Opinions were expressed to the effect that even in the absence of this future possibility the bequest would not have been regarded as lapsed, but that the money would have fallen to be applied to some proximate object. In the sequel of the case (*M'Dougall*, June 29, 1878, 5 R. 1014) the Court approved of a scheme whereby the funds were to be applied to the founding of a bursary for promoting the higher education of the natives of the parish so long as there should be no person answering to the description of 'the person officiating for the time as schoolmaster, &c.' This temporary element, formally qualifying the scheme, does not seem to me to affect the bearing of the case on the present question, because the scheme, so long as it lasted, deprived the residuary legatee of the benefits of the fund while applying it otherwise than to the specific purpose prescribed by the testator. No indication of an intention on the testator's part to devote the money to a more general purpose of charity is to be found in the words of his bequest except that the money was put permanently in trust for subserving an object (education) so general as to be capable of advancement in many modes other than the particular one which he prescribed.

"The other case above referred to is that of *Biscoe* v. *Jackson*, 35 Chan. Div. 460. There the testator directed his trustees to set apart a sum of money out of such part of his personal estate as might by law be applied for charitable purposes, and to apply it in the establishment of a soup-kitchen and cottage hospital for the parish of Shoreditch, in such manner as not to violate the Mortmain Acts. The bequest was held to be a valid one so far as the Mortmain Acts went, but thereafter it was found to be impossible to apply the fund to the specific purposes prescribed by the testator, and the question then arose whether the bequest had failed. It was decided that it had not, and that the Court would execute the trust *cy près*, and a scheme was directed accordingly. The ground of the decision was that the will showed a general intention to benefit the poor of the parish of Shoreditch. Kay, J., whose judgment was affirmed, said — 'I quite agree that if the mode of application is such an essential part of the gift that you cannot distinguish any general purpose of charity, but are obliged to say that that mode of doing a charitable act was the only one the testator intended, or at all contemplated, and that he had no general intention of giving his money to charity, then the Court cannot, if the particular mode of doing it fails, apply the money *cy près*.

"'On the other hand, if you do see a general intention of benefiting a certain class or number of people, who come within the ordinary definition of objects of charity, and you find that the particular mode the testator has contemplated of doing this cannot be carried out, and you are convinced that the mode is not so essential that you cannot separate the intention of charity from that particular mode, then the Court says there is a general intention of charity, and as the mode has failed, the duty of the Court is, favouring charity as the Court always does, to provide another mode than that which the testator has pointed out, and which has failed.'

"Cotton, L.J., said — 'Now in my opinion, notwithstanding the argument which has been addressed to us, I think there is that general intention. It is very true that the testator leaves certain things to be done by the trustees to whom he is giving the sum of £10,000, and if that is to be considered as a gift to an existing institution, or as a gift for that purpose only, it has failed. But then, in my opinion, looking at this whole clause, we see an intention on the part of the testator to give £10,000 to the sick and poor of the parish of Shoreditch, pointing out how he desires that to be applied, and that particular mode having failed, as we must for the purposes of this appeal assume to be the case, then the intention to benefit the poor of Shoreditch, being a good charitable object, will have effect given to it according to the general principle laid down long ago by this Court, by applying it *cy près*.

"In this case the testator did not expressly say that he intended to benefit the poor of Shoreditch in any event, and not only by providing a soup-kitchen and cottage hospital, and the general intention of charity seems to have been found in the general nature of the object of benefiting the poor, which might be promoted in many other ways. It is true that the testator directed the money to be set apart out of such part of his personal estate as might by law be bequeathed for charitable purposes. But this apparently referred to

the Mortmain Acts or other restrictions imposed by law on the powers of testamentary disposition, and did not, so far as I can see, bear on the question as to the area of the field of charity within which the testator desired his money to be applied. The decision in the case of *Biscoe* is referred to in subsequent English cases, but, so far as I can find, without criticism of its soundness.

"Taking these two cases together as being the nearest to the present one, I think this result may be derived from them, that where a testator has prescribed for the application of his money one particular mode of promoting a recognised object of charity which is capable of being furthered in other modes, and has not used restrictive words excluding these, and where the testator's mode is found to be impracticable, the Court will make a *cy près* application of the money, on the view that this course, rather than the failure of the bequest and the diversion of the money from charity altogether, is most in accordance with the testator's intention. A favour shown to charity no doubt underlies this rule, but favour shown to charity is a familiar aspect of the law relating to charitable bequests both in Scotland and in England.

"Apart from the fact that the testator here has cast his charitable purpose in one particular form only, so far as his express words go there is nothing of a restrictive character to be found in his will. He prefers his charitable purpose so conspicuously that he provides for the £2000 being raised, if necessary, by abating special pecuniary legacies. He makes no provision against a lapse, but directs the institution of a trust for the application of the money which is to be a permanent trust, thus showing that it was not within his contemplation that the money should ever revert either to his heirs *ab intestato* or to his legatees.

"The claimants, who are heirs *ab intestato*, and legatees, presented an argument derived from the fact that there has here been an original and not a subsequent failure of the testator's scheme. This, however, was so in *Biscoe's* case. I confess I do not see why, if a general intention of charity will support a bequest against a subsequent failure of the testator's scheme, it should not equally do so when that scheme has failed at the outset.

"I am accordingly of opinion that the bequest in question has not lapsed in consequence of the scheme prescribed by the testator having been found to be impracticable. In these circumstances, I shall give the pursuers and real raisers the opportunity of putting forward a scheme for the administration of the fund *cy près*."

The claimants other than the trustees reclaimed.

Argued for reclaimers—(1) The doctrine of *cy près* was inapplicable where, as here, there was no direct or implied intention to favour charity independently of the particular *modus* specified by the testator—*in re Ovey*, (1885) L.R., 29 C.D. 560; *in re White's Trusts*, (1886) L.R., 33 C.D. 449; *in re Rymer*, [1895] 1 Ch. 19; *in re University of London Medical Sciences Institute Fund*, [1909] 2 Ch. 1. The cases of *Grant* v. *Macqueen* and *Biscoe* v. *Jackson*, cited by the Lord Ordinary, were distinguishable, for in both there was a clear indication to benefit charitable purposes generally. In the present case, what was uppermost in the testator's mind was not the class of people to be benefited, but the institution named. Such institutions had a definite and well recognised meaning at the date of the testator's death — Reformatory Schools (Scotland) Acts 1854 (17 and 18 Vict. c. 74) and 1856 (19 and 20 Vict. c. 28); Youthful Offenders Act 1854 (17 and 18 Vict. c. 86). (2) The doctrine of *cy près* was also inapplicable where, as here, owing to the passing of the Children Act 1908 (8 Edw. VII, c. 67), the purposes of the trust could no longer be carried out—*in re Randell*, (1888) L.R., 38 C.D. 213; *Marquess of Bute's Trustees* v. *Marquess of Bute*, November 16, 1904, 7 F. 49, 42 S.L.R. 66. Any attempt to carry them out would merely be to relieve the ratepayers, and not to further the testator's intention — *Governors of Jonathan Anderson Trust*, March 12, 1896, 23 R. 592, 33 S.L.R. 430. [The LORD PRESIDENT referred to *Loscombe* v. *Wintringham*, (1850) 13 Beav. 87, and *Marsh* v. *Attorney-General*, (1860) 2 J. & H. 61, cited by Herschell, L.C., in *Rymer* (*cit. sup.*)].

Argued for respondents—The Lord Ordinary was right. (1) *Esto* that where the *modus* was of the essence of the gift the doctrine of *cy près* was inapplicable; that was not so here, for the will evinced a general charitable purpose, viz., to improve the condition of a certain class of the community by teaching them morals and a trade. That was clearly a charitable bequest, and therefore it fell to be administered *cy près—Biscoe* (*cit. sup.*). It was for the Court, and not for the respondents, to frame a scheme for the administration of the bequest — *Ironmongers' Company* v. *Attorney-General*, (1844) 10 C. & F. 908—but the respondents were ready to submit such a scheme if desired. (2) The rule laid down in *Randell* (*cit.*) and *Marquess of Bute* (*cit.*) that where the purpose of the bequest could not be carried out the bequest failed, did not apply to charitable bequests—M'Laren on Wills, 926; *Kirk-session of Prestonpans* v. *School Board of Prestonpans*, November 28, 1891, 19 R. 193, 29 S.L.R. 168. The cases of *Fisk* v. *Attorney-General*, (1867) L.R., 4 Eq. 521; *Ovey* (*cit.*), and *Rymer* (*cit.*), were distinguishable, for in these cases the object of the bequest had failed during the testator's lifetime, and therefore the bequest was held to have lapsed. Here it had not so failed, for in 1860 industrial schools were well-known institutions. That being so, the bequest did not lapse, but fell to be administered *cy près—in re Slevin*, [1891] 2 Ch. 236. *Attorney-General* v. *Bishop of Oxford*, 1786, 1 Brown C.C. 444 n.; *Corbyn* v. *French*, 4 Ves. 418; *Walsh* v. *Attorney-General*, 10 H.L. Cases 367; *in re Geikie*, 27

T.L.R. 484; *Caird*, February 25, 1874, 1 R. 529, were also referred to.

At advising—

LORD PRESIDENT—The question for determination arises in an action of multiplepoinding brought by the trustees of Charles Burgess. Mr Burgess left certain provisions to his widow and various legacies to various people, and then made a special provision as regards the residue. He directed the residue to be put aside to be liferented by Miss Helen Gilchrist, but he made a special provision that the residue was to amount to £2000—in other words, if there was not enough to leave £2000 after all else was paid, the special legacies he had left were to be docked so that the residue should be £2000. This £2000 was to be liferented by Miss Helen Gilchrist. As a matter of fact the legacies had to be docked. Then comes the provision upon which the question arises—the testator provided that if Miss Helen Gilchrist died without leaving lawful issue, which is the event that has happened, the said residue at her death should be applied in founding, erecting, and endowing in Paisley an industrial school for females under such rules and regulations as his trustees might see fit to make.

The only other matter I need refer to is that of the dates. The date of the will was in 1860—at least he died in 1860—and the will was registered immediately after. Miss Gilchrist, as I have already said, survived him, and eventually died on 10th December 1903.

Now the state of affairs is this. At the date of the will and at the date of the testator's death it would have been possible to found an industrial school under the provisions of an Act of 1854. But during the period by which Miss Gilchrist survived that date matters have changed, and it is now impossible to found an industrial school, because the matter has been entirely taken in hand by the authorities, and they will only permit industrial schools upon certain conditions. Even supposing, then, that the sum were adequate, which it is not, it is taken as common ground between the parties that the authorities would not permit an industrial school to be founded in Paisley by these trustees.

In these observations I am assuming, or am quite ready to decide, that there is no question but that the term "industrial school" is used in what I may call a technical sense. It does not mean a school where you may be taught a trade, but it means an institution known as an industrial school, and that is common ground between the parties.

The question is whether or not the bequest must be held to have failed, or whether the Court will arrange some scheme under which the money is to be administered. The latter is the view that was taken by the Lord Ordinary. His interlocutor which is under review finds that it is admitted that it is impossible to give effect to the direction of the truster the late Charles Burgess relating to the fund *in medio* by applying it towards founding, erecting, and endowing in Paisley an industrial school for females. His second finding is that the bequest of the fund has not thereby failed as a bequest for charitable purposes of a kind cognate to the aforesaid particular purpose described by the testator. Accordingly he remits to Mr Stair Agnew Gillon, advocate, to consider the cause and whole proceedings and to meet with the parties or their agents and to adjust the draft of a scheme for the administration and application of the fund. It is against this finding that the present reclaiming note is taken.

There is a most exhaustive and instructive judgment given by a very eminent Lord Chancellor, Lord Herschell, in the case of *Rymer* v. *Stanfield* (1895, 1 Ch. 19), and I think, in view of that, it would be quite useless for me to go through the cases. His Lordship divides the cases into three categories. The first class is where there undoubtedly is a gift for a charitable purpose, but where the means are not indicated, and where the Court will supply the means, there being no doubt as to the gift being given to charity, that arising out of the old favour that the Court has always shown to charitable bequests. The second class he takes are cases where bequests are given to a society or institution of some sort which does not and never has existed, and where from the mere fact of its non-existence the charitable intention of the testator in that direction is spelled out, and there again the Court will denominate the institution or means by which the charitable purpose should be carried into effect. Last of all he comes to the third class of case, and he there quotes with approbation the language used by Vice-Chancellor Kindersley in the case of *Clark* v. *Taylor*, which I think is well worthy of quoting in this case, and is as follows—"There is a distinction well settled by the authorities. There is one class of cases in which there is a gift to charity generally, indicative of a general charitable purpose, and pointing out the mode of carrying it into effect. If that mode fails the Court says the general purpose of charity shall be carried out. There is another class, in which the testator shows an intention, not of general charity but to give to some particular institution, and then if it fails because there is no such institution the gift does not go to charity generally. That distinction is clearly recognised, and it cannot be said that whenever a gift for any charitable purpose fails it is nevertheless to go to charity. In many cases it is difficult to see to which particular class the case is to be referred, and this is, to a certain extent, one of such cases."

I think that is admirably put. When you come to the concrete the application no doubt in some cases may be difficult, and when one goes through the very large number of decided cases on this subject no doubt there are some of them in which, speaking for one's self, perhaps one might

not have found it easy to spell out of the particular bequest the general charitable intention. None the less the remark, I think, remains true. It cannot be said that wherever a gift for a charitable purpose fails the bequest is nevertheless to go to charity, and one must do one's best in each individual case. I do not think it is a right way of treating the authorities to argue that because in one decided case there was what appears to be very little indication out of which a general charitable intention has been spelled, therefore one is generally bound in every case to spell a general charitable intention out of very little. I think one is bound to consider each case by itself.

Taking this view of the effect of the decision to which I have just referred, I come in this case to a different conclusion from the Lord Ordinary. I do not think you can spell out a general charitable intention. This man had a perfectly definite view. He knew what an industrial school was. He knew as a matter of fact that at that time a private individual, if he gave the money, could found an industrial school. He wished to do this for Paisley, and he wished the school to be confined to girls and not to embrace boys. That is the one thing he wanted, and that has come to be a thing impossible to attain. The bequest seems to me therefore to be in precisely the same situation as if the money had been given to a particular existing institution, and that institution had disappeared before the time when the will came into operation. This seems to me to be giving the money to an existent institution in potentiality, and when the will comes into operation there is no longer an existent institution in potentiality. I think here it is out of the question to say that the testator had a general charitable intention to girls in Paisley who had temptation to fall—because I think this is the only way in which you could describe the class that would be benefited by such an industrial school—and therefore you are in some way or other to make a scheme for the benefit of this class of person. In other words, although I am perfectly certain that the learned advocate to whom it was remitted by the Court would have done his best, it would have been the will of Mr Stair Gillon and not that of Mr Charles Burgess. Therefore I am of opinion that the bequest has entirely failed.

There is a question raised in the pleadings upon which I give no opinion, because I think it must be decided by the Lord Ordinary—that is, whether the effect of this judgment will be to give the money to the persons who had the docked legacies, or whether it will go to the heirs *ab intestato*, but this question cannot be decided by us now.

LORD KINNEAR—I agree with your Lordship.

LORD JOHNSTON—If this bequest is to be carried out *cy près*, as the Lord Ordinary thinks that it should be, I agree with him that it is necessary that we should be able to find that the testator has evinced expressly or by implication an intention to dedicate his money to charity independently of the particular *modus* in which he has directed it to be applied. But I do so with this qualification, that by charity I mean, and understand the Lord Ordinary to mean, not charitable purposes generally, but some charitable purpose in the concrete, definitely, however generally, defined. But I differ from him in that I do not think that the testator has evinced any such intention.

It is impossible to conceive of any charitable bequest however restricted in the *modus* of which it cannot be said that the granter had the intention of benefiting a class or furthering a charitable object. But it does not follow that he had any such intention apart from the particular object. However benign a construction it may be proper to give to a charitable bequest, still I think that the Court is not entitled to depart from the recognised principles of construction of a testamentary deed, and must find the testator's intention in his words, and not in any speculation as to what he would have done, or intended, in emerging circumstances which he did not and could not foresee.

The present testator has very definitely directed the residue of his estate to be applied in "founding, erecting, and endowing" in Paisley a definite institution, with power—which I think imposes a duty—to make rules and regulations for its conduct, to perpetuate the trust, and particularly "to do every act and deed for the permanency and management of the institution which they may see cause to adopt as fully and freely as I could do myself." The institution is to be an industrial school, and the objects of the charity are to be females, impliedly of the class and in the circumstances to whom upbringing in an industrial school would be a benefit. Nothing could be more definite or limited in its *modus*, and it is, I think, impossible, even on the terms of the bequest itself, to find a general intention to benefit the particular class of female children to whom the training of an industrial school is appropriate, in the way pointed out if possible, but if not in that way at least in some way.

But I am confirmed in this view, first, by the consideration of the particular class of institution proposed to be established, viz., an industrial school. When the testator wrote, an industrial school was already a well-defined institution. Reformatory and industrial schools existed prior to 1854, and they are referred to in the Act of that year, which was passed to render them, as already established by parochial boards and associations of individuals, more available for the benefit of vagrant children. They have since become State-aided, and correspondingly under State control. But they filled then, though in a very different way, as they do now, a felt need. It was an institution of this class which the testator intended to found in Paisley, and he was specially solicitous about its per-

manency. *Quomodo constat* that if he had found himself forestalled, had found that the effect of supervening legislation had been to make such a private foundation neither possible nor necessary, he would have made or continued his bequest for the benefit generally of the class for whom industrial schools are provided. Neither the expression nor the scope of his bequest justify any such conclusion. Second, by the consideration that the testator had so pointedly before him his conception of an institution, that he declared that if the residue, on a final scheme of division, should be found not to amount to £2000, the legacies which he had appointed to be paid should abate so as to bring up the residue to £2000. He thus shows that he prefers his scheme of an institution to his legatees. But it is impossible, except on mere speculation, to say that the testator would have fixed the same sum of £2000 as the minimum for a *cy près* application of his funds by the Court, and would have docked his legacies to secure that amount of residue for that purpose. And if, therefore, there is no justification for trenching upon the legacies, or indeed, as I think, no power either in the trustees or in the Court for so doing, to make up the £2000, for a *cy près* application, it follows that there is no justification for so applying the residue itself, which happens to be much less than £2000.

I think that the Lord Ordinary has been misled by the case of *Biscoe* v. *Jackson* (L.R., 35 C.D. 460). The language used there by the learned Judges is, I think, far too wide for the case before them, and I question whether it was really intended by them to be taken in its wider sense, and not as restricted *secundum subjectam materiam*. The testator's purpose was to establish a soup kitchen and cottage hospital for the parish of Shoreditch, and the form of his bequest indicated that he intended land free from the restrictions of the law of Mortmain to be acquired for the purpose. This proved impossible, for reasons which I do not pretend to understand, but it was clearly not impossible either to find the necessary land in the neighbourhood of Shoreditch or to establish the hospital and soup kitchen without acquiring the fee-simple of the site. The wide language used about general intention to benefit the poor of Shoreditch to the effect of entitling the Court to direct a scheme for that purpose seems to me to be somewhat beyond the mark. All that was really necessary for judgment is contained in the last few words of the opinion of Kay, J., where he says, "But also I am not satisfied that, because land cannot be found to build a cottage hospital or soup kitchen upon it, there may not be other modes of establishing a cottage hospital or soup kitchen within the parish of Shoreditch, which may carry out the testator's intention." To reach that eminently reasonable conclusion, and such very modified application of the doctrine of *cy près*, I do not think that the general exposition of the law on that subject was necessary, and I do not think that it would be at all safe to take it in its wide generality and to apply it to the present case.

If I might venture to express my opinion in terms borrowed from the service of heirs, I should say that there was here no general bequest for charity; that there was here no general special bequest for charity; that there was here a special bequest for charity, limited by the mode dictated; and that the mode having proved impracticable the bequest has failed.

LORD MACKENZIE—The testator's direction to his trustees is that the residue of his estate is to be applied by them "in founding, erecting, and endowing in Paisley an industrial school for females under such rules and regulations as his trustees might see fit to make." In the event of a deficiency the residue was to be made up to £2000 by the special legatees suffering a proportional diminution of their legacies. As the Lord Ordinary states, it is common ground between the parties that it is not practicable now to institute such a school as the testator contemplated. This was the footing upon which the case was argued. In any view the sum of £2000 would not have been adequate for the purpose. At the date of the will in 1860 it would have been possible under the then existing legislation for voluntary contributions to be received in aid of an industrial school. This is no longer possible. A reference to the terms of the Act (8 Edward VII, cap. 67) shows that such voluntary contributions, if received, would merely go to relieve the rates.

The bequest of the testator being in its terms impracticable, the question is whether the case is one for the application of the *cy près* principle. The principle is stated in the passage of Lord M'Laren's opinion in *Young's Trustee* v. *The Deacons of the Eight Incorporated Trades of Perth*, 20 R. 778, quoted by the Lord Ordinary in his opinion. If there is an absolute dedication of the fund to the purpose of charity generally, or if it can be affirmed that the testator has preferred the general object of charity to his residuary legatees, the principle of *cy près* may be applied,—otherwise not. Was the testator's object here to establish a charity for the benefit of a certain class, with a particular mode of doing it; or was the mode of application such an essential part of the gift that it is not possible to distinguish any general purpose of charity? I am unable in the present case to put the same construction on the bequest as the Lord Ordinary. I think the terms of the bequest exclude the idea that the testator intended his trustees to give effect to a general charitable object. In 1860 an industrial school was a quite well-known definite entity, brought into prominence by recent statutes. At the time the testator made his will the field was not fully occupied—now it is. Therefore the only mode of doing a charitable act which the testator contemplated is no longer

possible, he had no general intention of giving his money to charity, and the Court cannot, because the particular mode has failed, apply the *cy près* principle. The case founded upon in the Lord Ordinary's note of *Grant* v. *Macqueen*, 4 R. 734, does not appear to me to be analogous. There the sum was left in order that the interest might be paid to the person officiating for the time as schoolmaster in connection with the Established Church in a certain parish. Some years after the testator's death there ceased to be a schoolmaster answering the description. The fund was then claimed by the residuary legatee, who was himself the successor of the person who had closed the school. As Lord Deas pointed out, it would have been odd if the result of closing the school had been to put money into the pocket of his successor. The view upon which the Court proceeded was that the bequest had not lapsed because there might at some future date be a person answering the description of a schoolmaster in connection with the Established Church, and in the succeeding stage of the case—*M'Dougall*, 5 R. 1014—the Court approved of a scheme dealing with the fund in question so long as there should be no schoolmaster. There are cases closer to the present, of which I may take as an example *in re Rymer*, 1895, 1 Ch. 19. There the testator bequeathed a legacy of £5000 "to the rector for the time being of St Thomas' Seminary for the education of priests in the diocese of Westminster for the purposes of such seminary." At the date of the will St Thomas' Seminary was carried on at Hammersmith, but shortly before the testator's death the seminary ceased to exist, and the students who were being educated there were removed to another seminary near Birmingham. It was held by the Court of Appeal, consisting of Lord Herschell, L. C. Lindley, and A. L. Smith, LL.J. (affirming the decision of Chitty, J.), that the bequest was for the benefit of the particular institution, and that institution having ceased to exist in the testator's lifetime the legacy could not be applied *cy près* but lapsed and fell into the residue. That case is very like the present and affords a contrast to *Biscoe* v. *Jackson*, 35 C.D. 460, where a testator directed his trustee to set apart a sum of money out of such a part of his personal estate as might by law be applied for charitable purposes, and to apply it in the establishment of a soup kitchen and cottage hospital for the parish of S. in such manner as not to violate the Mortmain Acts. There it was held that the will showed a general charitable intention to benefit the poor of the parish of S., and that although the particular purpose of the bequest had failed the Court would execute the trust *cy près*, and a scheme was directed accordingly.

I am accordingly of opinion that the bequest has failed, and that this is not a case for the application of the *cy près* principle. The case ought, therefore, with findings to this effect, to go back to the Lord Ordinary to determine the further matters in dispute between the parties.

The Court pronounced this interlocutor—

"Recal the second finding and the remit contained in said interlocutor: In place thereof find that the testator's bequest of the fund *in medio* so far as it applies it towards founding, erecting, and endowing in Paisley an industrial school for females, has failed: *Quoad ultra* adhere to the said interlocutor, remit to the Lord Ordinary to proceed as accords, and decern."

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Counsel for the Legatees (Claimants and Reclaimers) — M'Lennan, K.C. — Kemp. Agents—J. & J. Ross, W.S.

Counsel for the Next-of-Kin (Claimants and Reclaimers)—Sandeman, K.C.—Dykes. Agents—J. & J. Ross, W.S.

VALUATION APPEAL COURT.

Saturday, February 3.

(Before Lord Johnston, Lord Salvesen, and Lord Cullen.)

UNITED COLLIERIES, LIMITED *v.* LANARKSHIRE ASSESSOR.

UNITED COLLIERIES, LIMITED *v.* LINLITHGOWSHIRE ASSESSOR.

Valuation Cases—Mineral Lease—Mineral Field Situated Partly in One County and Partly in Another—Principle of Apportionment of Valuation as between the Two Counties.

A colliery company leased a mineral field lying partly in one county and partly in another, at a fixed rent (or in the option of the proprietor at a royalty on the output). In the particular year in question the minerals had been worked in both areas, although to an unequal extent, and the royalty in respect of output being less than the fixed rent, the latter was paid to the proprietor. Different methods were adopted by the assessor for each county in arriving at the proportion of the total rent falling to be entered in their respective rolls. The figure was fixed in one case on the basis of actual output from workings within that county, while in the other on the basis of the relative surface area of the subject leased lying within each county, quite irrespective of the source of the minerals extracted.

The company appealed *against* the entries in both rolls.

Held that the yearly rent or value of the subject fell to be apportioned