

duplicate registers in his custody, and to direct that each of the said new duplicate leaves be authenticated by the signature of the petitioner and incorporated in the register books, and to declare that when so authenticated and incorporated the same shall thereupon become in all respects of the same force and validity as the originals; (b) in the case of the said parish of Glasserton, to order that a new duplicate register of deaths for the year 1855 be prepared at the sight of the petitioner from the duplicate register in his custody, and to direct that the same be authenticated by the signature of the petitioner, and to declare that when so authenticated it shall thereupon become in all respects of the same force and validity as the original register; and (c) in the case of the said parish of St Monance, to order that a new duplicate register of births for the year 1880 be prepared at the sight of the petitioner from the duplicate register in the custody of the local registrar of the said parish of St Monance, and to direct that such new register so prepared shall be authenticated by the signature of the petitioner, and to declare that when so authenticated the same shall thereupon become in all respects of the same force and validity as the original register, or to do further or otherwise in the premises as to your Lordships shall seem proper."

On 18th January 1923 the Court pronounced this interlocutor—"The Lords allow the petition to be presented in type-writing form, and appoint same to be intimated on the walls and in the minute book in common form: Allow all persons having or claiming interest to lodge answers if so advised within eight days after such intimation."

On 1st February 1923, on the motion of counsel for the petitioner in the Single Bills, the Court (the LORD JUSTICE-CLERK, LORD ORMDALE, LORD HUNTER, and LORD ANDERSON) granted the prayer of the petition.

Counsel for the Petitioner—J. R. Dickson.
 Agent—William Purves, W.S.

Wednesday, January 17.

FIRST DIVISION.

[Lord Anderson, Ordinary.

NESS v. MILLS' TRUSTEES.

Succession—Trust—Lapse—Impossibility of Performance—Averment that Funds Insufficient to Carry out Bequest—Failure to Discharge Onus of Showing that Trust Purposes had Failed.

A testator directed his trustees to devote the residue of his estate to the erection, equipment, and maintenance in his native city of a building for the use of telescopes, microscopes, and other scientific instruments, which would "afford to the community an opportunity of observing to an extent not generally within their reach the won-

ders and beauty of the works of God in creation, and would in doing so yield them rational and innocent entertainment of the highest kind." The trustees were empowered to take all measures which might seem proper to them for carrying out the testator's directions, and they were also authorised, if they should consider the residue insufficient for implementing the testator's wishes, to accumulate the income for such time, not exceeding twenty-one years, as they should consider adequate for the fulfilment of his wishes. The trustees accumulated the income for upwards of twenty-one years without taking any active steps to carry the bequest into effect. It appeared that, on the expiry of the twenty-one years, owing to the insufficiency of the funds appropriated to the bequest, it could only be carried out on a comparatively modest scale. In an action at the instance of certain of the testator's heirs *in mobilibus* for payment of the residue to them on the ground that the bequest had failed owing to impossibility of performance, *held* that, looking to the wide discretion given to the trustees in regard to the scale and manner of the fulfilment of the trust, the pursuers had failed to discharge the onus of showing that its purposes had failed, and defenders *assolizied*.

In February 1915 Mrs Johan Mills Balharrie or Livie, with consent of her husband David Brown Livie, boatbuilder, Dundee, and the said David Brown Livie, *pursuers*, brought an action against Thomas Milne and others, the trustees acting under the trust-disposition and settlement, dated 29th April 1881, and relative codicils of the late John Mills, manufacturer, Dundee, and relative deeds of assumption and conveyance, *defenders*, concluding, *inter alia*, for declarator "that the bequest or gift of the whole free residue of the trust estate, heritable and moveable, real and personal, of the said deceased John Mills, expressed and contained in his said trust-disposition and settlement, particularly the tenth article or purpose thereof, has failed and lapsed, and that the whole free residue of the said trust estate has fallen into intestacy." The summons also contained conclusions for declarator that the pursuer was entitled to succeed to a portion of the residue, that the trustees were bound to denude themselves of the residue and pay over a portion to the pursuer, and for accounting and payment.

The late John Mills died on 16th March 1889. The female pursuer and Mrs Mary Stewart or Ness, wife of James Ness, Dundee, who along with her husband James Ness was during the course of the proceedings sisted as a pursuer, were nieces of the testator and claimed to be his next-of-kin and heirs *in mobilibus*.

The tenth article of the trust-disposition and settlement was as follows:—"With regard to the whole free residue of my trust estate, heritable and moveable, real and personal, it is my wish that it shall be devoted to the erection and maintenance in my

native town of Dundee or suburbs thereof of a building of an ornamental description on a suitable site for the reception and use of a telescope or telescopes with all necessary appliances, appurtenances, and accommodation for astronomical observations as well as for viewing terrestrial objects, also a microscope or microscopes and any other scientific instruments the use of all which would afford to the community an opportunity of observing to an extent not generally within their reach the wonders and beauty of the works of God in creation and would in so doing yield them rational and innocent entertainment of the highest kind. For the accomplishment of these objects I hereby grant to my trustees full power to take all measures which to them may seem proper and expedient for the acquisition by purchase or otherwise of a permanent site suitable for the purposes before mentioned, and for otherwise carrying my said wish regarding the disposal of the residue of my trust estate into full effect. It is likewise my wish and intention that the foresaid building and other premises and the said instruments shall be under the charge of a proper keeper by whom they shall be shown to visitors on payment of a small fee to be fixed by my trustees or other trust managers of this bequest for the time being and that on such days (excepting Sundays) and at such hours and subject to such further regulations as my trustees or other trustees for the time being may think proper. Further although I desire that the said instruments shall be of the best description I at the same time recommend my trustees so to regulate their expenditure for providing accommodation therefor and for the oversight thereof as will if at all possible ensure that the annual proceeds of the remaining funds of this bequest shall with the fees of admission and any casual income from donations or otherwise suffice to defray the expense of superintendence of maintaining the premises and instruments in good order, providing a sinking fund for improving or replacing the same when this shall be considered requisite, and admit of the purchase of other instruments as before referred to without encroaching on the remaining capital of the trust. And if the assumption of *ex officio* trustees into the management shall be considered likely to give greater permanency to this special bequest I in addition to the general power of assumption of new trustees hereinbefore conferred upon my trustees do hereby authorise my trustees for the time being whenever they may think this proper and expedient to assume into the trust management of this special bequest persons holding public offices in Dundee and their successors *ex officio* and that either along with or in succession to the trustees on this bequest for the time being. I likewise provide and declare that if my trustees shall consider that the said free residue of my trust estate at the time when it shall become available will be insufficient for implementing my said wish regarding the application thereof I authorise them to hold and keep invested the whole or part of the said residue and

accumulate the free income thereof with the capital for such length of time not exceeding in all twenty-one years after the date of my death as they shall consider will create an amount of funds sufficient for fulfilment of my said wish without contracting debt upon the special trust. Further without prejudice to the powers hereinbefore conferred upon my trustees in relation to the disposal of the said residue of my estate and without interfering with the exercise of their own judgment respecting the same I suggest that it might be advisable for them to make if possible an arrangement with the proper authorities or trustees of one of the most frequented of the public parks in Dundee in which a suitable permanent site for the building and other accommodation above mentioned might be obtained and in the event of such an arrangement being effected I hereby authorise my trustees to erect the said building and other necessary accommodation on such site to place and fit up in said building and premises the instruments with their appliances and appurtenance above mentioned and to commit the same and the future management of this special trust to the said public authorities or trustees of such park expressly for fulfilment of the said special trust in all time thereafter, as also to pay or transfer to such public authorities or trustees in trust as aforesaid the free balance of the special trust funds to be administered by them for the uses and purposes above specified in accordance with the powers and directions given by me to my said trustees."

The parties averred, *inter alia*—" (Cond. 5) The trustees acting from time to time under the said settlement and codicils entered upon the management of the truster's estate and have realised the same. They have paid the truster's debts and funeral expenses, the annuities and legacies before mentioned, and have collected and accumulated the income of the estate. Notwithstanding that the period of twenty-one years, to which the defenders' power of accumulating income was limited, expired on or about 16th March 1910 they have since continued to accumulate the income and they stand possessed of the whole residue of the truster's estate. . . . (Cond. 6) The total amount of said residue and accumulations is now about £7000 or thereby. The defenders and their predecessors in office have from time to time since the death of the truster obtained expert advice from astronomers, architects, and others in regard to the practicability of carrying out the truster's intentions as expressed and contained in his said trust-disposition and settlement, particularly the tenth article or purpose thereof, and as to the sufficiency for that purpose of the funds constituting the residue of the truster's estate available therefor. The pursuers believe and aver that the defenders have all along been advised, and are well aware that it was impossible for them to execute the purpose of the bequest of said residue either as at 16th March 1910 or since. The pursuers believe and aver that the defenders have

therefore from time to time been in communication with the Town Council of Dundee with a view to obtaining from said Town Council the free grant of a site for the observatory contemplated under said tenth article or purpose of the trustor's settlement, and with a view to the Town Council or a committee thereof taking over from the defenders the management of the trust after the erection, completion, and equipment of the said observatory so as to relieve the defenders of the financial burden thereof, but the Town Council have not granted to the defenders any site or accepted any of the burdens which the future management of the trust by the Town Council would impose upon them. The defenders have no site for said observatory and no arrangements for the erection, equipment, and maintenance thereof. The trustor's intentions and directions in that respect as expressed in the said tenth article or purpose of his settlement have not been carried out and the defenders are unable to carry them out. . . . (Ans. 6) Admitted that the defenders and their predecessors in office have from time to time obtained expert advice and tentatively plans were prepared. . . . Admitted that with the view of leaving as large a sum as possible for the erection and equipment of the building contemplated by the trustor the defenders entered into negotiations with the Town Council of Dundee with the object of obtaining a free grant of a site for the erection of the said building. *Quoad ultra* denied. Explained that the said negotiations are still going on. . . . Explained further that the funds in the hands of the defenders, which amount with accumulations of income to the sum of £6876, 4s. 7d. or thereby, exclusive of a claim against the female pursuer in respect of the expenses of the former action raised by her amounting to £35, 12s. 6d. or thereby, are sufficient for the purpose of carrying out the purposes of the trustor, even on the assumption that the negotiations with the Town Council fail and that the defenders have to acquire a site on which to erect the said building, and the defenders propose and intend to execute the trust according to its terms. (Cond. 7) As at 16th March 1910, when said period of twenty-one years expired, it was owing to the inadequacy of the funds bequeathed for the purpose an impossibility for the defenders to acquire a site and erect, equip, and maintain said observatory in accordance with the trustor's intentions and directions as expressed in his settlement. Since then the cost of a suitable site and of labour, materials, and upkeep has risen so greatly that notwithstanding said accumulations of income it is still impossible for the defenders to execute the purpose of the bequest. The cost of same would be £12,000 or thereby. (Ans. 7) Denied."

The pursuers pleaded, *inter alia*—"1. In respect the bequest of residue contained in the trustor's settlement, particularly the tenth article or purpose thereof libelled on record, has failed through impossibility of performance as condescended upon, the pursuers are entitled to decree in terms of

the first and one or other alternative of the second and third declaratory conclusions of the summons. . . . 4. *Separatim*. The continued accumulation of income since the expiry of twenty-one years from the testator's death being incompetent and illegal, and said accumulations not having been authorised or disposed of by his settlement, the income so accumulated falls into intestacy, and the pursuer's share thereof should be paid over to her as craved."

The defenders pleaded, *inter alia*—"4. The pursuers' averments being irrelevant and insufficient to support the conclusions of the summons the action should be dismissed. 7. The free residue of the said trust estate not having fallen into intestacy the defenders ought to be assoilzied."

On 20th July 1915 the Lord Ordinary (ANDERSON) dismissed the action so far as at the instance of the original pursuers and continued the cause as insisted in at the instance of Mrs Ness in order that the defenders might have a further opportunity of carrying into effect the tenth purpose of the trust-disposition and settlement. The defenders having thereupon lodged a proposed scheme for proceeding with the work on the termination of the war, and the pursuers having lodged answers thereto, the Lord Ordinary on 4th November 1915 sisted the cause *in hoc statu*. The cause having thereafter fallen asleep, it was awakened and the sist recalled on 16th November 1920. The defenders again lodged a minute which stated the amount of the funds then in their hands, and a scheme, prepared with a view to the change in conditions since the case had been sisted, by Mr James Thomson, city engineer, Dundee, in accordance with which they proposed to carry out the testator's intentions, but with regard to which Mr Thomson suggested that in view of the high costs then prevailing further delay was advisable. The pursuers lodged answers contending that it was impossible for the defenders, with the funds stated, to carry the scheme into effect as proposed and submitting that, as the twenty-one years within which the purposes were to be given effect to had long since expired, the bequest should be declared to have lapsed. On 17th June 1922 the Lord Ordinary repelled the fourth plea-in-law for the pursuers and again sisted the cause *in hoc statu* to enable the defenders to proceed with the proposed scheme.

Opinion.—"I refer to my former opinions dated 20th July and 4th November 1915. The present situation is similar to that which existed in November 1915, except in these two circumstances, (1) that the defenders have now in hand a larger fund whereby to carry out the trust purposes, and (2) that in consequence a fresh scheme has been suggested by Mr Thomson, the city engineer of Dundee. I therefore propose to issue an interlocutor in terms similar to that of 4th November 1915, save as to the matter of expenses.

"The duties of the defenders with reference to the trust purpose in question are (1) to acquire a site; (2) to erect thereon a building of an 'ornamental description'—

there being no other trust directions as to the size, style, or cost of the building; (3) to place in said building one or more telescopes and one or more microscopes, the number and cost of these instruments being left entirely to the defenders' discretion, and the terms of the trust deed indicating that the said instruments are not to be provided for purposes of scientific research but merely for the amusement and edification of the community; and (4) to make provision for the superintendence and maintenance of said building and instruments.

"By the latest scheme suggested by the defenders it is proposed (1) to erect a building at a cost of £3250 (the sum suggested in 1915 being £5500); (2) to provide scientific instruments at a cost of £1500 (the sum suggested in 1915 being £500) and (3) to set aside for the expenses of superintendence and maintenance the sum of £3750 (the sum suggested in 1915 being £1000). The defenders have lodged a minute setting forth these new proposals. The pursuers have lodged answers to said minute in which the foreshaid proposals are criticised and alleged to be impracticable.

"The pursuers' counsel moved alternatively (a) for decree *de plano* in terms of the first declaratory conclusion of the summons, or (b) for an allowance of proof to enable her to establish by evidence that the defenders' scheme was impracticable.

"I am not prepared to grant either motion."

"The plain answer to the pursuers' criticisms of the proposed scheme is that all details have been left by the trustor to the unfettered discretion of the trustees. In the absence, therefore, of any averment or suggestion that the proposals of the defenders, or any of them, are extravagant or absurd, I can neither hold *de plano* that these proposals show that there is impossibility of performance, nor can I allow the pursuers to lead evidence in an attempt to establish this proposition. I am unable to figure any evidence which would induce a court of law to interfere with the site acquired by the defenders, or to decide that an ornamental building could not be erected for £3250, that £1500 was insufficient to purchase a telescope and a microscope, or that the revenue of £3750 was insufficient for the expenses of superintending and maintaining the proposed establishment.

"I shall therefore sist the cause *in hoc statu* as I did on 4th November 1915, to enable the defenders to proceed with the proposed scheme.

"The defenders, in my opinion, would be justified in delaying the execution of the scheme, as suggested by the engineer, for a reasonable time, to await the fall in cost which is anticipated.

"One other point was debated and can be determined at this stage, that, namely, raised by the pursuers' fourth plea-in-law. The pursuers thereby claim a share of the income of the residue accumulated after 1910, the year when the provisions of the Thellusson Act made further accumulations illegal. This claim by the pursuers is, in my opinion, not well founded. The income

of a fund affected by the terms of the Thellusson Act goes, after the expiry of twenty-one years, to 'such person or persons as would have been entitled thereto if such accumulation had not been directed.' In the present case, where the whole residue has been validly disposed of, the residuary legatees, that is, the defenders, as trustees, would have been entitled to the income of the residue if no accumulation had been directed. The defenders therefore, and not the pursuers, take the revenue which has been earned after 1910. (See *Lindsay's Trustees*, 1911 S.C. 584.)

"I shall therefore repel the pursuers' fourth plea-in-law."

The pursuers reclaimed, and argued—Sisting the cause was not the appropriate procedure. The time had passed for granting further delay. In the circumstances the pursuers were now entitled to decree. The residue accumulated at the end of the twenty-one years was insufficient then, and was so now, for carrying the bequest into effect. The bequest had therefore lapsed owing to impossibility of performance—*Marquis of Bute's Trustees v. Marquis of Bute*, 1904, 7 F. 49, 42 S.L.R. 66; *Burgess's Trustees v. Crawford*, 1912 S.C. 387, per Lord President at p. 394, 49 S.L.R. 294; *In re Packe*, [1918] 1 Ch. 437; *Lindsay's Trustees*, 1911 S.C. 584, 48 S.L.R. 470. In any event the next-of-kin were entitled to the accumulations since the expiry of the period of twenty-one years.

Argued for the defenders—There was nothing to prevent the defenders, who were the persons entitled to the residue, from accumulating until the period of twenty-one years—*Ogilvie's Trustees v. Kirk-Session of Dundee*, 1846, 8 D. 1229. All that had been done here was to save while steps were being taken to carry out the purpose. This was a lawful proceeding even where the Thellusson Act applied—*Lindsay's Trustees (cit.)*. The testator had never intended that his trustees should be limited to a period of twenty-one years after his death for carrying out his purpose, but had given them a very wide discretion. The time for testing the practicability of the bequest was the date when the twenty-one years expired, but the pursuers had no relevant averments regarding that time. It was not sufficient merely to say the bequest was then impracticable. Further, the intention of the testator was to make the trustees the judges of the nature of the building required.

On 20th July 1922 the Court recalled the interlocutor reclaimed against and allowed the defenders to lodge a minute setting out (1) the amount of money in their hands available for the tenth purpose of the settlement at 16th March 1910, and (2) how they could with these funds have given effect to the direction contained in the settlement, with all necessary details.

The opinion of the Court was delivered by LORD MACKENZIE—The Lord Ordinary in his opinion states that all details have been left by the trustor to the unfettered discretion of the trustees. This is only true if the directions in the tenth purpose of the settle-

ment are possible of performance. In order to judge of this it is necessary, first, to fix approximately the date when at latest the trustees were bound to give practical effect to the testator's wishes. This in my opinion is the date the testator has himself specified in the tenth purpose, namely, twenty-one years after the date of his death, *i.e.*, 16th March 1910. The trustees are expressly authorised to accumulate the free income of the residue for such period not exceeding twenty-one years after his death as they consider will create an amount of funds sufficient for fulfilment of his wish. This plainly implies that accumulation was to stop at that date, and the question whether there was a lapse must be judged of then. It is necessary to have a minute put in by the trustees setting out (1) the amount of money in their hands and available for this trust purpose as at that date, 16th March 1910, and (2) how they could with those funds have given effect to the directions contained in the settlement. Until this is done it is not possible to form any opinion as regards the real point in the case, *viz.*, whether with the money in hand at that date and at the prices then ruling it would have been feasible to do what the testator directed. How far what the trustees may propose is consistent with the directions of the trust cannot be determined until this has been done. If the trustees table a minute containing something which though modest in character may yet fairly be said to come within the directions of the settlement, they may be able successfully to maintain that the question of whether there was a lapse ought now to be decided in their favour. The interlocutor ought therefore to be recalled and an interlocutor pronounced giving the trustees an opportunity to lodge such a minute containing the necessary information in a detailed shape.

The defenders thereupon lodged a minute together with a report by Mr James Thomson, city engineer, Dundee, prepared in accordance with the interlocutor of 20th July 1922, from which it appeared that with the funds available in 1910 a building could then have been erected and equipped at the prices then ruling "which would afford to the community an opportunity of observing to an extent not generally within their reach the wonders and beauty of the works of God in creation, and would in so doing yield them rational and innocent entertainment of the highest kind," leaving a sum in the trustees' hands which invested at 4½ per cent., together with "payment of a small fee to be fixed by the trustees," would suffice "to defray the expense of superintendence, of maintaining the premises and instruments in good order, and providing a sinking fund for improving or replacing the same." A schedule of prices was annexed to the report. The pursuers lodged answers in which they, *inter alia*, maintained that the costs as scheduled were insufficient for the work specified, that a building constructed as proposed would be of a size "so small and insignificant as to be quite unsuited to the purposes contemplated by

the testator," and that in any event the increase in the costs since 16th March 1910 had made it impossible now to give effect to the testator's intentions.

On the case again coming before the Court it was argued for the pursuers that the onus of showing that the bequest was practicable was now owing to lapse of time since the expiry of the period of twenty-one years on the defenders, and that they had failed to satisfy the onus. The defenders maintained that they had sufficiently implemented the order of the Court by producing the minute and report, and that the bequest was capable of fulfilment.

LORD PRESIDENT—This case arises out of what may be thought a somewhat eccentric residuary bequest for the erection, equipment, and maintenance in the city of Dundee of a popular astronomical and scientific institution, in which a "telescope or telescopes with all necessary appliances, appurtenances and accommodation for astronomical observations as well as for viewing terrestrial objects," microscopes, and other scientific instruments are to be made available for public use under suitable supervision. The testator explains that his idea is that the use of these instruments "would afford to the community an opportunity of observing to an extent not generally within their reach the wonders and beauty of the works of God in creation, and would in so doing yield them rational and innocent entertainment of the highest kind." The trustees are authorised to acquire a permanent site, and the testator specially directs that the scientific instruments are to be of the best description. He gives them the fullest powers to assume persons holding public offices in Dundee and their successors as trustees *ex officio* in what he calls this "special trust," and also power to commit the whole future management of the said special trust, after the institution has been established, to the authorities of any public park in Dundee in which the trustees might be able to secure a site for it.

The testator evidently anticipated—as turned out to be the fact—that his free residue might be insufficient to make it practicable for his trustee to carry his object into effect at the date of his death, and he therefore provided that if they should "consider that the said free residue of my trust estate when it shall become available will be insufficient for implementing my said wish regarding the application thereof," they should be authorised "to hold and keep invested the whole or part of the said residue, and accumulate the free income thereof with the capital for such length of time, not exceeding in all twenty-one years after the date of my death, as they shall consider will create an amount of funds sufficient for fulfilment of my said wish, without contracting debt upon the special trust." The trustees accordingly accumulated the residue, and on 16th March 1910, being the date of the expiry of the twenty-one years, it amounted to £6302, 7s. 4d. Even then, however, they took no steps—at least no active steps—to carry the bequest

into effect, but continued to accumulate the income.

In 1915 the present action was raised at the instance of certain of the heirs in moveables of the testator, who claimed the residue on the ground that the residuary bequest had failed through impossibility of performance—the amount of the residue being so small (even after the elapse of the full term allowed by the testator for accumulating the funds required to carry his object into effect) as to make the realisation of the scheme altogether impossible. Owing mainly to the war conditions prevailing in 1915 and subsequent years, and the consequent impossibility of costing, and still more of executing, such construction work as the testator's bequest involved, the action was sisted more than once in the Outer House. The last interlocutor sisting the case is that of 17th June 1922, against which the present reclaiming note has been presented by the pursuers.

The problem in the case is different from that which occurred in *M'Caig v. University of Glasgow* (1907 S.C. 231). In that case the principle upon which the bequest was held to fail, and the rights of the heir-at-law were upheld, was that if a residuary bequest is to have the effect of disinheriting the heir, it must be such as to create some beneficial interest of an intelligible and tangible character in favour of some definite third party. There must, in short, be a valid gift and an effectual nomination of a donee who is to take preferably to the heir. Here there is a perfectly valid gift. The provision of the means for rational and innocent public entertainment is an intelligible and tangible object of public utility. And there is no doubt about the donee, namely, the community of the testator's native city. But the bequest is said to have lapsed because the purpose of the special trust is altogether incapable of being carried out with the funds appropriated to it by the testator, even after the trustees' powers of accumulation have been used to their utmost extent. The principle appealed to is, I think, a sound one. It is, that if the purpose of a trust or bequest can be shown to be incapable of receiving any practical effect (and this may be the result of the inadequacy of the funds limited to its execution), the trust or bequest fails, and the trust, if as here there is a trust, becomes a resulting one for the truster or his heirs-at-law.

When this reclaiming note was last before us we came to the conclusion that in order to bring the question to a point it was necessary first of all to ascertain the time at which the practicability of the bequest fell to be determined, what funds the trustees then had at their disposal, and what (if anything) the trustees could have done at that time towards fulfilment of the bequest. For the reasons explained at the last hearing by Lord Mackenzie, who delivered the opinion of the Court, we formed the conclusion that the date when at latest the trustees were bound (if possible) to give practical effect to the testator's wishes was the termination of the accumulation period,

namely, 16th March 1910. If it could be shown that at that date the bequest was an impracticable one owing to the inadequacy of the funds in hand, the way would be open to the pursuers to enforce their claim. In response to the order we then made, the trustees have lodged a minute bringing out the amount of the funds at the figure mentioned above, and detailed specifications and estimates showing the best that could have been done at that time with the available funds at the prices then prevailing. The pursuers have also lodged answers to this minute.

The minute is prepared on the assumption that a site could be procured without payment in one of the public parks of the city—an assumption the propriety of which I shall consider in a moment. It is evident from the details in the minute that if the trustees had got to work in 1910 and done their best to carry out the special trust with the funds then in hand, the result would have fallen far short of the ambitious scheme contemplated by the testator. The building would have been very small, about 30 feet square inside, and its equipment and the means of supervision meagre in the extreme. It certainly could not be said by any means worthily to fulfil the intentions of the special trust or to provide any but a disappointing memorial of the testator's public beneficence. I sympathise with the view which the pursuers pressed upon us that to spend the money in this way is not far removed from waste. But in considering whether in these circumstances the bequest can be said to be wholly impracticable, and therefore to have lapsed, it is, I think, vital to observe the distinction between the testator's main and essential purpose and those things which are neither *sine quibus non* nor yet essential parts of the main object but merely qualifications and incidents of it however desirable in themselves. His true objective was not science but popular entertainment, and I cannot say that that objective is entirely missed because the accommodation is small and the scientific equipment poor—probably very much smaller and poorer than the testator dreamed of. It must be kept in view that he gave the trustees a wide discretion in carrying out his main purpose. So far, accordingly, I find it impossible to say that what the trustees might have done in 1910 could not have been regarded as a practical satisfaction—however disappointing—of the purpose of the special trust.

But the pursuers have presented two serious criticisms which require consideration. The first is that the trustees' minute makes no provision for the expense of acquiring a site. In considering the force of that objection it must, I think, be kept in mind that according to the conception of this bequest the testator contemplated the acquisition of a site otherwise than by purchase. He contemplated that his trustees would get into touch with the local authorities who controlled the public parks of the city with a view to the granting of a suitable site, and although it may not be the case that in 1910 the trustees had any

firm bargain such as we are told they now have, I think it is impossible to hold that because in 1910 the money would not have been enough to buy a site as well as to put up and equip the building, therefore the bequest lapsed. The other criticism is that the money provided in the minute for the permanent supervision, maintenance, and renewal of the property of the trust is insufficient, perhaps manifestly insufficient, to cover these purposes. But when the terms of the special trust are looked at as a whole it becomes plain that although the testator considered that an endowment fund to meet all these purposes was very desirable, and should be provided by the trustees if at all possible, its provision was not a *sine qua non*. On the contrary, the testator contemplated the possibility of the institution being dependent on other funds derived from public sources, and even of the bequest as a whole being ultimately placed in the hands of the public authorities according as experience of its administration might indicate. In these circumstances it is not possible in my opinion to hold that the pursuers are successful in showing that the legacy had lapsed in respect of the impossibility of providing in 1910 an adequate endowment fund. On the whole matter therefore I think the pursuers fail to discharge the onus resting on them of demonstrating that the legacy had lapsed.

If your Lordships agree in this conclusion we shall be in a position to dispose of the action. If its purpose had been to enforce the special trust the question of further assisting the action in order to give the trustees an opportunity to proceed would have arisen. But the purpose of the action is to recover the amount of the trust fund for the testator's legal heir, and if I am right this attempt fails. The defenders ought therefore to be assoilzied from the conclusions of the summons.

LORD SKERRINGTON—I agree. The testator evidently thought that it would promote the intellectual, moral, and religious welfare of the citizens of his native town if he were to enable them to acquire a practical, though necessarily, as I think, a superficial, knowledge of the use of the telescope both astronomical and terrestrial, and of the microscope and other "scientific instruments." Opinions may differ as to the utility of this bequest, but the objects which the testator had in view and the methods by which he proposed to attain them were lawful. While he left a great deal to the discretion of his trustees, it was not argued to us that the residuary clause of the trust-disposition and settlement was void from uncertainty. The only question which we were asked to consider was whether the pursuer, who is one of the heirs *ab intestato*, has been able to demonstrate that the funds available for carrying into effect what the testator described as his "special trust" were too small for that purpose, with the result that the residuary bequest must be declared by the Court to have failed and lapsed. For various reasons I think that the pursuers' contention must be negatived. The

first is the extreme modesty of the testator's ambitions. It might be possible to prove that the available funds are quite inadequate for the purpose of building an observatory which would be of the slightest use from a scientific point of view, but how could it be proved that the funds are insufficient to erect a building in order to house a couple of telescopes and a microscope which would furnish "rational and innocent entertainment" to some of the inhabitants of Dundee?

Again, while the testator undoubtedly hoped that the special trust would be self-supporting, I do not think that he made this a condition of his bequest. On the contrary, I think that he looked forward to some of the "public authorities" of Dundee coming to the assistance of his trustees both as regards the provision of a suitable site and also as regards the financing and management of the special trust. The first part of this expectation has now been realised. While I have not lost sight of the fact that no site for the proposed observatory had been acquired by the trustees at the expiry of twenty-one years from the death of the testator, this circumstance does not enable me to affirm that the residuary bequest failed and lapsed at that date.

LORD CULLEN—I am of the same opinion. Keeping in view the terms of this bequest and the nature of the objects aimed at by the testator, it seems to me to be clear that the scale and manner of fulfilment of it are matters on which there is left to the trustees a very wide discretion. Now the position of the trustees is that in their opinion it would have been possible to carry out the bequest as at 1910 though on a comparatively modest scale, and in their recent minute and the report by Mr Thomson which accompanies it a statement is given of the expenditure for the purpose. If we were to reject that opinion of the trustees in whom the testator so fully confided the carrying out of his wishes we should only be justified if we had the clearest grounds, but on a consideration of the minute and report and of the pursuers' answers I am satisfied, for the reasons which your Lordship has already stated, that the pursuers on whom the onus lies have not demonstrated the impossibility of fulfilling the testator's purpose.

LORD SANDS—I concur. The object of the testator was to encourage popular study in the use of the telescope and microscope under suitable conditions and in agreeable surroundings. The onus is upon the pursuers to show that this purpose has failed owing to the impossibility of performance, and in my view they have not succeeded in doing so.

The Court assoilzied the defenders.

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