Friday, December 14.

SECOND DIVISION.

[Lord Pearson, Ordinary.

YOUNG'S TRUSTEES *v.* YOUNG'S TRUSTEE.

Succession — Testament — Trust — Uncertainty — Direction to Apply Residue "for such Charitable or Public Purposes as my Trustee thinks proper."

A testatrix by her last will and settlement left the residue of her estate to her two brothers and the survivor. By a holograph codicil she directed "that in the event of either of my brothers predeceasing me the half of the residue, and in the event of both predeceasing me the whole of the residue, shall be applied for such charitable or public purposes as my trustee thinks proper."

One of the brothers having predeceased the testatrix, *held* (*rev.* judgment of Lord Pearson, Ordinary) that the direction in the codicil was invalid on the ground of vagueness and uncertainty, and that the surviving brother was entitled to the whole residue as sole residuary legatee under the will.

Miss Agnes Wilson Young died on 29th January 1900 leaving a last will and settlement and a holograph codicil, both dated 5th December 1898.

By her last will and settlement the testatrix appointed John Blair, W.S., her sole executor and trustee, and conveyed to him her whole means and estate, heritable and moveable, in trust for certain trust purposes. By the third purpose of the deed the testatrix left the residue of her estate to her brothers Archibald Young, Advocate, and the Reverend James Gerard Young, D.D., equally between them, and in the event of either predeceasing her and one surviving she left the whole to such survivor.

The holograph codicil was in the following terms—"Referring to the will which I have signed to-day, I direct that in the event of either of my brothers predeceasing me, the half of the residue, and in the event of both predeceasing me, the whole of the residue, shall be applied for such charitable or public purposes as my trustee thinks proper."

The Reverend James Gerard Young, D.D., predeceased the testatrix.

The trustee and executor nominated in the last will and testament accepted office.

On 20th March 1900 Archibald Young raised an action against the trustee under the last will and settlement. In this action the pursuer concluded (first) for declarator that the direction in the holograph codicil was void, invalid, and ineffectual, and that the whole residue of the means and estate of Miss Young belonged to the pursuer; (second) for declarator that the pursuer, as heir-at-law and sole next-of-kin of Miss Young, or otherwise as residuary legatee under the trust-disposition and settlement, was entitled and had right to the whole of the residue; (third) for decree ordaining the defender to exhibit a full and particular account of his whole intromissions, as trustee under the trust-disposition and settlement, whereby the true amount of the residue of the trust estate might be ascertained; and (fourth) for decree ordaining the defender to convey to the pursuer the residue of Miss Young's estate as the same should appear from the accounts to be produced; and (fifth) in the event of the defender failing to produce an account and to convey the residue, for decree ordaining him to pay to the pursuer £18,000 with interest.

The pursuer pleaded—"(1) The direction as to the application of the residue of her estate contained in the holograph codicil of the said Miss Agnes Wilson Young being invalid on the ground of vagueness and uncertainty, the one-half of the residue falls to be dealt with as intestate succession, and to be paid over to the pursuer as her heir-at-law and sole next-of-kin. (2) Or otherwise the direction as to the application of the residue of the said estate contained in the said codicil being invalid on the ground of vagueness and uncertainty, the pursuer is entitled to the whole residue as sole residuary legatee under the trust-disposition and settlement. (3) The pursuer being the sole residuary legatee and heir-at-law and sole next-of-kin of the said Miss Agnes Wilson Young is entitled to decree of declarator, and decree for production of accounts and payment, in terms of the conclusions of the summons."

The defender pleaded—"(2) The bequest of one-half of the residue for such charitable or public purposes as the late Miss Agnes Wilson Young's trustee shall think proper is valid, and the said one-half of the residue falls to be administered by the defender in terms of the said trust direction."

On 8th May the pursuer died and his trustees were sisted as pursuers in his place.

On 19th July the Lord Ordinary (PEARSON) pronounced the following interlocutor:—"Finds that the legacy in favour of the defender is not void from uncertainty, therefore assoilzies the defender from the conclusions of the summons, and decerns.

Note.—"This question arises on the construction of one of the testamentary writings of the late Miss Agnes Young. She had two brothers, one of whom predeceased her. In that event she had provided by a codicil that one half of her residue should be applied 'for such charitable or public purposes as my trustee thinks proper.' The half residue is said to amount to about £9000.

"The trustee named in the will accepted office, and is the defender in this action.

"The representatives of the surviving brother now claim that the bequest is void through uncertainty and vagueness, and that they are entitled to the fund.

"It is not disputed that but for the words 'or public' the bequest would be good, as being a bequest for charitable purposes to

be selected by a person named. On the other hand, it seems to be settled that if the class of objects named alternatively is too vague and uncertain to receive effect, the otherwise good bequest to charitable purposes will also fail.

"I set on one side those cases of which *Low's Trustees*, 11 Macph. 744, is an example, where a legacy is left to a class of objects so wide that it requires a power of selection to make it definite, and where either no power of selection is given, or the trustees to whom it is given fail.

"Nor do I think much if any light is to be obtained from English authorities on this matter. The view taken by the English Courts is entirely different from ours, as is well explained by Lord Stormonth Darling in his opinion in the case of *Cobb*, 21 R. 638.

"In our law it is settled that a bequest for charitable purposes to be selected by trustees is valid, even where the purposes are not defined by a reference to locality, or to specific objects, or otherwise than by the word 'charitable.'

"If this be so, I profess myself unable to see any reason why the substitution of the term 'public purposes' for 'charitable purposes' should make all the difference in the validity of the bequest, and why the one bequest should be bad and the other good. Both terms are in a sense vague, not only as including a very large class, but as presenting difficulty in fixing the precise boundary of the class. It would be almost impossible to frame an exhaustive list either of charitable purposes or of public purposes; and possibly there would be a large difference of opinion in the case of each list, as to whether certain objects fell within the description or not. But that observation seems to me quite as applicable to charitable as to public purposes.

"As to the absence of any geographical limit within which the bequest is to be applied, I do not find that this has been accepted as a ground for refusing effect to a bequest for 'charitable purposes' generally. It is not necessary to limit the scope of the bequest by any reference to a locality. Provided someone is appointed to make the selection of individual objects, the charitable purposes may be world-wide; and it has not, so far as I am aware, been suggested that the bequest must fail because the selection may be of foreign charities. It is true a distinction may here be suggested. For while charitable purposes, being founded on the needs of humanity, are much the same in scope and object wherever they are promoted, the promotion of public purposes is a very different matter when it is not confined to the testator's own people and nation. But if 'public purposes within Scotland' would do, as I think it clearly would, I see no sufficient reason for holding that this bequest by a Scotswoman is to fail because she has not confined the selection to her own country. That is a matter she left to her trustee; and in my opinion she was entitled to do so."

The pursuers reclaimed, and argued—The gift was void from uncertainty. It conferred on the trustee an absolute discretion to give the money to any public purpose he pleased without qualification. That practically amounted to a delegation by the testatrix to the trustee to dispose of her estate as he thought proper, and was much too vague to receive effect. A testator was no doubt entitled to dispone estate to a well-defined class, leaving to the trustee the power of selecting individuals of that class—*Crichton* v. *Grierson*, July 25, 1828, 3 W. & S. 329; Opinion of Lord Chancellor Lyndhurst, 338. But the class selected must be particularised and definite. These cases fell under two heads. (1) If the bequest was one to persons, the class must be defined by relationship—*Murray* v. *Fleming*, November 28, 1729, M. 4075; *Playfair's Trustees* v. *Playfair*, March 1, 1900, 2 F. 686. (2) If the bequest was one for objects, the class must be defined by being 'charitable.' The law showed special favour to charities, and no case could be cited where a bequest of this kind had been upheld which did not fall within the category of "charitable." As an example reference might be made to *Cobb* v. *Cobb's Trustees*, March 9, 1894, 21 R. 638. In that case the bequest was one to "useful, benevolent, and charitable institutions." The words were there cumulative, and the bequest was held to be good. Even in a case like *M'Lean* v. *Henderson's Trustees*, February 24, 1880, 7 R. 601, where a bequest was made to trustees for the advancement of the science of phrenology, Lord Moncreiff, p. 611, admitted that the bequest could only be maintained because it fell within the category of charitable bequests. In the present case the bequest was not cumulative; it was one in favour of "charitable or public purposes." Public purposes being too vague, the whole bequest must fall—*Playfair's Trustees*, *supra*. Otherwise the Court would be making a will for the testatrix. The authority chiefly relied upon by the other side was the opinion of Lord Stormonth Darling in *Brown's Trustees*, *infra*. The opinion of an Outer House judge was not of much weight if it was against the whole trend of the authorities; but the opinion founded on did not apply, as it dealt with "public institutions," a very much narrower and more defined class than "public purposes."

Argued for the defender—The judgment of the Lord Ordinary was right. The law of Scotland permitted a testator to choose a class of objects and leave the selection of the individual units of that class to the trustee under the will. Two classes of bequests were held void by the law, viz., (1) where the disposal of the bequest was left at the absolute discretion of the trustee, and (2) where there was no nomination of a trustee in the will—*M'Gregor's Trustees* v. *Bosomworth*, January 8, 1896, 33 S.L.R. 364, where the authorities were reviewed by Lord Kincairney, p. 365. But where the testator fixed the class of objects, he could delegate to his trustee the choice of the individual object. In the present case the class of objects chosen was not too vague. A "trust for public uses" was quite as definite as a "charitable trust"—M'Laren

on Wills, sec. 1691. "Benevolent or charitable purposes" had been held by Lord Brougham in *Miller* v. *Black's Trustees*, July 14, 1837, 2 S. & M. 891, to define sufficiently the objects chosen, and the phrase "charitable or public purposes" was quite as definite. Lord Stormonth Darling in *Brown's Trustees* v. *Young*, June 3, 1898, 6 S.L.T., case 43, had expressed his opinion that a bequest to "public institutions" was good. A bequest to "public purposes" had no wider significance. In England "charitable purposes" had very much the same meaning as "public purposes"—*James* v. *Williams*, Ambler's Rep. 651; opinion of Lord Cairns in *Goodman* v. *Mayor of Saltash*, 1882, 7 App. Cas. 650, and it was becoming common to use the word in the same comprehensive sense with reference to England and Scotland alike — *Commissioners for Special Purposes of Income-Tax* v. *Pemsel* [1891], A.C., opinion of Lord Watson, p. 562. In England there was no doubt a bequest in the same terms as the present would receive effect—*Dolan* v. *Macdermot*, 1867, L.R., 5 Eq. 60.

LORD JUSTICE-CLERK — I find myself quite unable to read this bequest so as to bring it under the class of charitable bequests. The codicil directs that in the event of either of the brothers of the testator predeceasing her the half of the residue, and in the event of both predeceasing her the whole of the residue, "shall be applied for such charitable or public purposes as my trustee thinks proper." Whatever might be the result of an attempt, where two or more expressive adjectives are joined by the copulative "and," to read the one as exegetical of the other, it would be a quite improper stretch of language in such a sentence as we are now construing to read "charitable" as being interpreted by the word "public." There is nothing in the bequest to lead us to any interpretation, and we are obliged to take the words as we find them. I think the plain reading of these words is that the trustee may apply the fund to "charitable" purposes, or if he thinks proper may apply it to "public" purposes not included in that word. And that being the view I take of the reading of the words I differ from the judgment which the Lord Ordinary has given.

LORD YOUNG—Had the codicil in question directed the residue of the testator's property to be applied "for such charitable purposes as my trustee thinks proper" I should have thought it valid, and indeed this, I understand, is not disputed. The question in the case is whether the direction that the residue shall be applied "for such charitable or public purposes as my trustee thinks proper" is valid, and agreeing with your Lordship, but differing from the Lord Ordinary, I am of opinion that it is not. "Public purposes" is a very wide and indefinite expression, quite as wide and indefinite as the expression "private purposes," both and either so much so that I could not on authority or principle sustain either or both as a valid direction to a testamentary trustee. Nor can I hold that a direction to apply money to "charitable purposes" chosen by the trustee can be sustained if followed by words which extend his powers, so that he may decline "charitable purposes" altogether, and choose any others he thinks proper, whether "public" or "private," or either exclusive of the other. To hold otherwise would be to hold that a testamentary trustee may be validly empowered to apply the testamentary funds to any purpose he thinks proper, charitable or not, provided only that it is public or private, and of course lawful.

LORD TRAYNER — I am of the same opinion. The language of this deed is not ambiguous. It is simply this, that the trustee or executor should apply the half of the residue for such charitable or public purposes as the trustee or executor should think proper. Now, there is no doubt that if the direction had been to divide among "charitable purposes" or anything which could have been brought within the character of "charitable," it would have been a good bequest according to the decisions both in England and Scotland. But I think it is also settled by authority that any disposition of an estate to a trustee, to be disposed of according to his direction for "public purposes," is too vague, and must be held to be ineffectual through uncertainty.

LORD MONCREIFF — I am of the same opinion, and I have nothing to add on the merits. But I think the pursuers take under the will. The codicil being bad, Mr Archibald Young, the surviving brother and original pursuer, became, as residuary legatee, entitled to the whole of the residue, and accordingly the pursuers as his trustees and executors are entitled to decree on that footing in terms of their second plea-in-law.

The Court recalled the interlocutor reclaimed against, sustained the second plea-in-law for the pursuers, and decerned.

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