or building leases of the lands or any part thereof, or (as it is expressed still more widely in the original petition) to grant mineral leases of the minerals for periods not exceeding thirty-one years, and to grant feus of the said lands or any part thereof. In both cases the general authority is asked subject to such inquiry into the circumstances as to the Court shall seem meet. The petitioners say, and I can well believe it, that the necessity for separate applications hampers them in the administration of the trust estate and involves considerable expense. Now, there there might be some difficulty in giving them this general authority if this Court were vested with any duty of supervising the trustees or calling them to account for their actings. But as I understand the position, our intervention does not affect the responsibility of the trustees to the English Courts, but is given merely (as it was expressed in the case of *Allan's Trustees*) by way of exercising an auxiliary jurisdiction to enable the order of the English Court to be carried out. In this view it is neither necessary nor expedient that we should have an inquiry now into the circumstances of the estates, in order to make up our minds whether we should grant the general powers which are asked. That would involve considerations with which we have no concern, for the trustees are answerable for their administration not to us but to the English Courts. I am therefore disposed to grant the more general powers, but as regards the precise extent of those powers I think that we should follow as closely as possible the terms of the English order.

LORD M'LAREN and LORD KINNEAR concurred.

The LORD PRESIDENT was absent.

The Court pronounced this interlocutor—

"(*After authorising the petitioners to grant the particular feu in question*) . . . And further in respect of the order of the High Court of Justice in England, . . . grant warrant to authorise and empower the said trustees and executors to grant feus of the lands of Seafield, Blackburn, and Whitehill mentioned in the petition, or any part thereof, for building purposes, and to grant leases of the said lands or any part thereof, and the minerals thereunder for mining purposes in accordance in either case with the custom of the locality; and decern."

Counsel for the Petitioner—Blackburn, K.C.—Maitland. Agents—Murray, Beith, & Murray, W.S.

Tuesday, December 18.

SECOND DIVISION.

[Lord Dundas, Ordinary.

M'CAIG *v.* GLASGOW UNIVERSITY AND OTHERS.

Succession—Trust—Disinherison of Heir—Public Policy.

A testator by his holograph settlement appointed trustees, and, *inter alia*, provided — "The purpose of the trust is that my heritable property be not sold but let to tenants, and the clear revenue or income be used for the purpose of erecting monuments and statues for myself, brothers, and sisters" on a certain tower. . . . "the making of these statues to be given to Scotch sculptors from time to time as the necessary funds may accumulate . . . also that artistic towers be built" on a specified hillock "and on other prominent points" on his estate. "My wish and desire is to encourage young and rising artists, and for that purpose prizes be given for the best plans of the proposed statues, towers, &c., before building them." He further stated that his purpose and intention was that this trust should be perpetual. By a codicil he explained that the statues were to be of himself, his father and mother, and his five brothers and four sisters, and were to cost not less than £1000. He directed also that £300 a year be paid to such of his brothers and sisters as might survive him as long as they lived.

Held (*rev.* Lord Ordinary Dundas) that the holograph settlement and codicil were not valid and effectual to dispose of the estates and effects, heritable and moveable, of the testator except as regarded the said annuities, and that his sister, who was his heir-at-law and heir *ab intestato*, was entitled to have conveyed to her his whole estate, on the ground that she was not divested by the deeds which, with the above exception, created no beneficial interest in any third person or body of persons, or in the general public.

Opinion (*per* Lord Low) that the purposes of the trust, "although whimsical and of no utility, are perfectly lawful, and cannot, I think, be regarded as contrary to public policy."

Opinion (*per* Lord Kyllachy) that "if it is not unlawful it ought to be unlawful to dedicate by testamentary disposition for all time, or for a length of time, the whole income of a large estate, real and personal, to objects of no utility . . . and which have no other purpose or use than that of perpetuating at great cost, and in an absurd manner, the idiosyncrasies of an eccentric testator. I doubt much whether a bequest of that character is a lawful exercise of the *testamenti factio*."

On the 27th January 1905 Catherine M'Caig, John Street, Oban, brought an action against the University of Glasgow, the accepting trustees under the holograph testamentary settlement, dated 19th June 1883, and relative codicil dated 27th August 1891, of her brother John Stuart M'Caig, banker, Oban, who had died unmarried on 29th June 1902. A supplementary action was brought on the 1st April following, which included other defenders, amongst them the pursuer herself as the sole survivor of the persons nominated as trustees in the said settlement and codicil, and was conjoined with the original action. The pursuer, *inter alia*, sought declarator "that the said holograph testamentary settlement of 20th January 1900, and relative codicil of 18th February 1902, both executed by the said John Stuart M'Caig, are not valid and effectual to dispose of the free estates and effects, heritable and moveable, of the said John Stuart M'Caig, after payment of his debts and deathbed expenses, except so far as regards the direction contained in said codicil for payment to such of his brothers and sisters as should survive him during their lives of £300 per year, and that the pursuer has succeeded to, and is in right of, the whole of said free estates and effects, and that upon the said debts and deathbed expenses being paid or satisfied, the pursuer will be entitled to have conveyed and made over to her the whole of said free estates and effects."

Glasgow University compeared as defenders.

At the date of the action the pursuer was the sole next-of-kin and heir in heritage of the testator, whose estate consisted of heritage with a yearly rental between £2000 and £3000, and about £10,000 of moveables. The heritage included considerable properties in and close to the town of Oban.

The holograph settlement was as follows —"I, John Stuart M'Caig, residing at John Square, Oban, Argyleshire, Scotland, being resolved to settle my affairs so as to prevent all disputes after my death in regard to the succession to my moveable means and real estate, hereby nominate and appoint the Court of Session or Supreme Court of Scotland as my trustees and executors, who shall manage and administer the trust by the appointment of a judicial factor from time to time as the circumstances of the management and administration may require from time to time. The purpose of the trust is to pay all my legal debts and deathbed expenses, these debts are to be paid from the accumulations of the yearly income of the trust after the expenses of the management is paid. I also wish that Donald M'Gregor, solicitor, Oban, be continued by the trustees as local factor over all my estate, both moveable and real, at a legal remuneration for his work. The purpose of the trust is that my heritable property be not sold but let to tenants, and the clear revenue or income be used for the purpose of erecting monuments and statues for myself, brothers, and sisters on the tower or circular building called the Stuart M'Caig Tower, situated on the Battray Hill above Oban, the making of these statues to be given to Scotch sculptors from time to time as the necessary funds may accumulate for that purpose, also that artistic towers be built on the hillock at the end of Airds Park, in the parish of Muckairn, and on other prominent points on the Muckairn estate, and on other prominate places on the various estates; such in particular on the Meolroer of Balagown, lying north-east of Kilachonich Farmhouse, my wish and desire is to encourage young and rising artists, and for that purpose prizes be given for the best plans of the proposed statues, towers, &c., before building them, I wish and desire that the local factor during his term of office consult my surviving brother and sisters during their lifetime to consult them in the management of the estate. I give full power to the trustees to sell the property of the Gas Works, which is not to include Battary Hill or Tower—that goes with the unsaleable estate, or otherwise called the Muckairn, Soraba, Inverlonin, and Kilmore properties. My real purpose and intention is that this trust is to be perpetual for all time coming, and that is the reason of appointing the Court of Session as trustees, with the Auditor of the said Court of Session to audit the accounts yearly at the legal fees. And should the Court of Session decline the acceptance of the trust, then and in that case, which I hope and trust will not happen, I appoint the College of Glasgow to be the trustees to carry out the foresaid purposes and real written intentions of this will of mine, and failing the College of Glasgow accepting the trust, I I nominate and appoint in their order as follows—the First the College of Edinburgh, Second in order the College of Aberdeen, Third the College of St Andrews, failing them the trust to be handed over to the Court of Chancery in London as trustees. This holograph last will and testament is sygned by me at Oban this twentyth day of January One thousand nine hundred years (1900). — JOHN STUART M'CAIG, banker, Oban."

The codicil was in the following terms— "I, John Stuart M'Caig of Muckairn Soraba and Oban Argyleshire Scotland in reference to my will of the twentieth January one thousand nine hundred years made and sygned at Oban holograph do hereby make a codocil to said last will to the effect of more fully describing and explaining my real wishes and meaning in regard to the said will of 20th Jany. 1900 to prevent the possibility of vagueness in construing the said will I do hereby mean by College of Glasgow the University of Glasgow and by the College of Edinburgh I mean the University of Edinburgh and by the College of Aberdeen I mean the University of Aberdeen and by the

(Sgd.) J. S. M'C.

College of St. Andrews I mean the University of *Aberd* St. Andrews, I also wish and direct that the said Donald Macgregor be appointed factor over my whole estate

moveable and heritable as long as he lives and is fit and proper to manage the estate. Further in order to avoid the possibility of vagueness of any kind, I have to describe and explain that I particularly want the trustees to erect on the top of the wall of the tower I built in Oban statues in large figures of all my five brothers and of myself namely Duncan John Dugald Donald Peter and of my father Malcolm and of my mother Margret and of my sisters Jean Cathrine Margret be J. S. M'C.
and Ann and that these statues *by* modelled after photographs. And where these may not be available that the statues may have a family likeness to my own photograph or any other member of of my foresaid family and that these statues will cost not less than one thousand pounds sterling and that money to come out of the accumulated clear revenue. Should any vagueness of any kind crop up, as to the trustees or the purposes of the trust to render it void from uncertainty Judicially in that case I name and appoint the Town Council of Oban burgh. And the chairman of the Parish Council of the parish of Kilmore and Kilbride Oban as trustees to manage the estate under the factorship of the foresaid Donald Macgregor solicitor Oban, Moreover I wish and direct that the sum of three hundred pounds per year be paid to such of my brothers and sisters as may survive me as long as they live I also desire my trustees to carry on the law suit of the Muckairn right of way at present before the House of Lords under appeal from the First Division of the Court of Session Edinburgh to a final judgement. Sygned by me holograph to-day the eighteenth of February one thousand nine hundred two years by my own hand writing all holograph. (Signed)

"JOHN STUART M'CAIG.

"Feb. 18th 1902."

[*The words in italics were scored through.*]

The pursuer, *inter alia*, pleaded—"(1) The said testamentary settlement of 20th January 1900 and relative codicil of 18th February 1902 being void and ineffectual from vagueness and uncertainty as to their meaning and effect, except to the extent specified in the first conclusion of the summons, the pursuer is entitled to decree in terms of the said conclusion."

On 6th December 1905 the Lord Ordinary (DUNDAS) pronounced the following interlocutor—"Finds that the testator conveyed his whole means and estate to the defenders as trustees for the purposes specified in the holograph settlement and codicil, dated respectively 20th January 1900 and 18th February 1902, and that the said settlement and codicil are not void from vagueness or uncertainty or otherwise ineffectual in law, and to the above effect and extent sustains the fourth and fifth pleas-in-law for the defenders the University of Glasgow in each of the conjoined actions: Dismisses said actions and decerns: Finds the pursuer and compearing defenders entitled to expenses as between agent and client out of the estate of the testator," &c.

Opinion.—"The late John Stuart M'Caig died unmarried on 29th June 1902. He left heritable estate with a yearly rental of between £2000 and £3000 and moveable estate amounting to about £10,000. His sole surviving sister, who is the pursuer, is the only person who would be now interested in his succession, heritable and moveable, if he died intestate. The principal question raised by the conjoined actions is whether or not a holograph settlement, dated 20th January 1900, and a holograph codicil, dated 18th February 1902, both written by Mr M'Caig, are void from vagueness and uncertainty or otherwise ineffectual in law, and if so to what extent. The pursuer admits the validity of that portion of the codicil by which the truster directs 'that the sum of £300 per year be paid to such of my brothers and sisters as may survive me as long as they live,' but *quoad ultra* challenges the settlement and codicil. The compearing defenders are the University of Glasgow, who are the accepting trustees under these writings. The settlement and codicil are printed, and I need not recite their terms. It is important to note at the outset that the action is not one for the reduction of these writings as being 'not the deeds' of the testator. On the contrary, it is a declarator based upon the assumption that he was of sound disposing mind. This fact must be kept in view throughout the consideration of the terms, which are peculiar and fanciful, of the settlement and codicil. The question is whether these writings in whole or in part are void from uncertainty, or as being against public policy, or from unworkability, or upon any other ground known to the law.

"The pursuers' counsel took up a broad and bold position, based upon the rule of law that a testator in order effectually to disinherit his heir or defeat his executor must divest the estate from the heir or executor by giving it to some one else—*Cowan* v. *Cowan*, 14 R. 670; *Gardner* v. *Ogilvy*, 20 D. 105; *Neilson* v. *Stewart*, 22 D. 646. He maintained that the sole purpose of this trust was to effect that in all time coming the testator's lands should be loaded with statues of himself and his nearest relatives and with 'artistic towers' upon 'prominent points' or 'places.' This, he contended, is not a beneficial trust in any true sense, but one merely for administration of a perfectly non-beneficial kind. There is not, it was urged, any diversion of the estate from the heir nor any gift of it to some one else, but merely an attempted imposition upon her right of a burdensome and unproductive trust administration. This argument was, in my opinion, put too high. The heir has no right save in intestacy; and a truster may, I apprehend, do what he will with his own, provided his testamentary disposition is expressed with sufficient clearness and is not contrary to public policy or morals. The pursuer's counsel founded strongly upon the words, 'the purpose of the trust is,' as showing that the testator's sole purpose was the building of the statues

and the towers. But the identical words occur as applicable to the payment of debts and deathbed expenses. Again, the truster announces, 'My real purpose and intention is that this trust is to be perpetual for all time coming,' and the word 'purpose' or 'purposes' occurs in five other places in this short settlement. On the other hand, it expressly stated that 'my wish and desire is to encourage young and rising artists, and for that purpose prizes be given for the best plans of the proposed statues, towers, &c., before building them.' I think that when the settlement is read as a whole it appears that Mr M'Caig's object was really twofold, and embraced both the encouragement of Scottish art and artists and the erection upon his estate of family statues and artistic towers. Each of these aims was intended to be a means towards the achievement of the other.

"As regards the statues, I consider that the direction, especially when read along with the fuller explanation in the codicil, is quite precise as to the persons to be immortalised and the site which these family monuments are to occupy. As to the cost, I think it is reasonably clear, looking to the approximate revenue of the estate, and to the words used by Mr M'Caig in an earlier settlement, which it seems legitimate to consult for this purpose, that he intended that *each* of the statues should cost not less than £1000 sterling, It is true that no indication is given as to the exact dimensions of the statues or of the material to be used in their construction, but these, I apprehend, will be matters for decision by the trustees in conference with the 'Scotch sculptors' whom they employ. So far then as the statues are concerned, I am unable to see that the directions are vague or uncertain or unworkable, and though the scheme may be characterised as eccentric or of doubtful wisdom, no ground occurs to me upon which it can be held to be illegal. The due erection of these statues will, I suppose, absorb the trust income for a considerable period apart from any other demands upon it.

"The matter of the towers is, in my opinion, attended with more difficulty. The directions here are in my judgment open to more serious attack in respect of vagueness and uncertainty in conception and expression. But I have come to the conclusion, not without hesitation and with some reluctance, that the truster's 'wish and desire' have been expressed with sufficient clearness to enable practical trustees to carry them out if they set their minds to it, and are directed to an object which is not illegal and cannot be said to be entirely unbeneficial. It is of course easy to select words or phrases from the will and treat them with ridicule. Thus, for example, the term 'artistic towers' is by itself one of somewhat obscure scope and import. But the trustees are directed to give prizes for the best 'plans' of the proposed towers before building them, and with the aid of the artists and sculptors there need I think be no difficulty in arriving at a practical definition of what ought to be included in the words. Again, it was objected that 'young and rising artists' were a class too vague to be capable of definition. But I think that the phrase is certainly not more indefinite than 'poor and struggling youths of merit,' which in a very recent case (*Milne's Executors* v. *University of Aberdeen*, 7 F. 642), was held to be valid and not void from uncertainty. It was suggested that the trustees could not define what are or are not 'prominent points' or 'prominent places' on the estate for the erection of towers. But the testator has himself indicated at least two such points or places, and it is not to be assumed *ab ante* that no others of a similar and suitable character are to be found. Indeed, the testator's direction seems to assume the contrary. Passing from these and the like details of criticism, I may say broadly that it appears to me that a trust for the encouragement of young and rising artists, and in particular Scotch sculptors, the practical scope of which is so far defined by the provision for prizes to be given 'for the best plans of the proposed statues, towers, &c., before building them,' is not one which can be summarily dismissed without giving it any start or trial whatever. The scheme may be fantastic, and may result in what most people will consider waste of money. But the money was Mr M'Caig's, and the project is neither, so far as I can see, contrary to public policy or morals, nor more vague and indefinite in scope than some of the schemes which have been held to be within the recognition of the law. Thus in *Whicker* v. *Hume*, 7 Clark's H.L. Cases 124, the bequest was 'for the advancement and propagation of education and learning all over the world,' and in *M'Lean's Trustees*, 7 R. 601, 'for the advancement and diffusion of the science of phrenology, and the practical application thereof in particular.' I am not aware that the latter case has ever been judicially doubted, and it is referred to as authoritative by Lord Davey in the recent case of *Blair's Trustees*, 4 F. (H.L.) at p. 4.

"But while it seems to me that this part of the truster's settlement ought not to be here and now held as void, it also appears to be not improbable that at some more or less distant date, his scheme having been to some extent carried out may become unworkable and incapable of further extrication. If that should happen the pursuer or those in her right would in my judgment be quite entitled to come to the Court, and might under the altered circumstances succeed in obtaining a judgment to which as matters now stand I do not think she is entitled. Or it may be that the trustees will come at some future period to the Court and ask it to direct the administration of the trust funds, having regard to the doctrine of *cypres* or otherwise. See *Grant*, 4 R. 734, and its sequel in *Caw's Trustee*, 5 R. 1014; *M'Culloch*, 3 R. 1182; *Glasgow Infirmary*, 14 R. 680, 15 R. 624; *Gibson*, 2 F. 1195; Trusts (Scotland) Act 1867 (30 and 31 Vict. c. 97), sec. 16; *Dundas*. 7 Macph. 670. I do not speculate about or prejudge what might happen in either of

the events supposed, and my decision of this case now will not of course in any way affect or prejudice the position of parties in any future action or application to the Court under other and different conditions in fact. The defenders referred me to the old case of *Macnair*, 1791, M. 16,210, where in the reduction. of a trust-deed 'containing whimsical clauses' the defender urged 'that there was nothing irrational or inextricable at present in the circumstances attending this trust, and if a situation should eventually occur where the trust should become inextricable it would then be time enough to declare it void;' 'and the Lords repelled the reasons of reduction.' The subsequent history of that trust is recounted by the Lord Ordinary (Cunninghame) in *Mason* v. *Skinner*, 1844, 16 Scot. Jur. 422. The trust appears after a time to have become unworkable, and was terminated by a second action of reduction about twenty years later than the decision in the Dictionary. In *Mason* v. *Skinner* the deed there under consideration seems to have been very properly reduced, because Mr Lindsay, C.A., had reported to the Court 'that it will not be practicable to carry at all into effect any of the beneficial purposes of the trust.' Lord Jeffrey said—'It is no doubt a delicate task to reduce or disallow a testament which is intelligible, on the ground that people on reading it hold up their hands in astonishment at its absurdity, if it is not *contra bonos mores*. But if it terminates in results not contemplated by the testator or not recognised by law the Court is not bound to go on with it in the meantime.' Assuming that the settlement under discussion is of the class indicated in the first of the sentences quoted, I do not think that either of the cases supposed in the second sentence can be said to have here arisen. I do not think that I need decide whether or not the subject under discussion is a 'charitable' bequest, nor discuss the various views which have been judicially expressed as to the scope and meaning of that adjective—*Baird's Trustees*, 15 R. 682; *Pemsel*, 1891, A.C. 531; *Blair*, 4 Fr. (H.L.) 1. In *M'Lean's Trustees*, 7 R. 601, and in *Milne's Executors*, 7 F. 642, the majority of the Judges proceeded apart from that ground. But I am disposed to think that we are here in the region of charitable bequest, as defined and illustrated by the various cases in the books —*e.g.*, *Magistrates of Dundee*, 3 Macq. 134. Upon the whole matter, for the reasons which I have stated, I am not prepared to hold this settlement and codicil to be, under existing circumstances, void from uncertainty or otherwise ineffectual in law.

"It remains to decide whether by these documents the whole of the truster's estate is dealt with and disposed of, or whether, as the pursuer alternatively contends, the moveable estate, and also the heritable property known as the Gas Works, are excluded from their scope. My opinion upon a construction of the words used is in favour of the former and against the latter of these views. The testator states at the outset his resolution to settle his affairs so as to prevent disputes after his death 'in regard to the succession to my moveable means and real estate.' By the first purpose his debts, &c., are to be paid 'from the accumulations of the yearly income of the trust.' The factor is appointed 'over all my estate, both moveable and real.' Then follow the words—'The purpose of the trust is that my heritable property be not sold, but let to tenants, and the clear revenue or income be used,' &c. I think that the 'revenue or income' must be that of the whole estate, and that it is not legitimate to read in such words as 'of my heritable property' after the word 'income.' Similarly the word 'estate' must, in my judgment, mean the whole estate. Nor do I think that power to the trustees to sell the Gasworks property excludes it, or its proceeds if sold, from the operation of the trust. In my opinion, therefore, the defender's fourth plea-in-law is well founded.

"Looking to the views which I have expressed in regard to the validity and effect of the settlement of 1900 and codicil of 1902, it is unnecessary for me to consider or to state any opinion in regard to the earlier testamentary writings of Mr M'Caig, which are set out in the print."

The pursuer reclaimed.

After the commencement of the hearing in the Inner House the following minute was lodged for the pursuer—"Brown, for the pursuer, craved leave to amend the record by adding, after the first plea-in-law for the pursuer, the following additional pleas-in-law, viz., (2) In respect the said settlement of 20th January 1900, and codicil of 18th February 1902, make no beneficial disposal of the estate of the deceased John Stuart M'Caig except so far as regards the direction for payment of annuities, they are ineffectual to exclude the rights of the pursuer as his sole heir in heritage and moveables. (3) In respect the provisions of the said settlement of 20th January 1900, and codicil of 18th February 1902, relative to the erecting and building of monuments, statues, and towers, are not valid or effectual to exclude the rights of the pursuer in the estates of the deceased John Stuart M'Caig as his sole heir in heritage and moveables, the pursuer is entitled to decree in terms of the first conclusion of the summons."

Argued for the pursuer and reclaimer—There was no valid bequest of anything except the annuities. In order to disinherit the heir it was necessary to give the estate to someone else. A mere negative deed could not disinherit the heir—*Cowan* v. *Cowan*, March 19, 1887, 14 R. 670, 24 S.L.R. 469; *Gardner* v. *Ogilvie*, November 25, 1857, 20 D. 105; *Neilson* v. *Stewart*, February 3, 1860, 22 D. 646. A beneficiary having the sole interest was entitled to neglect a trust for administrative purposes—Lewin on Trusts, p. 864; *Miller's Trustees* v. *Miller*, December 19, 1890, 18 R. 301, 28 S.L.R. 236. And the same rule applied to the heir where the property was not given to anyone else. There was no person who

had an interest to insist on the purposes of the trust being carried out, for it conferred benefit on no individual, nor on the public, and consequently there was no room even for an *actio popularis*, as contemplated by Lord Watson in *Andrews and Others* v. *Ewart's Trustees*, June 29, 1886, 13 R. (H.L.) 69, at 73, 23 S.L.R. 822. Any benefit that might accrue to "young and rising artists," or to Scottish art, was not a primary object of the trust, but a mere incident thereof. The cases referred to by the Lord Ordinary in his opinion were charitable bequests, and these had been recognised in Scotland as well as in England as being in a preferable position—*Grimond or Macintyre* v. *Grimond's Trustees*, March 6, 1905, 7 F. (H.L.) 90, 41 S.L.R. 225, and 42 S.L.R. 466; *Burn* v. *Duncan*, December 17, 1901, 4 F. (H.L.) 1, 39 S.L.R. 212. This trust was in no sense charitable; it was not educational, and the artists need not be "poor and struggling," hence it was to be distinguished from such cases as *Milne's Executors* v. *Aberdeen University Court*, May 16, 1905, 7 Fr. 642, 42 S.L.R. 533. Assuming there was someone who had an interest to enforce the purposes of the trust, they were too vague to be capable of being carried out; it was impossible to discover what would be a breach of trust. Thus there was no maximum limit to the cost of the statues, which might apparently be of gold, and the terms "artistic towers," "young and rising artists," "prominent places" were too vague to be interpreted. The purposes of the trust were contrary to public policy. In any event, only the income of the heritable estate was dealt with, "clear revenue" referring only to the heritable estate. The moveables and the gasworks were undisposed of.

Argued for the defenders and respondents —A disposition of the whole estate to trustees, if the purposes were sufficiently definitely stated, was a positive disinherison of the heir. The objection that there was here no person who could enforce the will was an objection which would apply to every case in which the selection of the objects was left to the trustees, as where beneficiaries were defined only by locality. But in *M'Lean* v. *Henderson's Trustees*, February 24, 1880, 7 R. 601, 17 S.L.R. 457, a bequest was upheld for the pursuit and science of phrenology, and yet no one would have had a title to compel the trustees to carry out the trust. An instance of a bequest in very wide terms was *Whicker* v. *Hume*, July 16, 1858, 7 Clark's H.L. Cases, 124. The trust purposes did not merely involve administration of the trust estate. It was simply an accident that the buildings were to be on the estate, and this could not affect the character of the trust. The application of the funds was to be in perpetuity; there was not in Scotland any law against this—M'Laren on Wills, section 564, page 304; *Suttie* v. *Suttie's Trustees*, June 12, 1846, 18 Sc.J. 442—and though the trust purposes might eventually become incapable of further fulfilment, it was not the practice of the Court to anticipate *ab ante* the failure of a trust—*Macnair* v. *Macnair*, May 18, 1791, M. 16,210—the sequel to which was to be found in *Mason* v. *Skinner*, 6th March 1844, 16 Sc.J. 422. The purposes of the trust were sufficiently defined, and cases dealing with charitable bequests were not inapplicable, for, apart from the fact that the Court might be more disposed to regard such cases as sufficiently definite, there was no special sanctity about them—*Commissioners for Special Purposes of Income Tax* v. *Pemsel* [1891] A.C. 531, Lord Watson's opinion at p. 560, which was quoted with approval by Lord Robertson in *Blair* v. *Duncan*, December 17, 1901, 4 F. (H.L.) 1, at p. 6, 39 S.L.R. 212. "Young and rising artists" was not more indefinite than "poor and struggling youths of merit," which had been held not to be void from uncertainty in *Milne's Executors* (*cit. supra*). Even if parts of the deeds were unintelligible, these must simply be held *pro non scriptis*—Ersk. Inst., iii, 9, 14. Reference was also made to *Grant* v. *M'Queen and Another*, May 23, 1877, 4 R. 734, 14 S.L.R. 478; *Hutchinson's Trustees* v. *Young*, October 29, 1903, 6 F. 26, 41 S.L.R. 14.

At advising—

LORD JUSTICE-CLERK —In this case the heir in heritage of the late Mr M'Caig of Oban seeks to establish her rights as such, notwithstanding of the fact that he has made a testament in favour of trustees, and has directed them to hold his estate and to apply the proceeds in doing certain things on the estate. She does not impugn the deed on the ground of mental incapacity. She attacks it on the ground that it does not give any disposal of the estate for the benefit of any person or class of persons, and is in no better position to exclude her than if it had simply disinherited her without putting anyone in her place, which it is plain would not have invalidated her right as heir.

Now, what was it that Mr M'Caig expressed in the deed? What was his desire and intention? He seems to have been possessed of an inordinate vanity as regards himself and his relatives, so extreme as to amount almost to a moral disease, though quite consistent with sanity. Accordingly his desire was that towers—artistic towers he calls them—similar to one which he had during life erected on his property overlooking Oban, should be built on all prominent places, and that his own likeness, and that of his brothers and sisters, should be perpetuated in colossal statuary in stone or bronze placed on these towers. That was the only real purpose to be served by the establishment of the trust. It was no gift to anyone. It was solely a scheme for putting up so much stone building and statuary and nothing else. Up to this point therefore there was no beneficiary for whom he disinherited his heir. It could hardly be held that these towers and statues could be a benefit to Oban, although I do not doubt that he thought so, but certainly no beneficial enjoyment could result to anyone.

Thus in its main purpose the deed of the late Mr M'Caig was intended to cause the

revenues of his lands to be applied in all time coming to tower building and statue making without any purpose beyond of any kind. If there was nothing more than this in the deed I should have no hesitation in holding that no effectual taking of the right to the property out of the heir had taken place. Even if the purpose could be described as a distinct and definite purpose, there would be absolute vagueness if not absolute darkness, as to what beneficial interest was being conferred on anyone by the exclusion of the heir. Nor is there any purpose which can be held to have any definite outcome. The trust is one which cannot be carried out as directed to the end of time. A day must come when the trustees could no longer do anything under the trust notwithstanding that it is perpetual for all time coming, and when they could make no answer to the then heir should he demand that the lands with their towers and statues should be made over to him. In such circumstances can it be said that the testator has successfully shut the present heir out of her rights. Where is the beneficial interest the trustees are required to protect? Where is the beneficiary that is preferred to her?

The suggestion is made that this bequest falls under the category of "charitable," because the testator wishes that the designing of the statues, &c., is to be made matter of competition among "young and rising artists," and that prizes are to be given to competitors. But I am unable to see in what way it can be held that this is charity. It is quite a common thing to stimulate competition in designs for buildings by giving a premium to competitors who may fail to be chosen for the work. But that is not charity. It is an inducement held out to persuade men to spend their thought and their time in making designs, and so supplying the person wishing to get good designs to choose from—designs which are the fruit of earnest labour. But the mere fact that some pecuniary reward is to be given does not in the least constitute such employees or selected competitors beneficiaries under the trust. The direct purpose of their employment is to obtain good designs to carry out the true purpose, viz., the building of the artistic towers or the provision of artistic statues of the M'Caigs, if that be possible.

It cannot be suggested for a moment that any young or rising artists would have a title to come forward as beneficiaries and require the trustees to give them an opportunity of competing for prizes. It is not an educational trust in any sense like the trust in *Whistler's* case, and it is only if it can be called educational that I think that in this case it can he called charitable. The trustees are not to take in hand any work of education. They are only to select artists to compete for prizes in order to get designs for carrying out the artistic towers and statues. In that there is, as I think, nothing either educational or charitable. They are simply to allow a competition, and to give prizes to those whose work they approve of. They select artists and ask them for designs, and reward those who furnish good ones. How that by any stretch of reason can be called charitable or educational I cannot conceive.

I do not think that in setting aside this deed as not substituting any beneficiary in place of the heir the Court will be in any way narrowing the powers of a testator to deal with his estate as he will. A testator who desires to confer a benefit on an individual or a class can have no difficulty in doing so. But in this case I cannot hold that this has been done by this eccentric testator, and I am of opinion that the heir is entitled to prevail.

LORD KYLLACHY—In the view which I take of this case it does not appear to me that we are called upon to decide, at the present time, any question except this: Whether the pursuer is entitled to have it declared in terms of the first part of the first conclusion of the summons that, except as therein mentioned, the trust-settlement and codicil of 20th January 1901 and 18th February 1902 are ineffectual to dispose of the estate and effects of the deceased John M'Caig. There are alternative conclusions which ask declarations of a more limited character. And there are also questions which may remain behind with respect to the efficacy of certain earlier writings of the deceased—questions which may come up for determination afterwards. But the primary declarator, if affirmed, supersedes all that follows; and as regards the earlier writings I do not myself see how, in the first place, the writing of 19th June 1893 raises really any separate question; or, in the next place, how as regards the two earliest writings —those of 1883 and 1891—we could dispense with at least some inquiry; or even apart from that, how the pursuer could be allowed to try the question arising upon those writings between herself as an individual and herself as sole trustee and executor under them. It will be observed that in this part of the case the pursuer in her official capacity is the only person called as defender.

With regard, however, to the primary declaration—to which I should perhaps note the pursuer's counsel invited us to confine our attention at this stage—I am of opinion that we may and ought to affirm it; doing so substantially on the leading ground maintained by the pursuer's counsel in argument, viz., this, that the trust-deed before us does not, except to the extent mentioned, divest the truster's heir but leaves her (*i.e.*, the pursuer) still in the beneficial ownership of the estate heritable and moveable; doing so in respect that it (the trust-deed) creates no beneficial interest in any third person or body of persons, even including in the latter category the general public.

I do not propose to express any final opinion upon the pursuer's contention that the purposes of the trust are void from uncertainty. As at present advised, I think

that would be a difficult proposition. For while there are undoubtedly some points in the deed which present difficulties of construction, and others upon which the truster leaves a perhaps unusual latitude to his trustees, I am not—at least as at present advised—satisfied that the testator's intentions—whatever their character otherwise—are unascertainable—that is to say, incapable (if effectual otherwise) of being gathered and carried out either wholly or to a substantial extent.

Neither do I find it necessary to rest my opinion upon what is perhaps a wider ground than that above indicated, viz., this, that the trust purposes (except as aforesaid) are void as being contrary to public policy. I have, I confess, much sympathy with that argument. For I consider that if it is not unlawful it ought to be unlawful to dedicate by testamentary disposition for all time, or for a length of time, the whole income of a large estate —real and personal—to objects of no utility, private or public, objects which benefit nobody, and which have no other purpose or use than that of perpetuating at great cost and in an absurd manner the idiosyncrasies of an eccentric testator. I doubt much whether a bequest of that character is a lawful exercise of the *testamenti factio.* Indeed I suppose it would be hardly contended to be so if the purposes, say of the trust here, were to be slightly varied and the trustees were, for instance, directed to lay the truster's estate waste and to keep it so; or to turn the income of the estate into money and throw the money yearly into the sea; or to expend the income in annual or monthly funeral services in the testator's memory; or to expend it in discharging from prominent points upon the estate, salvoes of artillery upon the birthdays of the testator and his brothers and sisters. Such purposes would hardly, I think, be alleged to be consistent with public policy, and I am by no means satisfied that the purposes which we have here before us are in a better position. Still, it seems to me that the pursuer is perhaps on safer ground when she appeals not to considerations of public policy but to the definite rule of law already referred to, a rule perhaps ultimately founded on public policy, but also and perhaps primarily on considerations as to what is right and just as between the varied interests in a deceased's succession. Accordingly I prefer to rest my judgment upon the doctrine which I have expressed —a doctrine which, whatever questions may arise as to its application, is itself elementary, and rests upon the cardinal principle that by the law of Scotland there can be no divestiture of a man's heirs or next-of-kin except by means of beneficial rights validly constituted in favour of third parties. Authorities are perhaps superfluous, but reference may be made to Bell's Principles, secs. 1682, 1691, 1692, *Ross* v. *Ross,* M. 5019, and to the cases of *Gardiner, Neilson,* and *Cowan* mentioned in the Lord Ordinary's note.

Taking then the question to be whether any beneficial interests are by this deed created in favour of third parties, what are the interests which are said to be so created? and who are the persons or classes of persons said to be benefitted? I put that question to the defender's counsel at the close of the argument, and the only answer I obtained was a reference to the direction in the settlement that the making of the statues or monuments was to be given to Scotch sculptors, and that in order to encourage "young and rising artists" there should, before building the proposed statues and artistic towers, be prizes given for the best plans of the said statues, towers, &c. In short, the suggestion seemed to be, and it was really the only suggestion offered, that in respect not of the directed employment of Scotch sculptors (for that would perhaps have been too extreme) but of the incidental benefits arising to Scottish Art and Scottish artists from the institution of prizes for plans of the artistic towers, &c., the bequest was really elevated into the category of an educational or charitable bequest, being practically in the same position as if the direction had been to apply the testator's estate in endowing say an Art School in Oban or elsewhere in Scotland.

Now, it must be confessed to be a somewhat difficult proposition that the expenditure of several thousand pounds a-year upon the erection of artistic towers or other purposeless structures upon a remote Highland estate can be defended upon the ground that incidentally it will or may include a beneficial expenditure in the shape of prizes to be offered from time to time in connection with the designs for the work. If the cost of the designs represents the whole extent to which the expenditure is said to be for the endowment of art, it may, perhaps, be observed that the prizes can be bestowed without the erection of the artistic towers, and that the pursuer, if she were once assured that her estate was to be freed from the artistic towers, would not probably have much difficulty in accepting the burden of the prizes—all the more as that burden is not perhaps likely to prove onerous unless the young and rising artists designated have different ideas of their profession, and are less sensitive to public ridicule than is generally supposed. Apart, however, from all this, and treating the matter as far as possible seriously, it seems to me to be a sufficient answer that if a trust purpose is of such a character that if when executed it will benefit nobody, it cannot affect the legal result that in the course of executing the trust there will or may be some employment of labour, or the receipt of wages or salaries by deserving persons. An administrative trust, as we know, cannot be maintained against the will of an unlimited fiar, and it would not, I suppose, be contended that in that case it would affect the result that somebody had been named by the deed as factor or law-agent, still less that certain employees were to be selected from some professional class. And if that be so, it seems to me to be equally difficult to suggest that the trustees here, if otherwise bound to denude, can resist doing so

by reference to the incidental interests of Scottish sculptors or of young and rising artists, or even (what would be perhaps more to the point) of the respectable gentleman whom they are desired to appoint as factor and law-agent to the estate.

I may add two observations which perhaps express merely different forms of the same argument.

In the first place, the trust here and the directed expenditure is in terms made perpetual. But, plainly, it cannot go on for ever, or, indeed, for a very long time. The number of statues is limited, and the multiplication of artistic towers must sooner or later satisfy any reasonable view of the trustees' duty. In that case it was not disputed that the heir (*i.e.*, the pursuer) or those in her right would be entitled to step in. In other words the heir's enjoyment of her radical right is at best only postponed, and (subject to that postponement) her right is in itself indefeasible. But if that be so, what, it may be asked, is to prevent her stepping in now, and on the principle of the case of *Miller's Trustees*, and similar cases, claiming immediate possession, and the stoppage of operations on her estate which she does not desire, and in which no other person public or private has any stateable interest?

The other observation is this. It has been sometimes said that the test of the efficacy of a trust like the present is to inquire whether there is anybody who could enforce its performance; and there can be no doubt that that is a true proposition (indeed really a truism), provided it be kept in mind that as regards trusts for charitable or educational purposes, or other purposes of public benefit, there may always be the intervention, if of nobody else, of the Crown. But if that be so, who, it may be asked, would have a title to enforce as against the trustees or the truster's heir the carrying out of the trust purposes here in question? Or (to put the same question in a perhaps simpler form), supposing the trust-disposition here had been in favour of the pursuer (the truster's heir), but burdened (like a Roman *fidei commissum*) with an obligation to do the things which are here in controversy, could anybody prevent the heir ignoring the disposition and the obligations attaching to it, and making up her title and possessing as heir *alioqui successurus?* It appears to me that that question would fall to be answered in the negative; and I do not see that the present case presents any material difference. It is perhaps unnecessary to add that I hope it may not be supposed (should your Lordships take my view of the matter) that we should be deciding anything against the validity of a testamentary disposition directed to the providing on a customary and rational scale a burial-place for a testator or a suitable monument to his memory. Neither do I at least desire to decide anything against the validity of testamentary trusts for the erection in suitable situations of memorials to historical personages, or to commemorate historical events. Such things may have an educational value and be a public benefit; as would perhaps also be expenditure in the same or other directions for beautifying or embellishing a town or neighbourhood. But it has not been, nor I am afraid could be, suggested that we have anything of that kind here.

On the whole matter I am of opinion that we should, as already said, decern in terms of the first part of the first declaratory conclusion, and *quoad ultra* sist and continue the cause for further procedure.

LORD STORMONTH DARLING—With much in the Lord Ordinary's opinion I entirely agree, particularly where he speaks of the favour which has always been shown to wills the provisions of which are expressed with sufficient clearness and are not contrary to public policy or morals. I acknowledge also that this action has to be dealt with as not one for the reduction of these writings on the ground of testamentary incapacity but as based upon the assumption that the testator was of sound disposing mind.

But where I think the Lord Ordinary has erred has been in rejecting what he calls the "broad and bold position" taken up by the pursuer's counsel as the first ground of her attack on this will. That position simply is that a proprietor of Scottish heritage cannot deprive his heir by mere words of disinherison (Bell's P. 682), or as put by Lord Curriehill in *Gardner* v. *Ogilvie* (1857), 20 D. at p. 109—"An heir-at-law's right to succeed to his ancestor's heritage cannot be defeated except by a conveyance thereof granted by that ancestor while in *liege poustie* in favour of a third party." That statement of the law, which was described by Lord Curriehill as "a radical principle in the statute law of succession about which there is not and cannot be any dispute," was thus amplified by Lord Neaves in *Neilson* v. *Stewart* (1860), 22 D. at p. 650—"The law upon the several questions here involved appears to the Lord Ordinary to admit of no serious doubt. An heir cannot in this country be excluded from his right of succession by the mere will or intention of his predecessor, or by writings of a merely negative character. He cannot be disinherited by words to that effect, or by a simple declaration of a testator that his heritable estate is to be held as moveable. The heir may be excluded *mortis causa* in two ways, but, generally speaking, in two ways only—1st, by a disposition in *liege poustie* in favour of a third party; and 2nd, by a trust-disposition in *liege poustie*, accompanied or followed by a direction as to the beneficial disposal of the heritage, also made in *liege poustie*."

In this last quotation I emphasise the words "beneficial disposal" where there is a trust, for that expression obviously means a disposal for the out-and-out benefit of some individual or class of individuals, as distinguished from the mere indirect benefit which might be said to arise from a direction to build, say, a mansion-house without any direction as to the person for whose occupation and enjoyment it is to be built

and for whom it is to be held by the trustees. If so, it is impossible to regard in the present case the "Scotch sculptors" who are to be employed by Mr M'Caig's trustees in the making of these family statues, or the "young and rising artists" to whom prizes are to be given for the best plans of the proposed statues and towers, as at all coming up to the position of beneficiaries of the trust, in the sense of the rule as explained by Lord Neaves. Every trust which is created for the purpose of spending money upon anything, irrespective altogether of the nature of the purpose, must incidentally benefit somebody, such as servants, workmen, professional men and the like, and none the less that they give value for the money which they receive—value, that is to say, in the shape of services rendered or skill employed. But in the ordinary use of language such persons are not described as beneficiaries of the trust, or as persons for whom the heritage is held by the trustees.

For what purpose, then, is this considerable landed estate to be withdrawn from commerce and its revenues accumulated in all time coming so that it shall never be in the beneficial enjoyment of anybody? For the erection of ten large statues representing the members of a private family connected with Oban, and for the building of what the testator calls "artistic towers" on prominent points of the estate. I agree with the Lord Ordinary that it is not impossible to make out what the testator was driving at in these rather crazy directions, and that it would be difficult to hold them void from vagueness or uncertainty. I also agree with him that at some more or less distant date the directions may become unworkable and incapable of further extrication. And he is of opinion that if that should happen the pursuer or those in her right would be entitled to come to this Court, and might under the altered circumstances succeed in obtaining a judgment to which, as matters now stand, she is not entitled. But in saying so I think that his Lordship misapprehends the real nature of her objection. Her real objection is not, as it seems to me, based on the vagueness or uncertainty of the testator's directions, but on the ground that the testator has failed to oust her, as his heir-at-law, by substituting somebody else, whether a person or a class of persons, to take the beneficial interest in his heritage. If that be so, why should she wait till the purposes have for any reason failed? I can understand why the heir should be expected to wait if the immediate purposes are such as to oust him or her effectually in the meantime. This might happen if the immediate purposes could properly be described as "charitable," or even perhaps of public utility. But the Lord Ordinary hesitates to describe this bequest as charitable, and merely says that he is "disposed to think" that it is "in the region" of charitable bequest. Even to that modified extent I demur to his Lordship's suggestion, at least if it means that the "bequest" is to be treated as a beneficial bequest to anybody, and is to receive the benignant construction appropriate to charitable bequests.

One way of testing the real nature of the trust purposes is to ask, who would have any title or interest to enforce them? Not the pursuer, for although she is the last survivor and representative of the family which is to be handed down to posterity in stone or bronze, she naturally disclaims any wish to have them made ridiculous in this manner. Can it be suggested that any member of the public merely as such would have the right? And if not, could any "young and rising artist" come forward with a claim founded on the hope that he would win a prize if prizes were offered for the best designs of the statues and towers? Or would he be in any better position than a quarrymaster or a mason who insisted that he should have the opportunity of tendering for the erection of the statues and towers? To each and all of these persons I apprehend that the answer of the law would be—"You are not a beneficiary for whom this trust was called into being."

On the short ground therefore that this is an attempt on the part of a testator to disinherit his heir without giving any directions to his trustees for the beneficial disposal of his heritage, I agree as to the manner in which your Lordships propose to deal with the case. The rule of law, as it seems to me, is much more than a merely formal one, or one framed merely in the interests of heirs-at-law. It is very easy to exclude their rights without at all affecting the legitimate freedom of testators. But it is really in the interests of public policy that testators should not be allowed to exclude their heirs-at-law unless they take the trouble to provide some beneficial substitute.

LORD LOW—It is plain, I think, that by the holograph settlement in question the testator did not authorise his trustees to devote any part of the *corpus* or capital of the trust estate to the purposes of the trust, but only the income, and that, too, to a limited extent. He first says that the purpose of the trust is to pay all my legal debts and deathbed expenses; these debts are to be paid from the accumulations of the yearly income of the trust after the expenses of the management is paid. The yearly income thus referred to includes, I think, the income of the whole trust estate, whether heritable or moveable. The settlement then proceeds—"The purpose of the trust is that my heritable property be not sold but let to tenants, and the clear revenue or income be used for the purpose of erecting" certain monuments, statues, and towers. For that purpose, therefore, the trustees are only authorised to use the free income of the heritable estate, which is not to be sold.

Except in so far as the trustees are authorised to expend income by the two clauses in the settlement which I have quoted, neither the income of the trust-estate nor the *corpus* of the heritable

estate, nor the moveable estate, are in any way disposed of.

Now it is settled law that to disinherit the heir-at-law or to defeat the rights of the executor it is necessary that the estate should be given to some other person. That not having been done in this case, the beneficial right to the heritable and moveable estates respectively passed to the heir-at-law and the executor at the testator's death. The pursuer represents both the heir-at-law and the executor, and the question is whether she can object to the purposes to which the trustees are directed to apply the free income of the heritable estate being carried out, and demand immediate conveyance and payment of the whole estate, heritable and moveable.

So far as the moveable estate is concerned, I think that (leaving out of view in the meantime the question which is raised in regard to earlier settlements made by the testator) there is no answer to the pursuer's claim, because, except for the purpose of paying the debts and deathbed expenses of the testator, neither the income nor the capital of the moveable estate is in any way disposed of, nor are the trustees authorised to use or expend either the one or the other. Perhaps the same remark applies to what the testator calls "the property of the gasworks," which the trustees are authorised to sell, and which the testator refers to as not being part of the "unsaleable estate," by which he plainly means the heritable estate, which is not to be sold, and the revenue of which is to be applied in erecting statues and towers.

In regard to the latter estate the question is more difficult. The purposes to which the testator directed his trustees to apply the free income of that estate, although whimsical and of no utility, are perfectly lawful, and cannot, I think, be regarded as contrary to public policy. But then there is no human being and no public body who have an interest to require the trustees to carry out these purposes, while, upon the other hand, the heir-at-law has a very material interest to object to the estate, which is hers, being withheld from her for an indefinite period to allow of a number of statues and towers, which when completed will benefit no one, being erected on the land. I did not understand it to be seriously disputed that (assuming the trust purposes to be carried out) when the trustees had erected such statues and so many towers as, in their opinion, were required to carry out the testator's wishes, they would, there being no trust for maintainance, be bound to convey the estate to the heir-at-law. But upon that being done the heir would be perfectly entitled to throw down the statues and demolish the towers, and that being so, I think that the pursuer is entitled to object to the statues and towers being erected at all, because she has an interest to object and no one has an interest to insist.

It was argued, however, that the trust was, at all events to a sufficient extent to make it impossible for the Court to prevent the carrying out of the trust purposes, a charitable bequest. That argument is founded upon a direction which the testator gives that "the making of these statues is to be given to Scotch sculptors," and the statement that his "wish and desire is to encourage young and rising artists, and for that purpose prizes to be given for the best plans of the proposed statues, towers, &c., before building them."

I doubt very much whether that can be regarded as a charitable purpose at all, but, however that may be, I think that it is clear that the trust cannot be regarded as one for charitable purposes. The object of the trust was to perpetuate the memory of the M'Caig family and of the testator in particular, and his desire to encourage young and rising artists was entirely subsidiary to that leading purpose. It seems to me to have amounted to no more than this, that as statues and towers were to be erected at anyrate, it was desirable to take advantage of the opportunity thereby afforded of encouraging young and rising artists. If the testator had been told that his idea of erecting statues and towers could not be carried out, there is no reason to suppose that he would have devoted his means to any such purpose.

I therefore agree with your Lordships that decree should be pronounced in terms of the first part of the first conclusion, which will leave the questions which are raised upon the earlier settlements of Mr M'Caig to be determined in an appropriate action.

The Court pronounced these interlocutors:—

"The Lords open up the record and allow the minute of amendment to be received, and the amendment having been made of new close the record."

"The Lords having heard counsel for the parties on the reclaiming note for the pursuer against the interlocutor of Lord Dundas, dated 6th December 1905, Recal the said interlocutor reclaimed against: Find and declare in terms of the first part of the first declaratory conclusion of the summons to the effect that the holograph testamentary settlement of the deceased John Stuart M'Caig of Muckairn, Soroba, and Oban, Argyllshire, dated 20th January 1900, and relative codicil of 18th February 1902, are not valid and effectual to dispose of the free estates and effects, heritable and moveable, of the said John Stuart M'Caig after payment of his debts and deathbed expenses, except so far as regards the directions contained in the said codicil for payment to such of his brothers and sisters as should survive him during their lives of £300 per annum, and decern: *Quoad ultra* sist process meantime and continue the cause: Find all the compearing parties entitled to their expenses as between agent and client out of the trust estate of said John Stuart M'Caig, and remit," &c.

Counsel for the Pursuer (Reclaimer)—Campbell, K.C.—Cullen, K.C.—A. R. Brown. Agents—Alex. Morison & Company, W.S.

Counsel for the Defenders (Respondents)—Dickson, K.C. — Macmillan. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Tuesday, December 18.

SECOND DIVISION.

[Lord Ardwall, Ordinary.

AKTIESELSKABET "HEIMDAL" *v.* NOBLE.

Ship—Charter-Party—Construction—One Continuous or Two Separate Voyages—Limitation of Total Hire—Casus Improvisus—Provision that Hire shall not Exceed Certain Sum "until" Return of Vessel—Vessel Never Returns—Provision Held to Limit Amount and not Merely Regulate Time of Payment.

A charter-party provided that the "Heimdal" should proceed to Peterhead, load, and "proceed to Kickerton Island and/or other stations in Cumberland Inlet as may be required and there discharge cargo at charterer's stations, and load produce . . . and proceed to Peterhead or Dundee . . . and deliver the same on being paid freight as follows:—£110 sterling per month for the use of the whole ship, the time to count from the day the ship is ready for loading at Peterhead . . . and to cease when the home cargo is discharged, but the total hire is not to exceed £450, including laid-up hire if any. . . . (The Act of God, the King's enemies, . . . during the said voyage always excepted.) . . . The freight to become due and be paid as follows, viz.—£55 sterling on arrival of vessel to load in Peterhead . . . and thereafter £55 half-monthly, . . . but payments not to exceed £220 until vessel returns to Scotland. . . . Time occupied in Cumberland Inlet in loading and discharging not to exceed four or five weeks." A marginal note provided that during disablement of the vessel the hire was to cease, but that the charterer was to take the risk of detention by ice, paying £55 monthly hire during the continuance.

Held (1) that the charter-party was a charter-party for one continuous voyage and not for two separate voyages, one out and one in; (2) that under no circumstances could the hire exceed £450 (as against the contention that the provision as to £450 could not apply to such a *casus improvisus* as a ten months' detention by ice); (3) that it was a condition-precedent to the payment of more than £220 that the vessel should have returned to Scotland (as against the contention that the provision as to £220 merely regulated the time and not the amounts of payment).

Ship — Charter-Party — Freight — Use of Vessel Outwith Charter-Party — Claim for Quantum Meruit—Relevancy.

Averments which were *held* irrelevant to support a claim made by the owners of an ice-bound vessel against the hirers for a *quantum meruit* for the use they had made of her as a warehouse for goods beyond the scope of the charter-party.

In this action Aktieselskabet "Heimdal," shipowners, Norway, registered owners of the schooner "Heimdal," sued Crawford Noble, merchant, Aberdeen, for the sum of £1176, 16s. 3d.

The defender in March 1904 had hired the "Heimdal" from the pursuers, the charter-party being in the following terms:—

"*Aberdeen, 21st March* 1904.

"It is this day mutually agreed between Johan Bryde, Esq., owner of the good ship or vessel called the "Heimdal," of Sandefjord, whereof is master, of the measurement of 220 d.w. *reg.* tons or thereabouts, *now* to be ready for loading at Peterhead between 5th July and 15th July 1904, but not later than 15th July, and Crawford Noble, Esq., of Aberdeen, affreighter, That the said ship being tight, staunch, and strong and every way fitted for the voyage, shall with all convenient speed sail and proceed to Peterhead or so near thereunto as she may safely get, and there load from the factors of the said affreighter a *full and complete* cargo of not exceeding 200 tons coals, provisions, &c., such cargo not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture, and being so loaded shall therewith proceed to Kickerton Island and/or other stations in Cumberland Inlet as may be required, and there discharge cargo at charterer's stations and load produce (not exceeding 200 tons) and proceed to Peterhead or Dundee as ordered by charterer's agent or so near thereto as she may safely get, and deliver the same on being paid freight as follows:—£110—One hundred and ten pounds stg. per month for the use of the whole ship, the time to count from the day the ship is ready for loading at Peterhead (between 5th and 15th July 1904), and to cease when the home cargo is discharged, but the total hire is not to exceed £450 (four hundred and fifty pounds stg.), including laid-up hire if any. Ten pounds gratuity to the master *In full of all port charges and pilotage as customary* (The act of God, the King's enemies, strikes, fire, and all and every other dangers, and accidents of the seas, rivers, and navigation of whatever nature or kind soever during the said voyage always excepted). The ship or owners are not liable for any act, neglect, or default of the pilot, master, mariners, or other *servants* of the shipowners in navigating the ship. General average, if any, to be settled according to York and Antwerp Rules, 1890.

"The cargo to be brought to and taken from alongside the ship at merchant's risk