brothel only with aid, but he is none the less managing a brothel.

It appears to me that this is the weakest of all the cases that have been brought upon this ground. The charge is not a proper alternative at all, and it would be equally good if it simply libelled "managed" and the accused aided one another in managing the brothel. That was the charge against them, and of that charge they were properly found guilty.

I am of opinion that this bill ought to be refused.

LORD MACKENZIE—I am of the same opinion. I do not think that there is a proper alternative charge here. I am of opinion that managing or assisting in managing are not exclusive of one another.

LORD HUNTER—I concur.

The Court refused the bill.

Counsel for the Complainers—Macphail, K.C. — Maclaren. Agent — R. D. C. M'Kechnie, Solicitor.

Counsel for the Respondent—Lord Advocate (Clyde, K.C.)—Crawford. Agents—Campbell & Smith, S.S.C.

COURT OF SESSION.

Saturday, May 31.

SECOND DIVISION.

RENOUF'S TRUSTEES *v.* HAINING AND OTHERS.

Succession—Trust—Uncertainty—Bequest—"Preaching the Gospel of Jesus Christ my Lord among the Heathen"—"Foreign Lands."

A testator by his holograph general trust-disposition and settlement directed his trustees to pay out of the income of his estate "the salaries of two native missionaries chosen of them for preaching the gospel of Jesus Christ my Lord among the heathen; also that on the winding of my estate that the trustees make provision for these salaries to be continued to the societies they represent." The amount of the salaries was not stated. In subsequent provisions of his settlement he referred to the missionaries as "Christian native preachers" and to his scheme as "for preaching the gospel of Jesus Christ as already named for foreign lands."

Held (*dis.* Lord Salvesen) that the bequest was not void from uncertainty, in respect that the purpose of the bequest, the method of its execution, and the persons to be benefited by it were sufficiently defined.

Observations per Lord Dundas on the rule of law laid down by Lord Chancellor Lyndhurst in *Crichton* v. *Grierson*, 1828, 3 W. & S. 329.

Fee and Liferent—Conjunct Rights—Succession—Destination to "A and B jointly and to the Survivor of Them and his Heirs"—Destination to "A and B or the Survivor of Them and the Executors of such Survivor and to their or his Assignees whomsoever"—Predecease of A—Effect on Destinations of General Disposition by A.

The destination in a disposition of a superiority purchased by a wife was taken in favour of her husband and her son by a former marriage "jointly and to the survivor of them and his heirs." The son subsequently repaid her half the price. The destinations in four bonds and dispositions in security of moneys advanced by the wife were also taken by her in favour of her husband and the son "or the survivor of them and the executors of such survivor and to their or his assignees whomsoever." The husband predeceased the son, leaving a general disposition and settlement by which he disposed of his whole estate, and making the subject of express reference the superiority and three of the four bonds and dispositions in security. *Held* that the destinations in the disposition of superiority and in the bonds were not revoked by the testator's general settlement, and that in virtue of these destinations the fees thereof passed entirely to the son.

James Halliday Haining and another, the testamentary trustees of Frederick Mansell Renouf, of Royal Bank House, Hawick, *first parties;* the above-mentioned James Halliday Haining, who was a stepson of the testator, as an individual, *second party;* Orlando John Renouf and Alice Mary Renouf or Bricknell, a brother and sister of the testator, *third parties;* Albert James Renouf, a brother of the testator, *fourth party;* James Chapell and others, *fifth parties;* and Alice Chapell or Smith and others, *sixth parties*—the parties of the fifth and sixth part being nephews and nieces and residuary legatees of the testator—brought a Special Case to determine questions relating to the rights of the parties under the trust-disposition and settlement of Frederick Mansell Renouf.

By his general trust-disposition and settlement the testator conveyed to the trustees therein mentioned "all my means and estate, moveable or otherwise, of every kind and description wheresoever situated and belonging to me at my death or after my decease," for, *inter alia*, the following purposes—"2nd, I wish my trustees to pay out of the income of my estate the salaries of two native missionaries chosen of them, for preaching the gospel of Jesus Christ my Lord among the heathen: Also that on the winding of my estate that the trustees make provision for these salaries to be continued to the societies they represent." The testator further provided that in certain contingencies the trustees should have power to withdraw the shares of legatees "and put the money so withdrawn to the increase the amount already given to preach

the gospel of Jesus Christ by Christian native preachers." The testator further gave his trustees power in the event of legatees failing to claim their shares within a certain time "to use the said share or shares for preaching the gospel of Jesus Christ as already named for foreign lands."

The Case stated—"1. The said Frederick Mansell Renouf left estate of the value of £4465, inclusive of half of the properties and investments hereinafter mentioned. The gross income of the estate, inclusive as aforesaid, amounts to £211, 2s. 3d., subject to the deduction of expenses of administration and other outgoings. If the one-half of the properties and investments referred to is deducted, the value of the estate is about £2200, and the gross income thereof about £113. 5. The testator provided that the remainder of the income of his estate [after payment of the foregoing bequest] should be paid by his trustees to the parties of the third part (a brother and sister of the testator) in equal shares during their lifetime. 8. At the testator's death the following documents, *inter alia* (except the disposition No. 1 and the bonds Nos. 2, 3, and 4) were in the custody of the second party. The said disposition and said three bonds were in the custody of Messrs Haddon & Turnbull, solicitors, Hawick, who acted as agents both for Mr and Mrs Renouf and for the second party:—(1) Disposition of Salthall superiority by Mr John Wilson's trustees, recorded 6th December 1897, in favour of 'Frederick Mansell Renouf and James Halliday Haining jointly, and to the survivor of them and his heirs.' (2) Bond and disposition in security, dated 13th May and recorded 16th May 1899, for £165, over subjects 11 Dalkeith Place, Hawick, by George Telfer, payable to 'Frederick Mansell Renouf and James Halliday Haining, or the survivor of them, and the executors of such survivor, and to their or his assignees whomsoever,' the balance due thereon at testator's death being £150. (3) Bond and disposition in security, dated 25th May and recorded 28th May 1907, for £210, over subjects at 8 Ettrick Terrace, Hawick, by Robert Anderson, payable to 'Frederick Mansell Renouf and James Halliday Haining, or the survivor of them, and the executors of such survivor, and to their or his assignees whomsoever,' the balance due thereon at testator's death being £155, 12s. (4) Bond and disposition in security, dated 15th November and recorded 18th November 1902, for £200 over subjects at 7 Langholm Street, Newcastleton, by John Johnstone, payable to 'Frederick Mansell Renouf and James Halliday Haining, or the survivor of them, and the executors of such survivor, and to their or his assignees whomsoever.' (5) Bond and disposition in security, dated 15th May and recorded 22nd May 1908, for £700 over subjects 23 High Street, Hawick, by Miss Henrietta S. Robison, payable to 'Frederick Mansell Renouf and James Halliday Haining jointly, and the survivor of them, and their or his executors or assignees whomsoever,' the balance due thereon at testator's death being £450. . . . In all of the said documents it is stated that the money paid or invested was so paid or invested by the testator and the second party. In point of fact the money in each case was paid wholly by Mrs Agnes Robison Haining or Renouf out of her own funds, and the destinations in the deeds were inserted on her instructions; but the second party arranged with her to refund, and did refund, to her half of the price of Salthall superiority (No. 1). The said Mrs Agnes Robison Haining or Renouf, who was the mother of the second party by her first marriage, and the wife of the testator, died on 24th October 1911, leaving a disposition and settlement dated 25th October 1899, by which she bequeathed certain subjects to the second party and disponed her whole other means and estate to the said Frederick Mansell Renouf, and appointed him and the second party her executors. The said disposition and settlement contains no reference to the investments and subjects mentioned in this article. In all cases in which any part of the funds previously invested as above was repaid, the money was paid to the testator and the second party, and they granted a receipt for the same. . . . The parties are agreed that there is no evidence bearing on the questions submitted as to all the said investments except the terms of the said destinations, the facts herein set forth, and the testator's said general disposition and settlement. The parties are also agreed that one half of the sums contained in the said investments belongs to the second party, but a question has arisen whether the remaining half has passed under the testator's said general disposition and settlement to the first parties, or whether it now belongs to the second party in terms of the said destinations. 9. The said holograph general disposition and settlement of the testator contains a general conveyance of his whole estate to the trustees therein mentioned, and in the fourth purpose a direction to them after the death of the second party 'to call up all bonds and mortgages and to sell feus and stocks if necessary on division.' The third purpose provides that on the death of the said Orlando John Renouf and Alice Mary Renouf or Bricknell the trustees are to pay to the second party 'the income derived from the following bonds and feus—11 Dalkeith Place, 8 Ettrick Terrace, 18 Glebe View, and 6 Ladylaw Place, and feu from Salthaugh, all situated within the burgh of Hawick in the county of Roxburghshire, Scotland; likewise bond on 7 Langholm Place, Newcastleton, in the same county.' The said bond on 18 Glebe View and half of the property No. 6 Ladylaw Place belonged to the testator alone, the titles standing in his own name, and no question arises as to them in this case. (The said general disposition and settlement makes no reference to the bond and disposition in security by Miss Henrietta S. Robison for £700 in favour of the testator and the said James Halliday Haining) (No. 5)."

The *questions of law* were, *inter alia*—"(1) Is the provision in regard to the appointment of 'two native missionaries for preach-

ing the Gospel of Jesus Christ my Lord among the heathen' void from uncertainty? (3) Has the one half which belonged to the testator of the Salthall superiority and of the respective sums contained in the bonds and dispositions in security Nos. 2 to 5 (inclusive), mentioned in article 8, or any of them, passed (*a*) to the first parties in terms of the testator's said general disposition and settlement? or (*b*) to the second party in terms of the destinations in the disposition of the said superiority and in the said bonds and dispositions in security?"

At the debate in the Second Division it was made matter of admission between the parties that the testator was a domiciled Scotsman belonging to the Wesleyan Methodist body.

On the first question of law—Argued for the first parties—The bequest was not void from uncertainty. A bequest to foreign missions was good, in respect that it was a bequest to charities, and it applied to any of the activities of these bodies — *Allan's Executor* v. *Allan*, 1908 S.C. 807, 45 S.L.R. 579. The word "charity" was not restricted to relief from poverty but had a wider meaning both in English and Scots law—*Commissioners for Special Purposes of Income Tax* v. *Pemsel*, [1891] A.C. 531. A bequest to a limited class was not invalidated by the fact that it fell within the larger class "religious." *Allan's Executor* v. *Allan* was approved by the House of Lords in *Wordie's Trustees* v. *Wordie*, 1916 S.C. (H.L.) 126, *per* Lord Shaw at p. 130, 53 S.L.R. 291. But even if this bequest could not be described as a charitable purpose, it did not follow that it failed. The rule of Lord Chancellor Lyndhurst in *Crichton* v. *Grierson*, 1828, 3 W. & S. 329, showed that if the class was defined the bequest was valid, and the selection of recipients within the class could be left to the trustees—*Turnbull's Trustees* v. *Lord Advocate*, 1917 S.C. 591, 54 S.L.R. 501, in the House of Lords 55 S.L.R. 208. Charitable objects were admitted because they constituted a particular class susceptible of definition. Religious objects were excluded because they were not susceptible of definition—*Blair* v. *Duncan*, 1901, 4 F. (H.L.) 1, 39 S.L.R. 212; *Macintyre* v. *Grimond's Trustees*, 1905, 7 F. (H.L.) 90, 42 S.L.R. 466. In the cases referred to by Lord Chancellor Lyndhurst in *Crichton* v. *Grierson*, where the bequest had been sustained, were a a number of objects which could not be called charitable, *e.g.*, the testator's "blood relations," "poorest friends," &c. The word "heathen" similarly connoted a definite class. According to the Oxford Dictionary it meant "one who holds a religious belief which is neither Christian, Jewish, nor Mohammedan." "Native" meant natives of the country which was to be converted. The missionaries in question must be servants of some existing society which was carrying on its work by native teachers. The fact that the amount of the bequest was not given did not invalidate the bequest —*Macduff* v. *Spence's Trustees*, 1909 S.C. 178, 46 S.L.R. 135; *Adam's Trustees* v. *Adam and others*, 1908, 16 S.L.T. 144.

Argued for the third, fifth, and sixth parties—The provision as to native Christian missionaries was both too vague and too wide. It was so wide that it amounted to giving the trustees power to make a will for the testator. Further, the amount of the bequest was not mentioned. It was, further, not clear what societies were favoured, whether Scotch or not. Unless it could be established that this was a charitable bequest, it must be refused effect—*Allan's Executor* v. *Allan*, 1908 S.C. 807, *per* Lord Kinnear at p. 814, 45 S.L.R. 579. The law of Scotland as to charitable purposes had been laid down in *Baird's Trustees* v. *Lord Advocate*, 1885, 15 R. 682, 25 S.L.R. 533; *Blair* v. *Duncan*, 1901, 4 F. (H.L.) 1, 39 S.L.R. 212; and *Macintyre* v. *Grimond's Trustees*, 1904, 6 F. 285, at p. 293, 41 S.L.R. 225, 7 F. (H.L.) 90, 42 S.L.R. 466. The present case was the counterpart of *Macintyre* v. *Grimond's Trustees*, and was directly governed by it. The Oxford Dictionary definition of "heathen," even if accepted, was too wide to apply. Such a definition would include the most highly developed and cultured people of India, and would include a writer such as Tagore. But it was not authoritative. The original definition of "heathen" was still wider. This was the definition in the Gospels, which in the vernacular was ἐθνικος, and this was given in Liddell and Scott's Dictionary as meaning (1) national, and (2) as almost equivalent to βαρβαρος, *i.e.*, foreign gentile. In the German translation the word was similar to the English, viz., *heide*, and this meant pagan or gentile. There was no reason why it should not include non-religious in civilised countries. Foreign missions were not merely intellectual, but social and medical. In the present case the Court was dealing with the purely intellectual side, and these provisions were too wide to be applied.

On the third question of law — Argued for the first and third parties — The destinations in the bonds and dispositions in security and the disposition of the Salthall superiority had been evacuated by the general settlement — *Thoms* v. *Thoms*, 1868, 6 Macph. 704, *per* Lord Benholme and Lord Neaves at p. 723, Lord Kinloch at p. 728, and Lord Barcaple at p. 737, 5 S.L.R. 418. In *Campbell* v. *Campbell*, 1880, 7 R. (H.L.) 100, 17 S.L.R. 807, the case of *Thoms* was approved as accurately stating the law. The testator's settlement was a universal disposition, applying equally to heritage and moveables. The doctrine of *Campbell's* case had also been applied to moveables — *Buchan* v. *Porteous*, 1879, 7 R. 211, *per* Lord Gifford at p. 214, 17 S.L.R. 90. This rule of construction was based on the intention of the testator—*Connell's Trustees* v. *Connell's Trustees*, 1886, 13 R. 1175, 23 S.L.R. 857. The doctrine laid down in *Thoms* v. *Thoms, cit.*, and *Campbell* v. *Campbell, cit.*, had been applied in the most recent cases—*Perrett's Trustees* v. *Perrett*, 1909 S.C. 522, and *per* Lord Dunedin at p. 527, 46 S.L.R. 453, on the effect of a general disposition revoking a special destination not made by the testa-

tor himself—*Turnbull's Trustees* v. *Robertson*, 1911 S.C. 1288, 48 S.L.R. 1033; *Henderson's Trustees, Petitioners*, 1911 S.C. 525, 48 S.L.R. 424. There was nothing in the terms of the destination to prevent the testator exercising this power. If it could be shown that in any one instance the terms were contractual the result might be otherwise, but that was not the case. The argument on behalf of the second party confused the effect of the destination if left to itself and how far it could be affected by the debts or deeds of parties interested. All the cases founded on by the second party included an element of contract. In the present case that could not be said except possibly in the case of Salthall. In *Riddels* v. *Scott*, 1747, Mor. 4203, *cit. sup.*, the destination was very special, and it was difficult to make out from the report the precise ground of decision. In *Bisset* v. *Walker*, Mor. Deathbed, App. No. 2, the destination was to two sisters and the longest liver, the sisters providing the funds. In *Brown* v. *Advocate-General*, 1852, 1 Macq. 79, the destination was fortified by a clause of warrandice, and was also clearly a case of contract. In *Burrowes* v. *M'Farquhar's Trustees*, 1842, 4 D. 1484, the real point was as to the effect of a special destination made by the same person as made the general settlement. This case fell into the very limited class of conjunct fee and liferent to husband and wife, the husband providing the funds. In *Perrett's Trustees, cit.*, contract was inferred from the fact that each of the parties contributed one half. The case was quite different where A made a destination to B and C equally. That was not contract. Destinations of this character depended so much on the exact words used that it was very difficult to extend a decision in one case to another where the destination was only slightly different. The whole foundation of the second party's argument under this head was in Erskine, iii, 8, 35, which dealt with a destination to A and B jointly and the survivor. This, however, could not be used to interpret a destination to A and B without the word "jointly" and the survivor. Further, it did not mean that one of the joint holders could not innovate gratuitously on his share. It was anomalous that he could convey it to his creditors and not by his will. What the passage in Erskine really meant was that if the destination was unrecalled the property passed as stated by Erskine. The passage from Bell's Commentaries (M'Laren's ed.), p. 62, founded on by the second party, was really in favour of the trustees' contention. The inference therefore, was, that apart from contract there was no limitation on the right of the disponee to dispose of his share.

Argued for the second party—If the testator could competently revoke the special destinations, he had, no doubt, effectively done so, but it was not in his power to do so. It was settled beyond question that a destination to A and B jointly and the survivor and his heirs conferred a fee on the survivor which could not be gratuitously defeated by the act or will of the predeceaser — Ersk. Inst. iii, 8, 35; Duff's Feudal Conveyancing, p. 321, sec. 243, illus. 4; Bell's Comm. (M'Laren's ed.) i, p. 62; Bell's Lects. on Conveyancing, ii, 843; *Riddels* v. *Scott*, 1747, M. 4203; *Bisset* v. *Walker*, 1799, Mor. Deathbed App. No. 2; *Forrester* v. *Forrester's Trustees*, 1835, 1 S. & M. 441; *Burrowes* v. *M'Farquhar's Trustees*, 1842, 4 D. 1484; *Brown* v. *Advocate-General*, 1852, 1 Macq. 79, *per* Lord Chan. St Leonards, pp. 89-91; *Walker* v. *Galbraith*, 1895, 23 R. 347, 33 S.L.R. 246; *Perret's Trustees* v. *Perret, cit. sup.*, *per* Lord Kinnear, who based his opinion on the terms of the destination only, and whose view was supported by the Institutional writers referred to. In such destinations assignees meant assignees of the survivor—*Burrowes* v. *M'Farquhar's Trustees, cit. sup.* The lady when she took the destination in the names of her husband and son must have intended them to receive their proper legal construction. This principle was generally applicable whatever might be the form of the deed—*Burrowes* v. *M'Farquhar's Trustees, cit. sup.*, *per* Lord Cuninghame. In the case of the Salthall superiority the rule was clearly applicable, and the destination in the disposition clearly embodied a contract between the parties—mother and son. But the rule also covered the destinations in the bonds and dispositions in security, which were only moveable *quoad* succession, even though the word "jointly" was not used in them There was no force in the words "conjunctly," "jointly," &c. *per se*. It was the meaning and sense and not the exact words used which was important. Duff used the word "conjunctly" and Bell the word "jointly," but the effect was the same. In none of the cases could it be said that the source from which the money came was of the slightest importance. The insertion of the word "survivor" by the donor was equivalent to a condition and might also be defined as a contract, but a contract, not between the fiars, but between the donor and the donee which could not be gratuitously defeated. It was said that "spouses" formed a class apart, but this simply meant that the husband being the *dignior persona* was presumed to be the fiar. The same construction was given to the analogous case of a clause of return in deeds—*Mackay* v. *Campbell's Trustees*, 1835, 13 S. 246, and *per* Lord Medwyn at p. 250; *Barr's Trustees* v. *Barr's Trustees*, 1891, 18 R. 541, 28 S.L.R. 387.

At advising—

LORD DUNDAS—This case is concerned with various questions arising upon a holograph trust-disposition and settlement executed by the late Frederick Mansell Renouf, who was (parties are agreed) a domiciled Scotsman. I shall deal *seriatim* with the points raised.

1. [*After reading the second purpose of the settlement*]—In the fifth purpose allusion is made to the two missionaries as "Christian native preachers," and in the seventh purpose the testator refers to his scheme for "preaching the gospel of Jesus Christ as already named for foreign lands." The first question in the case is whether the provision of the second purpose is void from uncer-

tainty? I have come to the conclusion that it is not.

The considerations affecting the validity or invalidity of such a provision may, I take it, be summarised thus—(*a*) a testator cannot delegate to another the making of his will in whole or in part, for that, as Lord Robertson put it in *Blair*, 1901, 4 F. (H.L.), at p. 5, 39 S.L.R. 212, "is contrary to the fundamental idea of testamentary disposition;" (*b*) a testator may, however, select sufficiently defined classes of persons or objects to be favoured, leaving it to someone else after his death to select out of these classes particular individuals or objects to whom his bounty shall at that other person's discretion be applied—see Lord Lyndhurst's often-cited judgment in *Crichton*, 1828, 3 W. & S., at pp. 338, 339; (*c*) the object must not be unlawful or contrary to public policy, nor so vague as to be incapable of execution, but must be capable of enforcement at the instance of someone having an interest to enforce it, *e.g.*, *M'Caig*, 1907 S.C. 231, 44 S.L.R. 198, 1915 S.C. 426, 52 S.L.R. 347. I think the clause in question complies with all the requisites to validity thus indicated. As I read it the testator desires his trustees to select two native Christian missionaries representing a society for the propagation of Christ's gospel, to pay them salaries for preaching that gospel to the heathen in the land of their (the missionaries') nativity, and on the winding up of his estate to make provision for the continued payment of their salaries by the said society. In all this there is nothing unlawful or contrary to public policy; nor is there, I think, uncertainty as to the object of the bequest or the persons to be benefited by it. The object is "preaching the gospel of Jesus Christ my Lord," which seems to me to be sufficiently definite, however widely theologians may differ as to the scope and tenets of that gospel. It is to be preached "among the heathen." That term, occurring in the will of a Scots Wesleyan Methodist, as we were informed by the parties that the testator was, would or might include, I apprehend, all those beyond the pale of the gospel of Jesus Christ; but its wideness is limited and controlled (1) by the restriction of the preaching to "foreign lands," *i.e.*, as I understand, lands furth of the United Kingdom; and (2) by the limitation of the field of labour to that foreign land to which the selected "Christian native preachers" belong. The truster's wish appears to me to be comprehensible and definite enough, and the method of its execution sufficiently indicated by him. It is not stated in the case that there are in the United Kingdom or in Scotland no societies for the propagation of the gospel; nor, I imagine, could any such statement have been truthfully made. The duty of the trustees is, I take it, to approach a society of this sort and select out of the native missionaries in foreign lands who represent it two persons to whom they, or the society for them, shall pay suitable salaries for preaching the gospel to the heathen in the land of their nativity—the continuance of these salaries to be provided for when the estate comes to be wound up, as directed by the fourth purpose, on the death of the second party. The fact that a particular society is not named by the truster is not to my mind material if, as I assume, such societies exist among which the trustees may exercise their power of selection. Two further objections may, I think, be repelled. The amount of the salaries is not indicated by the truster, but I do not see how it could have been, depending as it must on conditions, geographical and other, attendant on the trustees' selection of the two native Christian preachers. The amount of the salaries it was urged might be such as grievously to diminish, or even to extinguish, the funds available for fulfilling the other purposes of the settlement. The truster has, however, chosen to devise this purpose and to place it in the forefront of his testamentary provisions; and even if its fulfilment should greatly impair, or possibly exhaust, the resources of his estate, I do not think such result would warrant us in holding either that the purpose is void from uncertainty, or that its execution would be otherwise than in accordance with the testator's intention. It must be remembered that he seems to have supposed the amount of his estate to be considerably greater than we decide it (by our answer to the third question) to have actually been. Lastly, if the Court declare the second purpose to be valid it would be the duty of the trustees to put it in execution; and I presume they would proceed at once to negotiation with some society of the kind indicated. If the trustees should not do their duty I do not think the resources of the law would lack means to enforce its performance.

Each case of this kind must be decided upon the language of the instrument presented to the Court for construction; and I do not think one derives much aid from a detailed perusal of the numerous decisions on this branch of the law. I propose therefore to make only a few observations on that head. It was keenly argued on the one hand that the bequest we are considering is a "charitable" one; on the other hand, that it is not; and the important case of *Allan's Executor*, 1908 S.C. 807, 45 S.L.R. 579, was much canvassed *hinc inde*. I am not sure that it has much bearing on the question before us. It was there held that a bequest "for the benefit of foreign missions in India, China, Africa, and South America, or any other in the foreign field suitable" was one for charitable purposes, and not void from uncertainty. "Foreign missions," however, may have many other purposes besides that of disseminating the gospel by spoken word; while here we have a mission only "for preaching" the gospel of Jesus Christ. I gravely doubt if that can be held to be a "charitable" purpose. But assuming that it cannot, it does not, in my view, by any means follow that the bequest fails. It must be remembered that, as Lord Kinnear pointed out in *Allan's* case, at p. 814, the general rule laid down by the Lord Chancellor in *Crichton* v. *Grierson*, and always since followed, is by no means limited to "charitable" bequests. Indeed in that very

case the clause sustained as valid extended far beyond the field of "charity." The testator's wish was that his residue should be applied not only "in such charitable purposes" but also "in bequests to such of my friends and relations as may be pointed out by" his wife, with the approbation of a majority of his trustees; and if she should die, or marry again, the trustees, or a majority of them, were directed to apply his estate "in the way and manner they would conceive to be most agreeable to my wishes if in life." And among the cases cited and approved by Lord Lyndhurst, one may note *Murray* v. *Fleming*, where a husband disponed his land to his wife in liferent, and "to any of his blood relations she should think most fit, to be nominated by a writ under her hand in fee"; and *Snodgrass* v. *Buchanan*, 16th December 1806, F.C., where a destination of lands was to "such of my mother's relations as my kind and respected friend" A B "shall appoint by a writing under her hand"; in both of which cases the bequest, though obviously not "charitable," was sustained. The recent case of *Grimond*, 1905, 7 F. (H.L.) 90, 42 S.L.R. 466, was strongly founded upon as an authority against the validity of the clause here in question. The House of Lords there held a bequest to "such . . . religious institutions and societies as my trustees . . . shall select" to be void from uncertainty. They did so because, as the Lord Chancellor (Halsbury) put it, the testator "has not given a class from which he allowed his trustees to select individually, but he has left his directions so vague that it is in effect giving someone else power to make a will for him instead of making a will for himself." Here, on the other hand, the testator has been much more precise; his bequest is for a definite purpose—"the preaching of Christ's gospel among the heathen"—and the trustees are directed to select preachers for that purpose from a particular nation and in a particular sphere to be chosen by them. I think this case stands in marked contrast to that of *Grimond*. As the learned judges in *Allan's* case pointed out, though a bequest for religious purposes in general is too vague to be valid, it does not follow that a will for a special purpose is the less capable of being sustained because that special purpose falls within the general description of religious purposes (*per* Lord Kinnear at p. 813, Lord President Dunedin at p. 816).

For these reasons I am for answering the first question in the negative.

2. [*His Lordship here dealt with a question with which this report is not concerned.*]

3. The next question is, whether one-half of a superiority, and of the sums contained in four bonds and dispositions in security, described as Nos. 1, 2, 3, 4, and 5 respectively in article 8 of the Special Case, passed to the testator's trustees under his settlement, or to the second party by force of the destinations in the deeds. The money for these investments was provided wholly by the testator's wife, who died in 1911, and the destinations were inserted on her instructions. These destinations are set forth in article 8. They are conceived in favour of the second party, Mr Haining, who was Mrs Renouf's son by her first marriage, and of the testator—in some cases "jointly"—and the survivor of them and "his heirs," or "his successors and to their or his assignees." Parties are agreed that by virtue of these destinations one-half of the superiority and of the terms in the bonds belongs to the second party. He claims the other half also, but the first parties contend that that half formed part of the truster's estate at his death, and passed to them for administration in terms of his settlement. I have little doubt that the settlement by which the testator conveyed to his trustees his whole means and estate of every kind and description in the widest language is habile to carry the subjects in question if it was within his power so to deal with them, and that he intended so to deal with them. Four of the five deeds are actually referred to in the settlement. The question is, whether the testator had power to dispose of them by gratuitous testamentary settlement. I am of opinion that he had not. It seems to me that Mrs Renouf's gift when she made each of the investments was given upon conditions specified in the destinations which it was not in the power of either of the donees to evacuate gratuitously. The effect of destinations such as those we are considering was thus described in general terms by Lord Kinnear in *Perrett's Trustees*, 1909 S.C. 522, at p. 528, 46 S.L.R. 453. "I take it to be perfectly well-settled law that when a right is taken to two persons jointly and the survivor and the heirs of the survivor, the two disponees are joint fiars during their lives, but upon the death of the first deceaser the survivor has the entire fee to the exclusion of the heirs of the predeceaser. The law is so laid down in every one of our institutional writers, and is supported by the authorities, and the rule applies to joint fiars who are husband and wife in exactly the same way as to other persons." Having considered the various destinations before us, I have come to the conclusion upon the authorities that in regard to each and all of them Mr Haining is entitled to our judgment. The destinations in Nos. 1 and 5 appear to me to fall directly within the words of Professor Bell (1 Comm., 7th ed., p. 62)—"where [the conveyance] is to 'two jointly and the heirs of one of them,' the one less favoured is a bare liferenter; the other is fiar, and not only cannot be gratuitously disappointed, but cannot even by onerous conveyance be deprived of his right (Ersk. iii, 8, 35)," and the fuller statement of the law in the passage in Erskine's Institutes to which Professor Bell refers seem to me to cover the whole of the destinations we are considering. We had also a citation of decided cases (*e.g.*, *Bisset*, 1799, M. App. "Deathbed," No. 2; *Riddels*, 1747, M. 4203; *Burrowes*, 1842, 4 D. 1484) and of text-writers (*e.g.* Duff's Feudal Conveyancing p. 320, sec. 243, and M. Bell, Conv., ii, 843) to a similar effect. I am of opinion that in accordance with authority we

must hold that while the testator's right to the fee of some of these investments might have been attachable by his creditors for debt, he had no power gratuitously to revoke or evacuate any one of the destinations by his settlement and thereby to defeat the survivors' right under them.

I am therefore for answering the third question—(*a*) in the negative, (*b*) in the affirmative.

[*His Lordship then dealt with questions with which this report is not concerned.*]

LORD SALVESEN—The first question presented for our decision is whether the direction to the trustees to pay out of the income of the testator's estate "the salaries of two native missionaries chosen of them for preaching the gospel of Jesus Christ my Lord among the heathen" is too vague or uncertain to receive effect. I do not doubt that the trustees might carry out this direction in a way that would presumably have commended itself to the truster; but that I apprehend on the authorities is not the criterion, for the same might have been said of the bequest which was the subject of decision in *Grimond's* case, 7 F. (H.L.) 90, 42 S.L.R. 466, where the bequest was of the residue of the estate "to and among such charitable or religious institutions and societies as my trustees or the survivors or survivor of them may select." If the words "or religious" had been left out of the bequest, then according to the decisions it would have been quite good, "charitable" being held to convey a definite meaning, but the alternative in favour of religious institutions and societies was held to make the bequest wholly void. In *Grimond's* case I think it would have been easier for the trustees to have divided the share of residue than it will be in the present case to carry out the testator's direction. In the first place no amount is indicated as a suitable remuneration for the native missionaries, and this is very important, because, if the bequest is held valid it seems to me plain that the whole income of the estate might be appropriated to this purpose, although the testator himself contemplated that there would be a considerable balance of income with regard to which he made elaborate provisions. In the next place there is nothing to indicate what is meant by "native missionaries," except perhaps that they are to be of the same race as "the heathen" to whom they are to preach; nor do I think that the trustees will necessarily be in agreement as to what the testator meant by "the heathen." Do these words imply that Buddhists or the followers of Confucius, or those professing the religion of Japan, are to be included amongst the heathen, or is it to be understood that the heathen are to be found amongst those who have no religion at all (if any such tribes exist) or those who worship idols or fetishes? In a broad sense perhaps it might be said that "the heathen" include all who are beyond the pale of Christianity, but if so Jews would be included. Further, I think it would depend very much upon the religion of the trustees (which they may conceivably change) as to how they would interpret the words "the gospel of Jesus Christ my Lord." The three main divisions of Christianity—the Protestant, Roman Catholic, and Greek Churches—might take widely divergent views of what that gospel embraced. I do not think it would be fair to impose upon the trustees the duty of interpreting for themselves all these difficult questions, and then, if the Court took a different view from them as to whether they had carried out the direction of the truster, to hold them responsible. In the case of *M'Caig*, 1907 S.C. 231, 44 S.L.R. 198, Lord Kyllachy expressed the view that the test of the efficacy of a trust is to inquire whether there is anybody who can enforce its performance, provided it be kept in mind that as regards trustees for educational or charitable purposes, or other purposes of public benefit, there may always be the intervention—if of nobody else—of the Crown. If that be the sound view I cannot see who are entitled to enforce, as against the trustees, the carrying out of the trust purpose here in question. The possible beneficiaries might exist in any country, except perhaps the British Isles, for there is an implication that they are not to be looked for at home.

I cannot think that the bequest is made any more easy to interpret by the provision that on the winding up of the estate the trustees are to make the provision for these missionaries to be continued to the societies they represent. It is suggested that such societies are to be found in this country, and Lord Dundas appears to have judicial knowledge that societies exist to employ native missionaries in foreign parts; but the trustees apparently are themselves to choose two native missionaries; and I cannot see that there is anything which would prevent them from selecting missionaries who are associated with some American or foreign society, or indeed had no connection with a society at all.

On the double ground therefore that the bequest is too vague and uncertain to receive effect, and that there is no beneficiary who would have a title to enforce it (the bequest not being for charitable purposes, to which a more liberal construction is given) I am of opinion that we should answer the first question in the affirmative.

On the other questions with which Lord Dundas has dealt in his opinion I content myself by expressing a general concurrence in his views.

LORD GUTHRIE—I answer the first question, as your Lordship in the chair does, in the negative. Not only is a testator disentitled from delegating to his trustees power to distribute his estate, or any part of it, as they think fit, without any limit to their discretion, but he must assign reasonable limits to their discretion. It is for the Court to say what limits are sufficiently restricted to be considered reasonable, as distinguished from limits which, although short of leaving the trustees absolutely free to do with the estate what they like, are so wide as to give them such an unreasonable latitude as substantially amounts to no

declaration of the testator's intentions. In the ordinary case a general description like public purposes, moral purposes, religious purposes will be held insufficient to answer to the description of such a reasonably limited definition. Probably from motives of public policy as well as in view of the prevalence of common action in favour of charity by persons of all opinions, religious and political, a bequest for charitable purposes, although unlimited in area, class, time, and distribution, is held good. It may be that, on the same ground of public policy and the absence of contentious elements, other equally and not more general definitions, such as educational purposes and scientific purposes, should have been held equally ineffectual in their own right. But the tendency has been, while in semblance adhering to a distinction which seems to have no substance, to get rid of the difficulty by including among charitable purposes such purposes as educational and scientific purposes, which may or may not involve the element of gratuitous mental, if not directly physical, benefit. One would have thought that religious purposes, although introducing more contentious elements, might, on grounds of public policy, have been considered sufficiently specific, and that in any event such bequests, being for the relief of moral and spiritual destitution, might have been sustained as charitable in the same sense as educational bequests for the relief of mental destitution are held charitable. But it is not necessary to canvass that question. In this case while the purposes of the bequests are purely religious, namely, preaching of religion as distinct from the medical, educational, and industrial work now often associated at home and abroad with the preaching of religion, the trustees are not left to the difficult task of selecting objects over the vast area comprehended under religious purposes. They are restricted in three directions, first, as to the kind of agents. They must be preachers; these preachers must be appointed by societies; they must be Christians; and they must be natives of the country where they preach. The subject-matter of the preaching is next defined; it must be Christianity. And, in the third place, the audience to be addressed must be heathen, and heathen in foreign lands. Thus the area and method of selection of preachers, the subject-matter to be preached, and the sphere of operations, are substantially limited—so substantially limited that the testator appears to me to have framed a distinct scheme sufficiently expressing his considered intention, and not imposing any unreasonable, because extravagantly difficult, duty on his trustees. It is not said that there are no missionary societies operating in heathen countries out of whose native preachers two might not be selected and their salaries paid by the trustees. Half a dozen letters between the agent of the trust and the society selected by the trustees would settle the whole matter. The case seems to me *a fortiori* of *Allan's Executor*, 1908 S.C. 807, 45 S.L.R. 579, whether that judgment (and the opinion of Lord Kinnear, which was specially approved by Lord Shaw in the case of *Wordie's Trustees*, 1916 S.C. (H.L.) 126, 53 S.L.R. 291) be looked at as deciding that a bequest for "foreign missions" in a certain area is entitled to the privileges of the rule applicable to charitable bequests, or whether regard be had to the other ground of decision in that case, namely, that the bequest was sufficiently specific to be sustained on its own merits. The case of *Grimond's Trustees* (6 F. 285, 41 S.L.R. 225, *rev.* 7 F. (H.L.) 90; 42 S.L.R. 466) seems to me in marked contrast to the present case. Read short, the words to be construed in that case were "such religious institutions and societies as my trustees may select," which seems difficult to distinguish from a bequest "for religious purposes." Lord Moncreiff said—"he (the testator) has left his trustees unlimited discretion . . . he has left them unfettered"; and in the beginning of his judgment, after quoting the very general words of the deed, he adds "the settlement contains nothing to aid us in the interpretation of these words."

The House of Lords held that the testator had failed to make a will. No doubt they adopted the reasoning of Lord Moncreiff. But it does not follow that they assented to the appropriateness of all the illustrations given by him. These illustrations are prefaced by the statement that "the distinctions between different churches and denominations professing the Christian religion are sharply defined and strictly enforced." This is a statement of fact which, however accurate two or even one hundred years ago, is not applicable in this unqualified form to modern Scotland. Judicial knowledge involves acquaintance not only with ancient history but with present-day conditions. Unions between churches and denominations in Scotland have taken place and are in contemplation, just because modern Scots people do not sharply see the distinctions between the churches and denominations. Instead of distinctions being strictly enforced, the churches are everywhere co-operating in local and in national work. This is particularly true about foreign missions and foreign missionary societies, which, athough connected with one denomination, are largely staffed and financially supported and publicly advocated by members of all denominations. In some cases Scottish churches, separate at home, are united in foreign countries, where they at one time had distinct foreign missions. In 1720 one of my ancesters, parish minister of Montrose, was libelled before the Presbytery of Brechin as a "malignant" because he had subscribed a guinea towards the erection of an Episcopal chapel in Montrose. Such a prosecution would be unthinkable now.

It seems to me that by contrast with *Grimond's* case the general desire of the testator in the present case to promote religion has been expressed in a sufficiently concrete scheme, and the discretion of his trustees limited and fettered—first in regard to the objects, second in regard to the agents, third in regard to the matter to be preached, and fourth in regard to the sphere of operation.

In regard to the other questions I have seen your Lordship's opinion. I concur in it, and have nothing to add.

The LORD JUSTICE-CLERK was absent.

The Court answered the first question in the negative and the third question branch (*a*) in the negative, and branch (*b*) in the affirmative.

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Counsel for the Second Party—Macphail, K.C.—R. C. Henderson. Agent—Jas. Scott, S.S.C.

Counsel for the Fifth and Sixth Parties—W. T. Watson. Agents—Guild & Guild, W.S.

Counsel for the Third Parties—MacRobert. Agent—A. C. D. Vert, S.S.C.

Wednesday, June 4.

SECOND DIVISION

[Sheriff Court at Wigtown.

THOMSON *v.* EARL OF GALLOWAY.

Landlord and Tenant — Compensation — Agricultural Holdings (Scotland) Act 1908 (8 *Edw. VII, cap.* 64), *sec.* 9

A tenant claimed compensation from his landlord under section 9 of the Agricultural Holdings (Scotland) Act 1908 in respect of damage done to his crops by winged game which came over from a neighbouring proprietor's land during the close season. *Held* that under the Act the landlord was liable to pay compensation to the tenant for the damage thus done.

The Agricultural Holdings (Scotland) Act 1908 (8 Edw. VII, cap. 64), enacts—section 9—"(1) Where a tenant of a holding has sustained damage to his crops from game, the right to kill and take which is vested neither in him nor in anyone claiming under him other than the landlord, and which the tenant has not permission in writing to kill, he shall . . . be entitled to compensation from his landlord for such damage . . ; (2) The amount of compensation payable under this section shall, in default of agreement made after the damage has been suffered, be determined by arbitration . . ; (4) Where the right to kill and take the game is vested in some person other than the landlord, the landlord shall be entitled to be indemnified by such other person against all claims for compensation under this section."

In an arbitration arising out of a claim for compensation lodged by William Thomson, tenant of the farm of Polwhilly, Wigtownshire, against the landlord, the Earl of Galloway, in respect of damage done to his crops by winged game coming over from a neighbouring proprietor's land, the arbiter, who had been appointed by the Board of Agriculture, proposed certain findings, and the landlord asked the arbiter to state a case for the opinion of the Court.

The Case stated—"2. By lease herewith produced, dated the 2nd and 5th days of March 1900, entered into between the said Earl of Galloway and John Thomson and William Thomson, his son, there was let to the said John Thomson and William Thomson all and whole the lands and farm of Polwhilly and Inks (excluding certain mosses and moorland) lying in the parish of Penninghame and county of Wigtown, and that for the space of nineteen years from and after the term of Whitsunday 1900, but with a break in favour of either the proprietor or tenants at the term of Whitsunday 1907. Under the said lease there is reserved to the proprietor, the said Earl of Galloway, the game on the said farm and the fish in the river and streams, with the exclusive privilege to the proprietor, and such persons as may be authorised by him, of shooting, sporting, and fishing, subject to the tenant's rights under the Ground Game Act 1880. The rent stipulated under the lease was £180. 3. On 11th August 1918 the said William Thomson, now the surviving tenant, lodged a claim under section 9 of the said Act against the said proprietor for compensation in respect of damage sustained by him to his crops on said farm from game, the right to kill and take which is vested neither in him nor in any one claiming under him other than the landlord, and which he has not permission in writing to kill. The said claim, which is produced herewith, amounted to £110. 4. The arbiter accepted his appointment, inspected the holding in presence of the parties or their representatives, and on 31st October 1918 heard proof and parties' arguments thereon. On 8th November 1918 the arbiter issued proposed findings, under which he estimated the damage to the tenant's crop by winged game to be £84, and proposed to find the proprietor liable therefor. 5. The arbiter finds the following *facts* established by the proof—(1) that due notice in terms of the said Act was given by the tenant to the landlord of the damage being done, and reasonable opportunity given to the landlord to inspect the damage, and that due notice of the tenant's claim for compensation for said damage was timeously given to the landlord; (2) that substantial damage was done by winged game, the right to kill and take which was not vested in the tenant, and which he had not permission in writing to kill; (3) that the game principally came upon the said farm from a neighbouring proprietor's land; and (4) that the damage was done almost entirely during the spring months, and during the close season for killing such game, when the crop was brairding. 6. The tenant was prepared to accept the arbiter's proposed findings, except that he lodged representations on the question of expenses of the arbitration. The landlord, however, maintains in law that the proprietor cannot be held liable under the said Act for damage done during the close season by game coming from a neighbouring proprietor's land. The tenant, on the other hand, maintains that the landlord's liability to his tenant