

capital fund of which the beneficiary has enjoyed the income, this is a power which is presumably to be exercised with reference to the personal circumstances and wants of the beneficiary which are capable of being ascertained, and therefore the devolution of such a discretion to new trustees or to a judicial factor may be represented as being an act of ordinary jurisdiction not involving the exercise of any arbitrary power by the Court, or the conferring an arbitrary discretion on the administrators of the trust. Yet, so far as I can find, this has only been done in cases where the testator has provided that the discretionary power might be exercised by assumed trustees not chosen by himself. There are three cases, the first being the case of *Allan*. When this case first came before the Court (5 Macph. 1004), the application for a direction to the judicial factor to increase the annuity payable to the truster's daughter was refused as incompetent. But on a second application, which was presented by the judicial factor himself, with the consent of the other beneficiaries, the authority was granted (8 Macph. 139), the decision being rested on three considerations—first, that the testator had empowered his trustees to increase the annuity; secondly, that all parties having an adverse interest consented; and thirdly, because these were accumulations of income which in the opinion of the Lord President might have been claimed by the truster's daughter as being the person entitled under the Thellusson Act to the surplus accumulations.

In the next case—*Hill*, 2 R. 68—the truster bequeathed a share of residue to the children of her daughter, and empowered another daughter, her sole trustee, to apportion this fund. The trust-deed did not contain a power of assumption, and the decision was that the power of apportionment was personal to the original trustee, and could not be exercised by the acting trustees, who seem to have come into office under the provisions of the Trusts Act. Lord Moncreiff in his opinion draws this distinction. He says—"Where there is a manifest *delectus personæ* and intention to entrust such a power (as here) to a particular person, the Court might hesitate to transfer the power to another. . . . Where a discretionary power is conferred upon ordinary trustees not implying *delectus personæ*, the Court might more readily confer these powers on new trustees."

Lastly, there is the case of *Simpson*, 10 R. 540, where a trust was constituted in favour of trustees named, with powers of assumption in the usual form, and in relation to the gift of an annuity to one of the beneficiaries it was provided that the trustees should have the power of advancing the whole or any part of the capital, it was held that this was a power given to trustees for the time being, and accordingly an application at the instance of a judicial factor for authority to make an advance of capital for the purchase of an annuity for life for the beneficiary was sustained, and the authority granted. The Lord President

was careful to point out that the frame of the trust was such as to exclude the supposition of *delectus personæ* in relation to the original trustees.

It appears to me that these decisions are distinctly adverse to the view that a power of selecting charitable and religious purposes to which an executory estate is to be applied can be exercised by a nominee of the Court. My opinion is that as regards the undistributed part of this estate the trust has failed, and that the second parties, who are admitted by the judicial factor to be the next-of-kin of the testator Miss Helen Robbie, are entitled to the sum in dispute.

In this view, the first question falls to be answered in the negative, and the second question to be answered in the affirmative.

LORDS ADAM, KINNEAR, and the LORD PRESIDENT concurred.

Counsel for the First Party—Crabb Watt. Agents—Reid & Guild, W.S.

Counsel for the Second Parties—C. S. Dickson—Grainger Stewart. Agent—A. Stewart Gray, W.S.

Saturday, February 4.

SECOND DIVISION.

[Lord Stormonth Darling,
Ordinary.]

BOWMAN v. MACKINNON AND OTHERS.

Process—Proof or Jury Trial—Reduction of Two Trust-Deeds on Ground of Testator's Insanity.

A testator died leaving two trust-dispositions and settlements. In the first, dated in 1882, he left his whole means and estate equally among four foreign mission agencies; in the second, dated in 1890, he revoked the first and left his whole means and estate to the Mildmay Mission to the Jews, of which a clergyman in London was the sole founder, treasurer, and director, to be expended in aid of its objects.

An action of reduction of both deeds was raised by a niece of the testator as one of his next-of-kin, on the ground that he was not of sound disposing mind when he executed the said deeds. When issues were lodged for the trial of the cause, counsel for the Mildmay Mission to the Jews moved that the case should be tried by proof before a judge instead of by jury trial, because (1) the matter was complex, the question at issue being the mental condition of the truster during a period of eight years; (2) there was always a natural prejudice in the mind of a jury against the whole estate of a testator being left to a mission such as this; and (3) because a large part

of the evidence would have to be taken on commission in India.

Held that no special cause had been shown for not following the ordinary practice of sending such a case for trial by jury.

Thomas Melville Russell, sometime merchant in Calcutta, died at Bridge of Allan on 3rd February 1891, survived by two next-of-kin, his nieces Mrs Helen Taylor Russell or Bowman and Miss Elizabeth Francis Russell.

On his death it was found that Mr Russell had left two trust-dispositions and settlements, the latter of which revoked the former.

By the earlier deed dated 2nd December 1882 Mr Russell granted and disposed to certain trustees his whole means and estate, and appointed them at his death, after paying his debts, &c., to realise the whole residue and pay over the whole proceeds equally among the Society for the Propagation of the Gospel in Foreign Parts, the British and Foreign Bible Society, the Society for Promoting Christian Knowledge, the Church of Scotland, to be used for their Foreign Mission Schemes, and the Free Church of Scotland, to be used for their Foreign Mission Schemes.

By the second trust-deed, dated 24th October 1890, Mr Russell revoked all former settlements and granted and disposed to certain trustees his whole means and estate, and appointed them, after payment of his debts, &c., to realise his whole means and estate, and, under burden of two annuities of £100 each, to pay and make over the whole residue to the Mildmay Mission for the Jews, the director of which was the Reverend John Wilkinson, 79 Mildmay Road, London, to be expended or employed at discretion in aid of the objects for which the said Mission was established.

After Mr Russell died all the trustees named in the second trust-deed refused to accept of the trust except Duncan Mackinnon. He accepted and thereafter assumed Neil Macmichael as co-trustee, and on 19th October 1891 they were confirmed as executors-nominate of Mr Russell by the Sheriff-Substitute of the Lothians at Edinburgh.

Thereafter Mrs Bowman brought an action of reduction of the two trust-deeds in the Court of Session, calling all parties interested as defenders.

Inter alia, the pursuer averred on record —“(Cond. 4) At the time when Mr Russell signed the said trust-disposition and settlement of 2nd December 1882, and for some years previously, he was of unsound mind. He had suffered from sunstroke when out in India, and his mental faculties had been thereby much weakened. At the time of signing the said deed he was not of sound and disposing mind. More particularly, he was a religious monomaniac, and believed that he could only obtain salvation in the hereafter by devoting his whole time and resources to religious objects. The said deed was not the result of his sound decision, but was subscribed by him while

suffering under mental delusions and hallucinations. At the time of subscribing the said deed he was mentally quite unfit to make a valid testament, and the said deed is void, as not being the expression of his sane decision, but of his diseased mental state. (Cond. 6) When Mr Russell signed the said trust-disposition and settlement of 24th October 1890, he was not of sound disposing mind, and was utterly unfit, owing to mental disease to understand its import. The weakness of mind mentioned in article 4 hereof had been increasing steadily, and showed itself continuously in new ways. He was completely possessed of religious monomania. He believed himself miserably poor, so that he could not afford money to maintain himself. He consequently deprived himself of necessary sustenance for months prior to the signature of the said deed, and his mental incapacity was increased by bodily weakness. At the time of signing the said deed Mr Russell was a fit subject for admission to a lunatic asylum. The said deed was in no way the expression of his sound and disposing mind. (Cond. 8) The Mildmay Mission to the Jews is an institution having its headquarters in London. It professes to have missions in various places in Russia, Roumania, Brazil, and other parts of the world, besides working miscellaneous organisations in London itself. The defender the Rev. John Wilkinson is the founder, treasurer, and director of the Mission. Mrs Wilkinson is the hon. secretary and correspondent. Mr Samuel Hinds Wilkinson is accountant and assistant correspondent; and Miss Florence Wilkinson is deaconess. Shortly before his death the late Thomas Melville Russell gave to the Mission certainly not less than £10,000, and it is averred as much as £15,000. This sum was intended by the donor to be devoted to the purchase of New Testaments for behoof of Jews, but it has not been expended. Of the sums received by the said Mission not half is expended annually on its professed objects. As matter of fact the Mildmay Mission is an utterly irresponsible institution, and practically consists of the said Rev. John Wilkinson and the other members of his family. The said Rev. John Wilkinson is entirely uncontrolled in his disposal of the funds of the so-called Mission, and there is absolutely no security that any money left to the said Mission will be applied to any of its professed objects.”

Defences were lodged by the Society for the Propagation of the Gospel in Foreign Parts, the British and Foreign Bible Society, and the Society for Promoting Christian Knowledge, who pleaded, *inter alia* —“(2) The pursuer's statements so far as directed against the deed of 1882 being irrelevant, and, *separatim*, being untrue, the present defenders are entitled to be assoilzied with expenses. (3) The deceased having been in no way incapacitated from making the trust-disposition and settlement of 2nd December 1882, the defenders are entitled to be assoilzied with expenses.”

Defences were also lodged for the exe-

cutors-nominate, who pleaded—“(2) The pursuer’s averments are irrelevant. (3) The defenders should be assoilzied, in respect (a) that pursuer’s averments, so far as material, are unfounded in fact; (b) that the deceased was in no way incapacitated from making the will of 1890.”

Defences were also lodged for the Mildmay Mission to the Jews, who averred, in answer to the pursuer’s statements on record concerning their Mission—“Admitted that the Mildmay Mission to the Jews has its headquarters in London, and has agents in various parts of the world. The Mission has over fifty agents at home and abroad. Admitted that the defender the Rev. John Wilkinson is the founder, treasurer, and director of the Mission, and that his wife and their son and daughter take part in the work thereof. *Quoad ultra* denied. During the period between 1884 and the date of his death Mr Russell freely and voluntarily made certain donations from time to time to the Mildmay Mission to the Jews, amounting in all to about £10,220. These sums, with the exception of a part of a donation of £5000 received in August 1890, which is being spent from time to time as needed, have all been expended upon the objects for which they were given to the Mission by the donor. The whole property of the Mildmay Mission is vested in responsible trustees; and the accounts of the Mission are audited yearly by Messrs Arthur J. Hill, Vellacott, & Company, chartered accountants, London.” And pleaded, *inter alia*—“(2) The statements of the pursuer are not relevant or sufficient to support the conclusions of the summons. (3) The pursuer’s whole material statements being unfounded in fact, the defenders ought to be assoilzied with expenses.

On 25th January 1893 the Lord Ordinary (STORMONTH DARLING) approved of the following issues for the trial of the cause—“(1) Whether the deed No. 21 of process was not the deed of the deceased Thomas Melville Russell? (2) Whether the deed No. 10 of process was not the deed of the deceased Thomas Melville Russell?”

“*Opinion.*—I have carefully considered the question whether this case should be tried upon the issues proposed or upon a proof, and I have come to the conclusion that no sufficient reason has been stated against a jury trial. It is impossible to say that a jury is not the appropriate and indeed constitutional tribunal for deciding questions of insanity. They are so in all cases of cognition, and the most delicate and important questions relating to insanity in criminal matters are entrusted to their arbitrament. Here the only case made against that form of trial is that the defenders might suffer prejudice, and in particular that the beneficiaries under the deed of 1882 might find themselves involved in the same condemnation as the beneficiaries under the deed of 1890 if the jury reached the conclusion that the deed of 1890 was bad. There is some force in that observation, but I think it implies that the jury would not act in conformity with

their duty, and in particular that they would pay insufficient regard to the directions which it would be the duty of the presiding Judge to give. Accordingly, I do not think that that is a kind of prejudice which I can reasonably anticipate, and on the whole matter I think the ordinary course must be followed of leaving this question to be decided by the constitutional body. Some reference was made to cases in which the form of trial by proof before a judge was preferred, but none of them seem to me to square with the present. The nearest perhaps was the case last year of *Gill*, in which Lord Kyllachy, and subsequently the Inner House, decided that a will was good—the will having been executed by a man who very shortly afterwards committed suicide. I understand that the speciality there was the close correspondence in point of time between the will and the suicide, and undoubtedly that case did raise some very delicate questions with regard to the connection between the will and the specific delusions under which the man was said to have been labouring. Here there do not seem to me to be any peculiarities of that kind, or indeed special difficulties of any kind.

“There being no objection to the form of the issues, I shall therefore approve of them.”

The defenders the Mildmay Mission to the Jews reclaimed, and argued—The case should not be tried by jury, but there should be proof before a judge. There were three reasons for this. (1) The matter was complex. The question at issue turned on the mental condition of a gentleman during eight years, and more especially at the two periods in 1882 and 1890 when the wills were made. It was therefore a case in which a jury could not be able to discriminate. The case of *Gill*, referred to in the Lord Ordinary’s note, was similar, and had been tried by proof before a judge. Other cases where the matter in issue between parties extended over a long tract of time, and which were therefore not sent to a jury, were—*Life Association of Scotland v. Foster*, January 31, 1873, 11 Macph. 351; *Scottish Widows’ Fund v. Buist*, July 14, 1876, 3 R. 1078; *Macfie v. Stewart*, January 24, 1872, 10 Macph. 408; *Blair v. Macfie*, February 2, 1884, 11 R. 515; *Scottish Rights of Way Society v. Macpherson*, October 23, 1886, 14 R. 7. (2) There was always a natural prejudice in the mind of a jury against a testator’s leaving his money to a foreign mission, especially one of this sort, instead of to his relations. The case would be more equitably considered by a judge. (3) much of the evidence in this case would have to be taken on commission in India, and the sending of a lot of evidence so taken would tend to confuse a jury.

Counsel for the pursuer were not called on.

At advising—

LORD JUSTICE-CLERK—In this case it does not seem to me that there is any sufficient ground for not following the usual practice of sending it to a jury. What the

mental condition or capacity of the testator was at the dates on which he executed these two deeds is purely a question of fact. In all the cases referred to by Mr Dundas, one or other of two elements is found; either (1) such a complication as regards the form in which the evidence had to be led or the circumstances of the case themselves, as to make it doubtful whether the point at issue could be presented sharply to the jury, or (2) such a prejudice on the part of the public toward one or other side of the question as to make it doubtful that the jury would be guided strictly by the evidence led during the trial. But neither of these elements is present here. It is a pure question of fact which is to be remitted to the jury. One example of a case which involves similar considerations as to the mental capacity of a person at a definite date—a case in which the most tremendous interests are involved, and which can only be decided by a jury—is the case of murder. I have heard my predecessor in this chair lay it down when trying such cases that the question whether the person committing the murder had or had not capacity at the time is a pure question of fact. In that I entirely agree, and in that view I see no good ground for interfering with the decision of the Lord Ordinary.

LORD RUTHERFURD CLARK—A case of this kind must go to a jury unless some special cause is shown why it should not. I do not think that any such cause has been shown here.

LORD TRAYNER—I agree. The only argument used by Mr Dundas which at all impressed me was that a great deal of the evidence would require to be taken in India on commission. But I do not think that is enough to override the pursuer's right to have the case decided by jury trial, especially looking to the fact that the question to be decided is a pure question of fact, and one sharply raised.

LORD YOUNG was absent.

The Court adhered.

Counsel for the Pursuer—Kennedy—Cooper. Agents—Pringle, Dallas, & Company, W.S.

Counsel for the Defenders the Mildmay Mission to the Jews—Dundas. Agents—J. & J. H. Balfour, W.S.

Counsel for the Defenders the Executors and the Executors-Nominate—John Wilson. Agents—Duncan & Black, W.S.

Counsel for the Defenders the Society for the Propagation of the Gospel in Foreign Parts, &c.—Comrie Thomson—Hay. Agents—Dundas & Wilson, W.S.

Tuesday, February 14.

SECOND DIVISION.

[Lord Stormonth Darling,
Ordinary.]

WRIGHT v. JAMES DUNLOP & COMPANY, LIMITED.

Reparation—Master and Servant—Insufficient Precautions for Safety of Workman—Defective Scaffold—Relevancy.

In an action of damages raised by a labourer against his employers, a limited company, carrying on business as coalmasters, the pursuer averred that the whole duties and responsibilities of working and managing the coalpit devolved upon a general manager and managing secretary; that the pursuer was engaged as a labourer at the demolition of an old scaffold, and fell therefrom owing to one of the planks giving way; that the plank had become rotten as the result of a defective system of working the defenders' coalpit; that it was the duty of the manager to have had the scaffold examined prior to its removal to see if it could be taken down with safety; and that the pursuer was not aware of the defect at the time he was ordered by a foreman, to whose orders he was bound to conform, to go upon the scaffold. It was not averred that orders were given as to how the work was to be done. Further, the pursuer did not aver that it was necessary for him to go upon the scaffold, and assuming that this was necessary, it was not averred that the pursuer had not sufficient skill to judge for himself whether and in what respect the scaffold was unsafe.

Held that although a company who delegate to any person the management and supervision of their workmen are bound by and responsible for their manager, no fault was averred which could make either the manager or the company he represented responsible to the pursuer for the injury he had sustained, and the action *dismissed* as irrelevant.

Opinion per Lord Young, that the pursuer could not have successfully sued under the Employers Liability Act 1880.

Upon 10th August 1892 John Wright, labourer, Maryhill, Glasgow, brought an action against James Dunlop & Company, Limited, coalmasters, 97 Bath Street, Glasgow, for £500 damages for personal injury.

The pursuer averred that he had been in the employment of the defenders as a labourer at their pits at Jordanhill, Glasgow, for about twelve years; that upon 25th April 1892 he was engaged under the superintendence of James Roy, the defenders' foreman, to whose orders he was bound to conform, in taking down a scaffold, which had stood for fourteen years at the mouth of the pit—the scaffold was