

der seems to have rested his case on this, that an accused person before the bar of a police court is really a prisoner. I think, as I have said, that the pursuer was not accurately described as a prisoner, but still it does not follow that because a description is not accurate it is therefore necessarily libellous, and before the prisoner can get an issue he must show that there was something libellous said about him. All that was said about him here was that he was a prisoner and that he was acquitted. Accordingly there was no libel published of him to the effect that he had committed any offence, for it is put in the very forefront that he was acquitted.

Nor do I think that it is a libel to say of anyone that he is a prisoner when in point of fact he is not. I do not think so, for a person may be a prisoner quite innocently. Whether a person is apprehended or not rests on the discretion of the procurator-fiscal, and on the discretion of the judge who is asked to grant the warrant. Anyone who is familiar with the working of criminal procedure knows that this is all done behind the back of the person accused. There are many cases where a person who has been apprehended is found to be innocent, and many persons are found guilty who have appeared at the bar on citation and not by apprehension. So all that these words reflect on is, not the character of the pursuer, but the rightness or not of the steps taken by the prosecuting authorities to bring him to trial.

I therefore think that the case fails in relevancy and that there is no issuable matter, although no doubt there was a misdescription, and here I also think that there is really no hardship, for I agree with what was said by Lord M'Laren and Lord Kinnear in the case to which we were referred (*Grand Theatre and Opera House, Glasgow, Limited v. G. Outram & Co.*, June 23, 1908), that though the heading of an article may be libellous yet the effect of the heading and article when read together may be such as to put libel out of the question.

I therefore think that no issue can be allowed here, and that the case must be dismissed.

LORD KINNEAR—I also think that there is here no issuable matter. The pursuer's whole case rests on the headnote of a paragraph published in the *Evening News*. It is based on the headnote apart from the paragraph itself. All that the headnote does is to give notice that the paragraph relates to a licensing prosecution in which the prisoners were acquitted, and it is only when you read the paragraph that you find that one of the prisoners was the pursuer. What the paragraph says is that two persons were charged with trafficking in excisable liquors, that the Magistrate found the charge not proven, and that the two men were acquitted. There is no libel in that. It is said the pursuer was accused and that he was acquitted, and that is admittedly true.

But the pursuer says that he was inac-

curately described as a prisoner, and that so to describe him was libellous. I think the description was not technically exact. But a newspaper in a paragraph of this kind does not necessarily use technical language; and in ordinary language an accused person at the bar of a court may not improperly be described as a prisoner. To an ordinary reader the paragraph with its heading would not, in my opinion, convey any more injurious meaning than that the pursuer had been accused and had been acquitted. The pursuer maintains that it is for a jury to say whether it has not a farther and defamatory meaning. But whether the words of which he complains are capable of a defamatory meaning is a question of law; and the Court must be satisfied that they are before they are sent to a jury. If they are, it is for the jury, having regard to all the circumstances of the publication, to say whether they in fact conveyed that meaning. I am of opinion that the action is irrelevant, and should be dismissed.

LORD PEARSON—I agree in thinking the action irrelevant.

LORD M'LAREN was absent.

The Court recalled the Lord Ordinary's interlocutor and dismissed the action.

Counsel for Pursuer (Respondent)—Mac-
kechnie, K.C.—A. A. Fraser. Agent—
R. F. Calder, Solicitor.

Counsel for Defenders (Reclaimers)—
Morison, K.C.—Munro. Agents—Weir &
Macgregor, S.S.C.

Tuesday, May 18.

SECOND DIVISION.

M'CONOCHIE'S TRUSTEES *v.* M'CONOCHIE AND OTHERS.

Succession—Trust—Uncertainty—Charitable Bequest—Directions to Trustee to Divide Residue amongst "Such Educational, Charitable, and Religious Purposes within the City of A as he shall Select to be the Recipients thereof."

A testator directed his trustee to divide the residue of his estate "as he shall think fit amongst such educational, charitable, and religious purposes within the City of Aberdeen as he shall select to be the recipients thereof."

Held that this was to be construed as a direction to devote the residue to three different classes of purpose, viz., educational, charitable, and religious, and that the bequest was void from uncertainty.

By his trust-disposition and settlement the late George Charles M'Conochie, who died in 1879, conveyed his whole estate to Lachlan Mackinnon junior, advocate in Aberdeen, as trustee for the purposes therein mentioned.

The trust-disposition contained the following direction:—"And whatever reversion of my said estate, heritable and moveable, there may be over and above meeting the foresaid annuities, provisions, and bequests, I hereby direct my said trustee, failing my making further bequests or leaving further provisions from the same, to divide the same, as he shall think fit, amongst such educational, charitable, and religious purposes within the city of Aberdeen, as he shall select to be the recipients thereof."

In 1908 a Special Case was presented to the Court, to which the parties were (1) the surviving and acting trustees under the trust-disposition, and (2) the representatives of a brother of the testator who was his sole heir and had died in 1893, and in which the following question was stated for the opinion of the Court:—"Is the said bequest of residue void from uncertainty?"

Argued for the first parties—The natural construction of the residue clause was that the testator intended to benefit one class, and one class only, of organisations, namely, those which were at once educational, charitable, and religious. It was not difficult to conceive of institutions to which all these adjectives would apply, e.g., foreign missions—per Lord M'Laren in *Allan's Executor v. Allan*, 1908 S.C. 807, at p. 817, 45 S.L.R. 579, p. 584. The conjunction used by the testator was "and" not "or," and the meaning these parties contended for could not be more naturally expressed by any words other than those the testator had used. Since the case of *Grimond or Macintyre v. Grimond's Trustees*, March 6, 1905, 7 F. (H.L.) 90, 42 S.L.R. 466, the tendency had been distinctly in favour of sustaining charitable bequests, and the Court would hold them void from uncertainty only in the last resort—*Macdruff v. Spence's Trustees*, 1909 S.C. 173, 46 S.L.R. 135, per Lord M'Laren. It was thus only necessary for these parties to show that the testator's words were capable of being construed in such a way as would make the bequest valid. If the bequest here were construed in the way these parties contended for, it was certainly less vague than the bequest which was sustained in *Cobb v. Cobb's Trustees*, March 9, 1894, 21 R. 638, 31 S.L.R. 506, or than a bequest for charitable and public purposes which would be good—per Lord Davey in *Blair v. Duncan*, December 17, 1901, 4 F. (H.L.) 1, 39 S.L.R. 212. If the bequest was for charitable purposes the addition of adjectives which would be vague if they stood alone did not result in voidness from uncertainty—*Weir v. Crum Brown*, 1908 S.C. (H.L.) 3, 45 S.L.R. 335. The case of *Williams v. Kerschaw*, 1835, 5 Cl. & Fin. 111, 42 R.R. 269, was distinguishable, because there the words were held to be used disjunctively. Further, that case was not followed in *Cobb v. Cobb's Trustees*, cit.

Argued for the second parties—The question was whether the testator intended to indicate three different classes of purpose or one class exhibiting the three features mentioned. The use of the word "and"

was not conclusive—*Williams v. Kerschaw*, cit.—and other considerations indicated that the testator used the words disjunctively, and had in his mind three different classes of purpose. That view did not involve reading "or" for "and," because if "or" had been used the meaning might have been that the trustee was to give the whole residue to the one of the three classes mentioned which he should, in his discretion, select. It was not very easy to conceive of institutions which were all the three things mentioned. The fact that the adjectives used by the testator were by no means synonymous or even similar in meaning supported the view that they were used disjunctively—per Lord M'Laren in *Hay's Trustees v. Baillie*, 1908 S.C. 1224, at p. 1233, 45 S.L.R. 908, p. 913. If the words were used disjunctively and three different classes of purpose were meant, one of which was religious, the bequest was undoubtedly void from uncertainty—*Grimond or Macintyre v. Grimond's Trustees*, cit.

LORD JUSTICE-CLERK—In this case the question is whether the bequest is sufficiently definite. The decision turns upon a single word or phrase, and sometimes it is extremely difficult in construing such cases to come to a satisfactory conclusion. But in this particular case I do not find any serious difficulty, although the bequest is peculiarly expressed. It is a bequest giving the trustee a right to give money to certain "purposes" named. That of course is much more vague than a bequest to giving money to certain "institutions" of a particular character named. Certainly the clause itself does not read very intelligibly, because it directs the trustee to divide the residue as he should think fit among such purposes as he should select to be "the recipients" thereof. Now, there is a fatal blunder in grammar there, because a "purpose" cannot be said to be a "recipient." You may give money for a particular purpose, but a recipient must be somebody who will take charge of it for the purpose. The words of bequest are—"To divide the same as he shall think fit amongst such educational, charitable, and religious purposes within the City of Aberdeen as he shall select to be the recipients thereof." I find it impossible myself to read this as meaning that he is to select certain purposes, which are combinedly educational, charitable, and religious. I take it that the only reasonable meaning of it is that the trustee shall select certain purposes (by which the testator must have meant certain established purposes) which are educational or charitable or religious, not, of course, excluding any one which might combine all these features; but if the alternatives include the word "religious" then I think the case falls within the case of *Grimond*, 7 F. (H.L.) 90, although the word used there was "or." I think this cannot be read truly in any other sense than as a bequest to each of these purposes as distinguished from the other, there being a power, according to the intention of the

testator, to select among them. But then "religious" has been held not to be a definite object according to the decisions, and if you have a bequest which includes the word "religious" as one of the objects to which the money may be applied, that bequest is bad from vagueness and uncertainty. That being so, I have come to the conclusion that we must answer this question in the affirmative.

LORD LOW—I have come, with much hesitation and with some regret, to the same conclusion. I think it is conceded that if the clause in the settlement can fairly be read as meaning that any purpose to which the fund is devoted must be at the same time educational and charitable and religious, the bequest is good. Now if what had been directed had been to divide the fund among such educational, charitable, and religious institutions as the trustee might select, I think that the direction might fairly have been construed as meaning institutions which combined all three characteristics, and the case would then have been on all fours with the case of *Cobb's Trustees*, 21 R. 638, which was decided in this Division. But although that might be what the testator had in his mind, the word which he uses is not "institutions" but "purposes." The trustee is directed to divide the residue amongst such educational, charitable, and religious purposes as he thinks fit. If you are told to divide a fund among three classes—A, B, and C—I think that means that you must give part of it to each of the three classes, and that the direction is not confined to an object which combines the characteristics of all of them. Therefore I have, as I said, come, although with reluctance, to the conclusion that the bequest cannot be sustained.

LORD ARDWALL—I concur. It has been repeatedly said that no one case regarding the construction of a will can be held to rule another, unless the words in both wills are identical. Now here the words of the bequest are not identical with those under consideration in any of the cases which have been quoted to us. I think, therefore, we must endeavour to find what is the natural meaning of this clause read as any ordinary English sentence would be read. In the first place, we have a direction to divide the residue "amongst" certain "purposes." Now that means, to my mind, that there are different purposes amongst which it is to be divided, and we find it is distinctly set forth what these purposes, or rather I should say three classes of purposes, are. They are educational purposes, charitable purposes, and religious purposes. As I read this will, the trustee is directed to divide the residue amongst these three classes of purposes, and he would carry out this will properly, assuming the direction to be valid, by selecting one or more educational purposes, one or more charitable purposes, and one or more religious purposes, to benefit by the bequest of residue. That being so, it

follows, that we have here a bequest which is void from uncertainty, because in addition to charitable purposes there are introduced as objects to be benefited educational purposes and religious purposes, and the direction to divide a certain sum of residue amongst purposes of these descriptions at a trustee's discretion is void as being vague and indefinite.

LORD DUNDAS was sitting in the Extra Division.

The Court answered the question in the affirmative.

Counsel for the First Parties—Cullen, K. C.—Sandeman. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Second Parties—Lord Kinross—Jameson. Agents—Boyd, Jameson, & Young, W.S.

Thursday, May 20.

SECOND DIVISION.

(SINGLE BILLS.)

GALLACHER v. CONNERTON.

Title to Sue—Husband and Wife—Curator ad litem—Married Woman—Marriage pendente lite—Action of Affiliation and Aliment.

The pursuer in an action of affiliation and aliment, in which the Sheriff-Substitute had granted decree and the Sheriff, on appeal, had assolizied the defender, appealed to the Court of Session. The pursuer married, and the husband, with whom the pursuer was living, intimation of the action having been made to him on the motion of the defender, declined to sist himself. The defender having moved that the appeal be dismissed on the ground that a married woman could not sue in her own name, the Court, on the motion of the pursuer, appointed a *curator ad litem*.

In October 1906 Annie Gallacher raised an action in the Sheriff Court at Linlithgow against James Connerton, concluding for aliment for an illegitimate child to which she gave birth in April 1906 and of which she alleged the defender was the father. In December 1906 the Sheriff-Substitute (MACLEOD) granted decree. The defender appealed to the Sheriff (MACONOCHIE), who assolizied. The pursuer appealed, and in April 1907 the case was sisted to enable her to apply for admission to the poor's roll, which application was granted. In June 1908 the pursuer married John Gaffney.

In March 1909, when, the sist having been recalled in July 1908, the case appeared in the roll, the defender lodged a note narrating the marriage and craving an order for intimation to the pursuer's husband that he might sist himself as consenting and concurring, or failing his doing so, dismissal of the appeal. Intima-