in both of these cases, the enumeration of the two classes of objects or purposes among which the trustees are to select is clearly disjunctive, so that they might competently apply the whole to a religious object or purpose. So far the case of *Grimond* is precisely in point.

But then it is said that the adjection of a local limit—"within the city of Aberdeen"—makes all the difference. It is unnecessary to decide whether the definition of a local area within which existing organisations were to be found would save such a bequest. Something might perhaps depend on the extent of the area; but where it is no larger than a single city, the argument would be that the class of religious organisations existing there at the death of the testatrix was a definite and ascertainable class. But this argument loses all its force when it appears that the trustees are not restricted to such religious objects or purposes as they may find in Aberdeen, but that they may "institute" any religious object or purpose at their discretion so long as they set it up in Aberdeen. This seems to me to throw the whole definition loose, and to leave the trustees free to make a will for the testatrix as were the trustees in *Grimond's* case, which, of course, is the thing struck at by the rule which makes a bequest void from uncertainty.

I am therefore for sustaining the contention of the second and third parties, and answering the questions of law as they propose.

The LORD JUSTICE-CLERK and LORD KYLLACHY concurred.

LORD LOW was absent.

The Court answered the first question of law in the negative and the second in the affirmative.

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

Counsel for the Second and Third Parties—Campbell, K.C.—Grainger Stewart. Agents—Boyd, Jameson, & Young, W.S.

Friday, November 10.

FIRST DIVISION.

[Sheriff Court of Aberdeen, Kincardine, and Banff, at Aberdeen.

ARGO *v.* PAULINE AND OTHERS.

Succession—Will—Meaning of Bequest—Description of Class—"My Relatives of Like Degree in Scotland Living at the Time of My Death."

A testatrix made this bequest—"In regard to the residue of my estate I add the name of Gavin E. Argo, of Scotland, who I wish to divide what falls to him with my relatives of like degree in Scotland living at the time of my death."

Held that a relative in the same degree of relationship as Mr Argo, but whose home and ordinary residence were in Australia, though she happened to be in Scotland on a visit at the time of the testatrix's death, was not within the class whom the testatrix intended to benefit.

Expenses — Multiplepoinding — Appeal — Will—Uncertainty—Unsuccessful Claimant in Sheriff Court Allowed Expenses of Appeal out of the Fund in medio.

Expenses of appeal allowed to an unsuccessful claimant in an appeal from the Sheriff Court out of the fund *in medio*—there being doubt as to the meaning of the bequest, the Sheriff and Sheriff-Substitute having differed, and the action being a multiplepoinding to which the appellant had been called *nominatim*.

By a codicil to her will, dated 1st October 1889, the late Rebecca Elmslie of Philadelphia, U.S.A., who died on 20th March 1900, made this provision—"In regard to the residue of my estate I add the name of Gavin E. Argo of Scotland, who I wish to divide what falls to him with my relatives of like degree in Scotland living at the time of my death."

Thirty-one persons, all of whom were in the same degree of relationship to the testatrix, claimed right to participate equally in this bequest. In regard to the rights of twenty-nine of these claimants there was no dispute—they being all permanently resident in Scotland as well as being all equally related to the testatrix. In regard, however, to the two remaining shares a dispute arose, the said two shares being claimed (1) by the twenty-nine claimants above referred to, equally among them, and (2) by two ladies, Isabella Janet Elmslie and Annie Elmslie, both residing in Melbourne, Australia, one of whom, however, happened to be in Scotland at the time of the testatrix's death, and the other shortly thereafter.

In these circumstances Argo raised the present multiplepoinding in the Sheriff Court at Aberdeen to have the right to the said two shares determined.

In their condescendence and claim the Misses Elmslie averred—"(Cond. 4) The free amount of residue remitted to Mr Argo for division between himself and the other claimants was £6903, 2s. 5d. To each of twenty-nine of the present claimants he has paid £215, 14s. 6d., being one thirty-second part thereof. The balance in his hands, therefore, is £647, 3s. 6d., which, with interest amounting to £12, 1s. 7d., makes up the fund *in medio*, namely, £659, 5s. 1d. Further interest has accrued thereon, and the sum consigned by the real raiser in Court amounts at this date to £663, 2s. 5d. These claimants being related to the deceased in the like degree to Mr Argo, are entitled to participate in the said bequests, and there being thirty-one claimants in all, their share of two thirty-first parts of the said sum of £6903, 2s. 5d. is £445, 7s. 2d., which amount, with interest

thereon since August 1903, they now claim out of the fund *in medio*. (Cond. 5) These claimants have resided in Australia for many years, but the claimant Annie Elmslie was residing in Scotland on 20th March 1900, the date of the deceased's death. The other claimant, Isabella Janet Elmslie, resided in Scotland from 18th April 1900 to 27th December 1901. (Cond. 6) The deceased, being herself of Scotch origin, intended by said bequest to favour the whole of her relatives of the degree of relationship designated by the said codicil, who were likewise of Scotch origin, and these claimants are included in the class so favoured."

They pleaded, *inter alia*—"(3) On a sound construction of the said will and codicil these claimants are entitled to be ranked and preferred to the fund *in medio* in terms of their claim. (5) In any event, these claimants should be found entitled to their expenses out of the fund *in medio*."

On 13th December 1904 the Sheriff-Substitute (HENDERSON BEGG) sustained the claim of Miss Annie Elmslie to participate in the bequest, but repelled that of Miss Isabella Janet Elmslie, for the reasons stated in the following note:—"The only claimants whose right to participate is disputed are Miss Isabella Janet Elmslie and Miss Annie Elmslie. It is admitted by the former that she did not come to Scotland till after the death of the testatrix. She is therefore not entitled to participate unless the codicil can be read as if the words 'in Scotland' were dropped out (which is plainly inadmissible) or held as equivalent to some such words as 'of Scottish descent,' and I do not think that this can be held without doing violence to the plain grammatical meaning of the codicil. The case of Miss Annie Elmslie is, however, different, for she admittedly came to Scotland on 1st July 1899, and remained in Scotland till some weeks after the death of the testatrix on 20th March 1900. She therefore is one of the relatives favoured by the codicil, unless the words 'in Scotland' are to be read as equivalent to some such words as 'having a domicile of succession in Scotland.' But I see no warrant for so reading them. Whatever may have been the motive of the testatrix, I think that the words of the codicil are sufficiently satisfied by the claimant having been alive in Scotland at the time of the death of the testatrix,"

The other claimants appealed to the Sheriff (CRAWFORD), who sustained the appeal and repelled the claims of the Misses Elmslie, finding that the bequest fell to be divided among the 29 claimants above referred to.

Note.—"By the codicil in question the testatrix desires to benefit her relatives of like degree (that is, of like degree with the Reverend Gavin E. Argo) in Scotland, living at the time of her death. These words are somewhat ambiguous. But if the meaning were adopted that the legacy included and was confined to persons who happened to be in Scotland at the time of the death of the testatrix, the result would be extremely capricious. It would inevitably follow that if one member of a family of several brothers and sisters were absent for a few days in London or even Carlisle he would be cut out. It appears on the pleadings that the testatrix had relatives in other parts of the world. This clause is intended to benefit her relatives in Scotland as distinguished from others, and I think that the true meaning of the words, the most natural as well as the most reasonable meaning, is those settled in Scotland and having their home in Scotland."

The Misses Elmslie appealed.

(The claimant Miss Isabella Janet Elmslie, however, withdrew her appeal before the case was heard.)

Argued for the appellant Miss Annie Elmslie—The Sheriff-Substitute was right. This claimant was actually resident in Scotland at the time the testatrix died. That was the meaning of the words "in Scotland at the time of my death."

Counsel for the respondents was not called upon.

LORD PRESIDENT—The testatrix, who lived in America, by her will divided the residue of her estate among various persons, some of whom I suppose may have been resident in America. By a subsequent codicil she made this provision—"In regard to the residue of my estate I add the name of Gavin E. Argo, of Scotland, who I wish to divide what falls to him with my relatives of like degree in Scotland living at the time of my death."

Mr Argo has raised this multiplepoinding to have it judicially determined who are the persons entitled to share with him in the bequest. A variety of persons have come forward who are in the same degree of relationship as he is, and as to all of whom, with one exception, viz., that of Miss Annie Elmslie, the appellant, there is no question.

Miss Elmslie is an Australian, her home and ordinary residence being in Melbourne. She is alive and she is a second cousin of the testatrix, that is to say, of the same degree of relationship as Mr Argo.

Now at the time of the testatrix's death Miss Elmslie happened to be in Scotland on a visit of several months' duration, and she says that she is entitled to participate in the bequest because she was a relative of like degree in Scotland at the time of the testatrix's death.

There are three conditions to be satisfied to entitle a person to share in this bequest, namely, "a relative of like degree," "in Scotland," and "living at the time of the testatrix's death." Undoubtedly Miss Elmslie satisfies two of these; she is a relative of like degree, and she is alive. The whole point, therefore, turns on the condition that the persons who are to take are to be relatives of like degree "in Scotland." Does it mean merely that at the moment when the testatrix expired the persons were to be bodily present in Scotland, or does it mean some more permanent connection with Scotland which may fairly enough be expressed by the word "in"?

The Sheriff-Substitute has taken the first

view and the Sheriff the second view. I am bound to say that without any hesitation I think the view taken by the Sheriff is right. I think that that is so not only because the effect of the other construction of the words would be fantastic and capricious—admitting those who had no connection with Scotland at all but who happened to be there by chance when the testatrix died, and excluding those who had spent all their life in Scotland but who happened on the day of the testatrix's death to be out of Scotland on a visit of, it might be, only twenty-four hours—but also because if you take the words in their ordinary sense only one conclusion is possible.

The testatrix knew that Mr Argo was a second cousin, and she knew that he lived in Scotland somewhat permanently, for she says, "Gavin Argo of Scotland." She singles out others in the same degree of relationship and in the same circumstances as Mr Argo himself, and that I think is equivalent to saying "my Scotch cousins."

I am therefore of opinion that the interlocutor of the learned Sheriff is right, and that it ought to be affirmed.

LORD ADAM—I am of the same opinion. I think the lady meant this bequest to go to her relatives living in Scotland at the time of her death.

I think that is the right view to take of the meaning of this bequest. Mr Anderson says the words must be taken as meaning my relatives actually in Scotland at the time of my death, but he does not admit that a relative whose ordinary residence was in Scotland but who happened to be out of Scotland for a few hours would be excluded. I think the view taken by the Sheriff is right.

LORD M'LAREN—There are two points which I think may be noticed. The first is, What is the time at which the class to be benefited falls to be ascertained? Parties here are agreed that it must be the time of the testatrix's death, and that would seem to be sound, as the bequest is to be shared by persons who were living at the time of her death. It would be a very arbitrary construction to hold that residence in Scotland was to be determined at one point of time and the fact of survivance at another. It is in accordance with the general practice that the opening of the succession is the time at which a bequest to a class must be ascertained.

The second point is as to the meaning and effect of the words "in Scotland," regarded as descriptive words in a legacy. The expression is elliptical, for there is no verb or participle governing the words "in Scotland," and we may supply the word "living," or "resident," or as Mr Anderson suggested, the word "present." In the absence of anything to show that mere casual presence in Scotland was intended, I think we must accept the more reasonable construction and hold that the words mean being resident in Scotland.

I do not say that a domicile in Scotland would be necessary, and if this lady had come over and taken a house in Scotland for an indefinite period she might fairly be held entitled to the benefit of the legacy. But as she came to Scotland on a visit to friends, and with the intention of returning to Australia, she cannot, as I think, be held to fall within the description of "my relatives of like degree in Scotland at the time of my death."

LORD KINNEAR—I concur.

The Court refused the appeal and affirmed the judgment of the Sheriff.

Counsel for the appellant moved for the expenses of the appeal out of the fund *in medio*.

Argued for the appellant—The codicil was ambiguous. There was a difference of opinion between the Sheriffs, and the appellant was reasonably justified in bringing this appeal. This was not a case of making one claimant pay for determining the meaning of the codicil, as the two shares would fall to be divided among all the other claimants equally. Further, this was an action of multiplepoinding, and the appellant had been called *nominatim*.

Argued for the respondents—This was not a case for expenses out of the fund. The meaning of the codicil was clear. This was just the ordinary case of a dispute between two claimants, one of whom had been unsuccessful.

The Court found the parties entitled to their expenses out of the fund *in medio*, and pronounced this interlocutor:—

"Refuse the appeal; affirm the interlocutor of the Sheriff, dated 3rd February 1905; and decern, and remit to the Sheriff to proceed as accords: Find the appellant Annie Elmslie and the respondents entitled to their expenses in the appeal out of the fund *in medio*," &c.

Counsel for the Appellant—Orr, K.C.—A. M. Anderson. Agents—Clark & Macdonald, S.S.C.

Counsel for the Respondents—Cullen, K.C.—A. R. Brown. Agents—Ronald & Ritchie, S.S.C.

Friday, November 17.

FIRST DIVISION.

[Sheriff Court of Lanarkshire at Glasgow.

M'LAUGHLAN *v.* THE CLYDE VALLEY ELECTRICAL POWER COMPANY.

Process—Appeal for Jury Trial—Proof or Jury Trial—Trifling Nature of Case—No Definite Injuries Specified.

In an action of damages for personal injuries alleged to have been sustained through falling into an excavation on the side of a street made by the defenders while engaged in laying an electric cable, the pursuer, a miner, averred