VISCOUNT FINLAY—I am of the same opinion. The question is the shortest one in the world. It is simply this—Does the bequest in this will relate only to charitable institutions, or does it extend to deserving institutions though not charitable? If it is confined to charitable institutions it is good; if it extends to institutions of a deserving nature which are not charitable it is bad. It appears to me beyond all doubt that it is not confined to charitable institutions, and I cannot see how by any process of mental gymnastics one can say that when a man says he leaves money for "such charitable or other deserving institutions" as the trustees may think fit, it can be held that they are confined in their choice of other deserving institutions to institutions which are charitable. "Other" means not charitable, and I cannot see how it can be read otherwise.

I do not go further into the case because Lord Dundas has delivered what, to my mind, is a most admirable judgment, dealing with the whole principle and referring sufficiently to the authorities. I adopt what he said, and I am confirmed in the view that he was right by the fact that his colleagues, while they differed in order that the will might rather be upheld than perish, expressed very grave doubts whether the view they took was correct.

LORD DUNEDIN—I think in this will two alternatives were given. One alternative is obviously bad for vagueness, and therefore the whole bequest must go.

I agree with what the noble and learned Viscount has said about Lord Dundas's judgment, and I would only just like to add this. I think that Symmers' case was rightly decided, that it did not in any way conflict with the two cases in which I took a part in 1908 while I was President of the Court of Session, because the whole ground of my judgments in those cases was that there was not such an alternative.

LORD ATKINSON—I concur. I think it is absolutely impossible to read this bequest as to "charitable or other deserving institutions of a charitable nature," and if it is impossible to read it like that, then the words of the bequest are too wide and too uncertain.

I join with my noble and learned friends who have preceded me in expressing my confidence in, and admiration for, the judgment of Lord Dundas.

LORD SHAW — The judgment of Lord Dundas so fully expresses my own opinion that I do not add anything. I agree with your Lordships.

Their Lordships ordered that the interlocutor appealed from be reversed, that the interlocutor of the Lord Ordinary be affirmed, and that the respondents do pay to the appellant her costs here and below.

Counsel for the Appellant—Dean of Faculty (Constable, K.C.)—T. Graham Robertson. Agents—Wiliam C. Dudgeon, W.S., Edinburgh—Attenboroughs, London.

Counsel for the Respondents—MacRobert, K.C.—J. C. Fenton. Agents—Wilson, Caldwell, & Tait, Glasgow—Cowan & Stewart, W.S., Edinburgh—Hicks, Arnold, & Bender, London.

Friday, December 3.

(Before the Lord Chancellor, Viscount Finlay, Lord Dunedin, Lord Atkinson, and Lord Shaw.)

M'MASTER & COMPANY *v.* COX, M'EUEN, & COMPANY.

(In the Court of Session, May 25, 1920, 57 S.L.R. 504.)

Contract — Sale — Impossibility of Performance — Supervenient Legislation — Jute (Export) Order 1917.

By contracts dated 1st and 2nd November 1917 a firm of jute manufacturers contracted to sell to a firm of merchants certain quantities of jute goods, one-half to be delivered in January and the remainder in February 1918, delivery to be f.o.b. Dundee. On the passing of the Jute (Export) Order, dated 27th November 1917, the sellers wrote the buyers asking for a guarantee that the goods would not be exported from the United Kingdom, or if the goods were for export for the necessary permit from the War Office. Application was made for a permit but it was refused. The buyers then cancelled the contracts.

In an action of damages at the instance of the sellers for breach of contract, *held* (*reversing* the judgment of the Second Division, *diss.* Lord Dundas) that the Jute (Export) Order and the refusal of the permit had not the effect of voiding the contract, there being no contractual terms, express or implied, as to the market in which the goods were to be disposed of, and that accordingly the buyers were in breach of contract in refusing to take delivery.

This case is reported *ante ut supra.*

The pursuers appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR — In this action the pursuers, who are a firm of jute manufacturers in Dundee, sue the defenders, who are jute merchants, for damages arising from failure to take delivery of a certain quantity of jute goods under contracts between the parties. The defenders buy jute in the course of their business both for home and foreign markets. The contracts which fall to be construed, whether one calls them sales or agreements for sale, were entered into on the 1st and 2nd November 1917, and under their terms the defenders ordered and purchased from the pursuers on November 1st 50 bales of 10 oz./40″ chested Hessian at the price of $8\frac{1}{16}$d. per yard, each bale containing about 2000 yards. Delivery was to be f.o.b. Dundee of 25 bales in January and 25 bales in February 1918. On the

2nd November 1917 the defenders ordered and purchased a further 50 bales under similar conditions to those contained in the order given on the 1st November, but the bales were not of the same description in respect of size or shape.

Much discussion has arisen as to the meaning and effect of this contract, and many contentions no longer persevered in have been put forward at the various stages of this litigation by those who at different times represented the interests of the respondents. It was at one time strenuously contended that the language used in this contract made it plain to those who were experienced in such matters that the purchasers under it intended to export the jute. The importance of this attitude cannot be understood until one considers the terms of the Jute (Export) Order, which was issued by the Army Council on the 23rd November 1917.

That Order was as follows:—"On any sale of any article or material manufactured or to be manufactured wholly or partly from jute, it shall be the duty of the vendor either to obtain from the purchaser a guarantee in writing that such article or material will not be exported from the United Kingdom, or if it is the intention of the purchaser that such article or material shall be exported from the United Kingdom, to obtain a permit issued by or on behalf of the Director of Raw Materials authorising the sale or manufacture, as the case may be, of such article or material as aforesaid"; and "no person shall sell or deliver any article or material of the description aforesaid for exportation from the United Kingdom without a permit issued by or on behalf of the Director of Raw Materials." When this prohibition became effective the defenders were much concerned to show that the pursuers knew at the time of sale, and were affected by the knowledge, that the jute was intended for export. The various contentions put forward with this object have not survived the argument.

Indeed, the issues which have arisen in the course of the litigation have been very much limited as the debate has proceeded in your Lordships' House. I do not myself in my experience either on the Bench or at the Bar remember an occasion on which there has been a swifter and more complete transformation of all the issues which have been treated as important and relevant in the Inferior Courts. Two Judges of the appellate tribunal in Scotland decided this matter in favour of the respondents, and Mr Sandeman in almost the first sentence of his argument to-day made a complete jettison of the whole ground upon which the judgments of these learned Judges were based. I do not in any way call in question his judiciousness in adopting this course, but he has of course involved himself in a somewhat difficult situation and your Lordships in some slight embarrassment. He has founded himself, and has founded himself only, upon an argument which I have satisfied myself was not appropriately raised in the pleadings, and which was only dealt with in the argument below in the most perfunctory and fugitive manner. I find on page 507, vol. 57, of the Scottish Law Reporter one solitary reference to the contention which is now the only *tabula in naufragio*—"In the present case the pursuers sought to adject to the contract a novel condition which they were not entitled to adject, namely, that the defenders should give a guarantee that the goods would not be exported. Further, this could be regarded as a contract with deliveries in January and February," and so forth. Those four lines contain the only memorial of the only argument which the respondents now desire to bring forward.

I ought not to pass from this immediate subject without placing on record my own view that the two judgments which Mr Sandeman abandoned in his argument would not have afforded him any support or sustenance had he attempted to recommend their conclusions in this House. I have myself no doubt that the learned Judges who delivered those judgments were under a misapprehension when they founded themselves upon the authorities upon which they relied.

I have the good fortune to find myself in almost complete agreement with the judgment delivered by Lord Dundas, and that degree of agreement relieves me from the duty of discussing this matter with the detail I should otherwise have thought necessary. I will therefore merely indicate the two grounds which have led me without any doubt to the conclusion that this appeal must succeed.

I found myself in the first place upon the actual scope and content of this agreement. When I examine the agreement what do I find? I find that it is one in which a vendor has undertaken to supply a certain article to a purchaser. He is not concerned to ask, and he does not ask, in what market the purchaser proposes to dispose of that which he buys. I have already pointed out that every attempt to show that the vendor was affected with any knowledge that the purchaser intended to dispose of these goods in a foreign market has failed. If it was the wish of the purchaser to procure for himself an opportunity of resiling from the contract in case a certain possible market should be denied to him, it was for him to introduce some condition into this contract which would have secured him the protection desired in the contingency indicated. We are dealing here with a contract in which there is an undertaking to sell, and there is nothing further. I am clearly of opinion that the buyer under that contract cannot be heard to say that he is entitled to resile from the contract upon the ground that a market which appeared to be open to him at the time the contract was made has since been denied to him by superior authority. On this broad ground I hold that this appeal must succeed, and that the defenders have no cause of complaint and no justification for evading liability under their contract.

I do not consider that the point taken by Mr Sandeman at this late stage of the litigation is open to him, having regard to the

manner in which the matter has proceeded in the earlier stages, but nevertheless I think it is desirable that I should make one observation upon his contention. It is quite true that in what has been called I think a general circular letter the pursuers did write to the defenders and to others that they would require a guarantee in accordance with the Jute (Export) Order 1917. It is, nevertheless, also to be borne in mind that when the correspondence was resumed upon this subject with greater particularity between the parties, we find the appellants (the pursuers), so far as I know, consistently maintaining that the Order had no application to them. They made it abundantly plain that they held themselves at liberty and were prepared to carry out their contract.

I should desire, however, to base the decision which I have reached upon the broader ground already indicated, that this was a sale without any condition by a seller to a purchaser, and that on the terms of this agreement the pursuers were entitled to treat themselves as completely disinterested in all questions affecting the purchaser alone, such as a consideration of the markets, which might be open to that purchaser at the moment when he disposed of that which he bought.

I move your Lordships that this appeal be allowed.

VISCOUNT FINLAY—I am of the same opinion. As regards the points upon which the case was really contested in the Court below, I agree absolutely with all that Lord Dundas says. It appears to me that on the view which he took, which appears to me to be right, it is not necessary to deal here with the effect of the Jute (Export) Order or its precise construction. The Jute Order concerned the purchasers. It may be that it rendered their contract a much less advantageous one for them than it otherwise would be, but it could not exonerate them from the performance of the contract as between themselves and the pursuers. As Lord Dundas said—"For the rest, there were, in my judgment, simply agreements to sell goods at a stipulated price." Something was said about the words "f.o.b." They, of course, would be equally applicable to any transit by sea, whether coastwise or to foreign ports; but it appears to me quite impossible to find in the documents or in the surrounding circumstances any sufficient foundation for making it a term of the contract that liberty of export should exist at the time it was to be performed.

Then a new point has been raised, to which reference has been made by Mr Condie Sandeman. That was a statement that in accordance with the Jute (Export) Order 1917 the appellants would "require a guarantee in writing that all goods on order will not be exported from the United Kingdom, and if such goods are for export, a permit." Well, I do not think we can possibly at this stage of the case, in consequence of that general notice with reference to all contracts to which that Export Order was applicable, hold that they committed a breach of contract by sending out that notice. If I rightly followed the argument suggested, that was the point that was put. I think it would be very wrong indeed at this stage of the case to come to any such conclusion. The point ought to have been raised in the Courts below, and might have been elucidated by evidence. We have nothing except a mere reference of the shortest nature in a very casual way to this point, and for my own part I certainly should decline to act upon it as a reason for supporting a judgment which fails upon the grounds which are really contested. So far as I can appreciate the point, I do not think it is a good one, but in the absence of all necessary materials which would have been before us if the point had been really taken, it seems to me quite impossible for us to act upon it as a sufficient ground for supporting the judgment given by the majority upon a perfectly different ground.

LORD DUNEDIN—I concur. I think the judgment of the majority in the Second Division is vitiated by one underlying fallacy, namely, that the right of the respondents to dispose of their goods was a right which came to them under the contract. The right to dispose of the goods when and where they chose is a right due to the fact that after delivery they were owners of the goods, and for that reason all these references to cases, such as *Tamplin* and *Dick Kerr*, are quite by the way. The whole doctrine of frustration of contracts goes to this, that there is something which a *vis major* (using that expression in the widest sense) has prevented the party from doing in the fulfilment of his contract.

Now the duties of the respondents under this contract were only two, namely, to accept the goods and pay the price; and nothing that the Government did with respect to preventing goods going abroad, or imposing conditions on their going abroad, interfered with either of those duties. That I think was the fallacy in the judgment of the Court below, and therefore although Mr Sandeman certainly executed the happy despatch with the judgments in his favour, I do not blame him, because I think he could not have supported them.

But then he started another argument. Now one looks in vain for any real treatment of that argument in the Courts below. First, I look at the pleadings. Mr Sandeman tried to make out that I could find it in the pleas. Well, perhaps I can; but if I do I find it with the same sort of skill that a person has to exercise in making out a complicated anagram or solving a double acrostic, and the meaning of pleas is to state in clear language the legal proposition on which the party means to found. It is obvious also that the argument, although it seems to have been mentioned—because in the first place I would certainly take Mr Dykes' word, and in the second place there is the quotation which was read by the noble and learned Lord on the Woolsack—although it seems to have been mentioned in the Inner House it does not really

seem to have bulked there at all. But here it is. Now I have a strong view upon the subject of these matters. I do not think that we could have shut out the question. It might have had a very great effect upon the expenses; but if there had been really something in it I do not think we could have shut it out. But I do not think there is anything in it. The plea rested upon the circular letter. Now that circular letter was written by people who, so far as their minds were concerned, did not suppose that the Government Order applied to these contracts at all, and the moment that these contracts as separate things are taken up by the parties, namely, by the letter of the 18th of December from the defenders to the pursuers, where they deal with the first order (the 50 bales of 10 oz./40 in. chested Hessian), and say they are for exportation to America and ask if they have a permit, the other parties at once reply, We have never heard about this going to America before. "We do not require, so far as we are aware of, any licence to manufacture 10 oz./40 in. Hessian." That is tantamount to saying, "The general circular letter we sent does not in our view apply to these goods." Therefore I think this plea is not only born out of time but is bad when we get it.

LORD ATKINSON—I concur. I think the judgment of Lord Dundas was well founded and is correct, and that the judgment of the majority of the Inner House is erroneous and should be overruled.

It is quite clear to my mind that there was no contract ever entered into between the parties here to sell these goods for export. The purchaser had a perfect right when he got them to export them, but that was a right that sprang from his ownership of them, and not from any stipulation in the contract at all.

I quite agree with what my noble and learned friend who has just preceded me has said with reference to this new point that has been raised. I do not think there is anything in it, and therefore the matter may be put aside.

LORD SHAW—I agree with the judgment of my noble and learned friend Lord Dunedin.

In my opinion these contracts for sale of jute goods were complete contracts as and from the 1st and 2nd of November 1917. The Order issued by the Government department three weeks later, namely, on the 23rd November, would *a priori* appear to be an *ex post facto* declaration, and unless there is inside of that Government Order a clear application to existing and unfulfilled contracts, it might be impracticable and would be highly against principle to make such an application.

The finding of the learned Lord Ordinary is not controverted in the Inner House, to the effect that under these contracts the buyer who might be able to dispose of the goods in the home market was perfectly free to insist upon their fulfilment, and the seller was bound to deliver. This must mean that notwithstanding the Departmental order the contracts still remained binding on the seller. I agree that it was so, but the contracts remained binding not on one party but on both.

That I am not putting this matter too high I venture to quote the judgment of Lord Salvesen to this effect—"I agree with the Lord Ordinary," he says, "that under the contract as originally framed the defenders could have demanded delivery f.o.b. Dundee, and that the pursuers could not have refused to deliver to them on the ground that the defenders proposed to sell them in the home market." It is therefore clear that in both Houses of the Court of Session the conclusion was come to that there was a binding contract so far as the seller was concerned; the buyer was perfectly free to hold the seller bound, and yet curiously enough the buyer, under the judgment of the Second Division, seems to have had a certain recourse at law under which he could assert his own freedom from the contract under which the seller was bound. It arises in this way. I read again from the judgment of Lord Salvesen—"By the contract," says he, "the defenders had complete freedom of disposal of the goods contracted for, and the continued existence of that freedom till the contract was performed must therefore have been in their contemplation as the very foundation of the contract at the time they entered into it."

On the construction of the contract of the 1st and 2nd November I do not find that it is restricted to goods for exportation, agreeing in that with the learned Lord Ordinary. And if there was a restriction in freedom of disposal of the goods, I agree with all your Lordships that that restriction had no operation in the annulment of the contract entered into, but was only operative on the liberty of action of the buyer as and when he became owner of the goods sold. How freedom to dispose in one particular manner of goods contracted for can give, not both parties to the contract but one party to it, the right of declaring the contract at an end, passes my comprehension.

In the course of legislation many restrictions may be laid upon the possessors of goods or the owners of property, but why the consequence should be that there is thereby annulled, or permitted to be annulled, all current contracts at the time of that legislation, unless the legislation expressly bears that that result shall happen—that I cannot understand. If the supervenient legislation forbids the execution of contracts as between the parties, then, of course, these contracts fall; otherwise the presumption is all to enable the commercial business of the country to proceed without interruption.

All these points of view were jettisoned in the argument at your Lordships' bar for the respondents, and the circular letter to which my Lord Dunedin has referred as issued by these merchants in Dundee was founded upon. Upon that subject I go a little further than my noble and learned friend. I agree with him that the circular letter does not apply to the present contract,

and I agree with the argument—so concise and clear—of Mr Mackay that the further correspondence shows that at the moment when an attempt was made by these London merchants to make it apply to the existing contract, with which this House is now concerned, that attempt was at once blocked by an immediate contradiction.

But I go thus further. Supposing the circular letter had referred to the existing contract, in my opinion that circular was a proper circular to issue, and I do not think that a circular so issued can be viewed in the light of a demand by the sellers for the adjection of a new term to the bargain. That adjection is not demanded by one party to the contract; the adjection was made by the law itself. It does not affect the contracts, their existence, or their continuance; it affects merely the rights of the persons coming into possession of the goods under any current contract. That and that alone was the meaning of the circular letter. If the contract had stood the circular letter would, in my opinion, have been equally justified; as it was it so turns out that it did not apply to these particular contracts with which the House has had to deal.

Their Lordships ordered that the interlocutor appealed from be reversed, that the interlocutor of the Lord Ordinary be restored, and that the respondents do pay to the appellants their costs here and in the Court of Session.

Counsel for the Appellants — Mackay, K.C.—Gentles. Agents—Hill & M'Gregor, Dundee — Douglas & Miller, W.S., Edinburgh—James, Mellor, & Coleman, London.

Counsel for the Respondents—Sandeman, K.C.—D. Oswald Dykes. Agents—Guild & Shepherd, W.S., Edinburgh—Waltons & Company, London.

Friday, December 3.

(Before the Lord Chancellor, Viscount Finlay, Lord Dunedin, Lord Atkinson, and Lord Shaw.)

CANT *v.* FIFE COAL COMPANY, LIMITED.

Master and Servant—Workmen's Compensation—Whether Incapacity Results from Injury — Refusal to Undergo Surgical Operation — Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *First Schedule,* (1) (*b*).

The employers of a workman who had sustained an injury to the thumb of his right hand, and who was in receipt of compensation, sought to have the compensation ended on the ground that the workman's incapacity was due, not to the injury which he had sustained, but to his unreasonable refusal to submit to surgical treatment. The medical evidence led by the employers was to the effect that if the workman underwent certain operations which were recommended by their doctors, the first of which involved the amputation of the top of the thumb, and the second (which was recommended by a specialist) was an operation of a different kind, the condition of his hand would be materially improved. The workman's medical adviser, whom he had consulted in reference to both proposals, was clearly of opinion that neither of the operations proposed would have the effect predicted. *Held* (*affirming* the judgment of the First Division) that in the circumstances stated there was evidence which justified the finding of the arbiter that the employers had failed to prove that the workman's incapacity was due to unreasonable refusal to undergo surgical treatment.

In an arbitration under the Workmen's Compensation Act 1906 Alexander Cant, miner, Cowdenbeath, *claimant and respondent,* craved warrant to record a memorandum of an agreement between him and the Fife Coal Company, Limited, *respondents and appellants,* dated 21st April 1919. The company craved a review of compensation, and asked the arbiter to grant an award finding that the claimant's right to compensation came to an end at 31st May 1919, or in any event came to an end for the time being on said 31st May 1919, or at such other date as the Court might determine, on the ground that his incapacity from the accident after mentioned had come to an end, and that his incapacity was due to his unreasonable refusal to undergo a minor operation.

The *facts* admitted or proved were as follows: — 1. The respondent was on 23rd October 1918 a miner in the employment of the appellants at their No. 10 Pit, Cowdenbeath. On said date he sustained personal injury by accident arising out of and in the course of his employment through a stone falling from the roof and crushing the thumb of his right hand. The thumb was severely lacerated, and the bones at the metacarpal joint were fractured. 2. The respondent was totally incapacitated, and received compensation from the appellants in respect of total incapacity. On 11th March 1919 he started light work, and on 21st April 1919 the agreement, of which a memorandum was lodged for registration, was entered into. By that agreement the appellants undertook to pay compensation to the respondent in respect of partial incapacity at the rate of 8s. per week. Compensation at said rate was paid to 31st May 1919, after which date the appellants discontinued payment. 3. At the time when said agreement for payment in respect of partial incapacity was entered into, the wound on the respondent's thumb had healed, but the thumb was in a fixed position, laid on the palm of the hand with the distal phalanx flexed at a right angle. That is still the condition of the respondent's thumb. The effect of this fixed position is that the respondent is unable to grasp with his right hand. He cannot move his thumb, and the position of the distal phalanx interferes with