whole, therefore, I come to the conclusion that there is a good bequest of the residue of this lady's estate, heritable and moveable, for the purpose of founding and endowing a home for colliers.

LORD PEARSON was absent.

The Court recalled the Lord Ordinary's interlocutor and assoilzied the defender.

Counsel for Pursuer (Respondent)—Scott Dickson, K.C.—A. M. Anderson. Agents—Inglis, Orr, & Bruce, W.S.

Counsel for Defender (Reclaimer)—Clyde, K.C.—R. S. Horne. Agent—A. C. D. Vert, S.S.C.

Saturday, July 18.

FIRST DIVISION

[Lord Johnston, Ordinary.

HAY'S TRUSTEES *v.* BAILLIE AND OTHERS.

Succession—Trust—Uncertainty—Charitable Bequest—Direction to Trustees to Divide Estate "Amongst such Societies or Institutions of a Benevolent or Charitable Nature" as they Think Proper.

A testatrix directed her trustees to divide the residue of her estate "amongst such societies or institutions of a benevolent or charitable nature in such proportions as they shall in their own discretion think proper, but excluding all societies or institutions either connected with the Roman Catholic body or under the control or management or even general management of those connected with that body."

Held (*rev.* Lord Johnston) that the bequest was not void by reason of uncertainty.

Mrs Margaret Baillie or Hay, who resided at Holmwood, Uddingston, died on 29th December 1898, leaving a trust-disposition and settlement, dated 9th March 1896, by which she assigned and disponed her whole means and estate to and in favour of William Jackson Andrew, solicitor in Coatbridge and another, as trustees for certain purposes.

The trust-disposition and settlement contained this clause:—"In the last place, I direct my trustees or trustee, on the death of the survivor of me and the said Margaret M'Donald," (a servant of the testatrix to whom she had made certain bequests, including the life-rent of Holmwood), "to apportion and pay over the free proceeds of the whole residue of my means and estate, after giving effect to the above provisions, to and amongst such societies or institutions of a benevolent or charitable nature in such proportions as he or they shall in their own discretion think proper, but excluding all societies or institutions either connected with the Roman Catholic body or under the control or management or even general management of those connected with that body."

The trustees being advised that the validity of the above provision ought to be determined by the Court, raised an action of multiplepoinding in which the residue of the estate formed the fund *in medio*. Claims were lodged by the trustees and by Miss Jessie Baillie and others, the next-of-kin of the truster.

The trustees claimed primarily to be ranked and preferred to the whole fund *in medio* in order that the same might be administered by them in terms of the residuary clause of the trust-disposition and settlement. And they pleaded—"(1) Said bequest of residue being valid and falling to receive effect, the claimants are entitled to be ranked and preferred to the whole fund *in medio* in terms of their primary claim."

The claimants, the next-of-kin, claimed to be ranked and preferred to such shares of the fund *in medio* as they were entitled to as heirs *ab intestato* of the truster.

On 14th November 1907 the Lord Ordinary (JOHNSTON) pronounced an interlocutor finding that the said bequest of residue was void from uncertainty.

Opinion.—"The late Mrs Hay of Holmwood, Uddingston, directed her trustees to apportion and pay over the free portion of the residue of her estate 'to or amongst such societies or institutions of a benevolent or charitable nature in such proportions' as in their discretion they should think proper, but always to the exclusion of Roman Catholic societies or institutions. The validity of this bequest is challenged by the testator's next-of-kin, who maintain that it is void on the ground of uncertainty in respect that though 'charitable' has, since the case of *Crichton* in 1828, 3 W. & S. 329, been recognised as sufficiently descriptive of a class of objects or institutions, to receive effect in discretionary bequests of this nature, the alternative word 'benevolent' is not so descriptive, and has not been so recognised.

"The trustees, who support the bequest, did not, I think, go the length of maintaining that 'benevolent' and 'charitable,' taken by themselves as words in common use in the English language are identical in meaning.

"But I think I may state their contention as embraced in these three propositions:—

"(1st) That in the collocation of words used by the testatrix the disjunctive 'or' must be read as equivalent to the conjunctive 'and.'

"(2nd) That 'benevolent' is identical with 'charitable,' or at least is used by the testatrix as equivalent to 'charitable,' so that the use of both words is a mere redundancy or surplusage.

"(3rd) That the law of Scotland shows such favour to charitable bequests that to give effect to the bequest it will read 'benevolent or charitable' as intended to express no more than charitable—in fact, appeal is made to the principle of benignant interpretation of charitable bequests.

"Taking these points in their order:—

"(1st) It is true that the conjunctive 'and' is sometimes read as having the same effect as the disjunctive 'or.' I cannot better illustrate this construction than by comparing the two cases of *Cobb's Trustees*, 1894, 21 R. 638, and *Williams* v. *Kershaw*, 1835, 42 R.R. 269. In *Cobb's* case the words were 'useful, benevolent, and charitable institutions.' In *Williams* v. *Kershaw* they were 'benevolent, charitable, and religious purposes.' In the former case the three adjectives were capable in natural combination of qualifying the same institutions, and there was no call therefore to read the 'and' as otherwise than conjunctive. Whereas in the latter case the three qualifications were not naturally found combined in the same institutions, and therefore to give a reasonable interpretation to the adjectives in combination it was necessary to read the 'and' as distributive and not conjunctive, and that necessity is the only justification of the interpretation. See Lord Rutherfurd Clark in *Cobb's* case at p. 641. But where the distributive 'or' is used there can never be the similar necessity for interpreting it as conjunctive. If the qualifying adjectives are merely equivalents, it does not matter whether they are connected conjunctively or disjunctively. If they are not mere equivalents, but being distinctive in meaning are capable of alternative use, there is no necessity to construe the distributive 'or' in any other than its natural meaning, and every reason for construing it in that meaning. And this, I think, will apply, even though the adjectives disjunctively used have, in part, a common sense—that is, to a certain extent overlap.

"I cannot therefore read 'or' as equivalent to 'and.' No instance was quoted to me in which this has been done.

"Nor do I think it possible to accept the argument in an alternative form, viz.—that the terms 'benevolent' and 'charitable' are merely exegetical of one another. So to read them would be to go against a cardinal canon of interpretation of such documents. It would be to deny to each word its natural and ordinary meaning, without any compelling reason. Presumably when a testatrix says 'benevolent' she means benevolent, and when she says 'or charitable' she means something different from benevolent. Moreover, which word is exegetical of the other? It must be contended that it is 'charitable' which is exegetical of 'benevolent' as the latter comes first—as if the lady had said 'benevolent' and then caught herself up, seeing that she had used too wide a word, and added, by which I mean 'charitable.' I cannot think it possible to put such a gloss upon her words without finding an intention for her by my own surmise, and not from the words she uses.

"(2nd) Is 'benevolent' equivalent to 'charitable?' I think not. I think it may be said that everything which is 'charitable' is 'benevolent,' as the less is included in the greater. But I do not think that everything 'benevolent' can be included in the term 'charitable,' whether that term be used in the more technical English sense or in the less technical Scottish sense. On the contrast between the two words I refer to Lord Bramwell's judgment in *Pemsel's* case [1891], A.C. 531.

"I approach this question from the point of view expressed by Sir William Grant, M.R., in *Morice* v. *Bishop of Durham*, 7 R.R. 232, where he says—'The question is not whether the trustee may not apply it upon purposes strictly charitable, but whether he is bound so to apply it.' This has been repeatedly stated by other judges and cannot be controverted. If then 'benevolent' covers more than 'charitable,' though the trustees might confine themselves to what was strictly charitable, that would not support the bequest, if they need not so restrict themselves and might apply the funds committed to them to what is benevolent but not charitable. And if benevolent is not descriptive of a particular class of which the law can take cognisance, the bequest must, according to the now well-established rule, fail.

"The term 'benevolent' has occurred in a number of cases in Scotland and England (1) by itself, (2) along with 'charitable' or other terms used conjunctively, and (3) along with charitable or other terms used disjunctively. Where used by itself and where used disjunctively it has been rejected as indefinite, but where used conjunctively it has been sustained as not vitiating the bequest, provided its colleague is sufficiently definite, on the ground that if a purpose is, for instance, charitable, and therefore in the eye of the law definite, it does not render it indefinite that it must be not only charitable but also benevolent—*ca va sans dire*, though the converse may not hold true.

"But before referring to the cases, a word as to the applicability of English cases in this question. I shall, under the third head, have to consider the specialities of the English law with regard to charities. But I find nothing in it which precludes English authorities, on this particular aspect of the question, being received in Scotland. Both in England and in Scotland 'charitable' is accepted as in the eye of the law sufficiently descriptive of a particular class of purposes to be definite. There may be a question whether the limits of the class are quite the same in the law of the two countries, and I think, notwithstanding a certain generality of statement on the subject sometimes found, that they are narrower in Scotland rather than the reverse. But I apprehend that the question, whether another descriptive term not 'charitable' is sufficiently definite or is too indefinite to be recognised, is the same question whether it arises in Scotland or in England, and I am therefore prepared to accept English decisions on that point, not as authorities indeed, but as guides which I should hesitate to discard.

"(1) In *James* v. *Allan*, 17 R.R. 4, the word 'benevolent' was used by itself, and Sir William Grant, M.R., holding that

'though many charitable institutions are very properly called "benevolent," it is impossible to say that every object of a man's benevolence is also an object of his charity,' determined that as the property might, consistently with the will, be applied to other than strictly charitable purposes, the trust was too indefinite for the Court to execute, and could not receive effect. I acknowledge that by 'charitable' purposes he means those purposes which are specified 'in the statute of Queen Elizabeth,' or which have been held to be within the analogies of that statute, but, as already stated, I find these purposes at any rate no narrower than 'charitable purposes' as understood in Scotland.

"In the preceding case of *Morice* v. *Bishop of Durham*, *supra*, where the expression used was 'objects of benevolence and liberality,' the same conclusion had been reached. Sir William Grant, M.R., points out, what is as true in Scotland as in England, that the general rule is that every trust must have a definite object, but that this doctrine does not hold good with regard to trusts for charity. 'It is now settled,' he says, 'upon authority which it is too late to controvert, that where a charitable purpose is expressed, however general, the bequest shall not fail on account of the uncertainty of the object,' and the words might, since the case of *Crichton*, *supra*, have been used by a Scottish Judge. But then, he asks, 'Is this a trust for charity? Do objects of liberality and benevolence mean the same as objects of charity?' And these questions he answers in the negative.

"There is a further passage in Lord Eldon's judgment in that case which has an important bearing on the present. 'The principle upon which that trust' (referring to *Browne* v. *Yeall*, 6 R.R. 78) 'was ill declared is this: As it is a maxim that the execution of a trust shall be under the control of the Court, it must be of such a nature that it can be under that control, so that the administration of it can be reviewed by the Court; or if the trustee dies the Court itself can execute the trust; a trust, therefore, which in case of maladministration could be reformed and a due administration directed; and unless the subjects and the objects can be ascertained upon principles familiar in other cases, it must be decided that the Court can neither reform maladministration nor direct a due administration. That is the principle of that case.' Now, although the Court in Scotland has not developed its Chancery jurisdiction on such precise and perhaps technical lines as that in England, and although it has not been so ready to interfere in trust matters as the Court of Chancery does by way of suits for administration and otherwise—see Lewin on Trusts, chap. 24, sec. 2 (15) and (16), 11th ed., p. 753, and compare the Irish case of *Hagan* v. *Duff*, 23 L.R. Ir. 516—it does intervene in its own way to correct abuses, prevent diversion, and settle and alter schemes. And I conceive the principle enunciated by Lord Eldon is just as applicable in Scotland as in England, and that the reason why a trust for an indefinite purpose is refused effect in Scotland as in England is just because the Court could not control its execution if called upon.

"(2) Again 'benevolent' and 'charitable' in conjunction have been sustained on the ground that the charitable bequest was not vitiated by the further qualification of 'benevolent'—as in *Hill* v. *Burns*, 1826, 2 W. & S. 80; *Millar* v. *Black's Trustees*, 2 S. & M. 866; *Cobb's Trustees*, 1894, 21 R. 638; and in *re Best* (1904), Ch. 354; and compare in *re Sutton*, L.R. 28 Ch. Div. 464, where 'charitable' is qualified by 'and deserving.'

"With reference to the case of *Cobb*, I am bound to notice that Lord Trayner would appear to regard 'benevolent' and 'charitable' as synonymous. But I can hardly consider what he says as a judgment to that effect, but rather as the acceptance of an assumed admission. I say assumed, because I think the argument was misconceived, and that no such admission was made. It was admitted that, standing the authority of *Hill* v. *Burns*, *supra*, no objection could be maintained to the expression 'benevolent' and 'charitable' in conjunction. Such argument as could be submitted was based on the adjection of the word 'useful,' upon which necessarily the whole stress was laid in support of the contention that the 'and' should be read distributively.

"(3) Where 'benevolent' has been connected by the distributive 'or' with 'charitable,' the effect has been held to be destructive of the definiteness of the trust purposes — *Williams* v. *Kershaw*, 1835, 42 R.R. 269; in *re Jarman's* estate, L.R. 8 Chancery Division 584; in *re Riland's*, 1881, W.N. 173.

"In these cases the same conclusion of indefiniteness or failure to particularise the class intended to be benefited was reached which led to the judgments in the analogous cases of *Ellis* v. *Selby*, 43 R.R. 188, where the expression was 'charitable or other purposes'; *Duncan* v. *Blair*, 3 Fr. 374 and 4 Fr. (H.L.) 1, where the expression was 'charitable or public'; and *Grimond's Trustees*, 6 Fr. 285 and 7 Fr. (H.L.) 90, where the expression was 'charitable or religious.'

"*Grimond's* case is, I think, of special importance, as the last pronouncement of the House of Lords on the subject, and because the Lord Ordinary and the majority of the Inner House were in different ways prepared to give that restricted meaning to 'religious' which would have made it, in their opinion at least, as definite as 'charitable,' and which, had the judgment stood, would have justified such a restriction of 'benevolent' as would have made it synonymous with 'charitable.' My own opinion is that 'benevolent' is a word of too wide meaning to be descriptive of a particular class of objects, and I find confirmation of this opinion in the English cases cited.

"(3rd) Is there in Scotland such favour to charitable bequests that our Court will, to give effect to a testator's benefi-

cent intention, read 'charitable' so wide as to be the equivalent of 'benevolent,' or so restrict 'benevolent' as to be the equivalent merely of 'charitable.'

"Much has been said of the difference of Scottish and English law in the use of the word 'charitable,' and it is maintained that in England the word has a narrow and technical, and in Scotland a wider and more liberal meaning. I admit that it has in England a technical meaning, but if not the same in result, I think it is wider rather than narrower than that which it has in Scotland.

"In contrasting the law of England and Scotland I am unable to follow the reasoning of one of the learned Judges in *Cobbs'* case, *supra*, where he says that 'nothing can illustrate more strongly the vital distinctions between the two systems than to contrast the English cases of *Williams* v. *Kershaw*, *supra*, and in *re Jarman's Estate*, *supra*, with the judgments of the House of Lords sitting as a Court of Appeal from Scotland in *Hill* v. *Burns*, *supra*, and *Millar* v. *Black's Trustees*, *supra*.' I have endeavoured to trace this contrast without success. The different results arrived at in these cases by the Courts of the two countries depend upon no distinction between their two systems of jurisprudence, but merely on the fact that the English Courts were dealing with terms actually or constructively distributive, and the Scottish Courts with terms actually conjunctive. But for this fact there would, I am satisfied, have been no difference in the judgments.

"In England the expression 'charitable' derives its meaning from the Act of Queen Elizabeth passed to provide a control over maladministration of charities. That Act has received from the Court a wide interpretative application, in the same manner as our triennial prescriptive Act has received, and it covers charitable purposes of the eleemosynary character, educational purposes, religious purposes, and certain public purposes such as supply of water to a locality, building of sea dykes, &c., but subject to this condition—that each and all of these purposes must be public and not private in their purview, an excellent example of which is the case of *Cocks*, L.R., 12 Eq. 574 (585). It is clear that some of these purposes would be benevolent but hardly charitable in any ordinary sense, and I think that there can be no doubt that trustees in Scotland with a discretionary power to apply funds to charitable purposes would be restrained from applying them to some of them.

"In Scotland, on the other hand, there is no statutory foundation for the interpretation, and no statutory jurisdiction conferred on the Court. But I think much has been borrowed from England. Apart from decision it has often been stated from the Bench that 'charitable' is indefinite in itself, and but for favour to charity would never have been accepted as descriptive of a sufficiently particular class of objects. But two leading decisions made it a *vox signata* in Scotland, and thenceforth determined that it must be accepted as sufficiently particular.

"In *Hill* v. *Burns*, 1826, 2 W. & S. 80, the main question at issue was whether a testator could invoke *alienum arbitrium* to any effect in the distribution of his estate. On a review of prior Scottish cases Lord Gifford deduced the conclusion that the law of Scotland was more liberal in the construction of charitable than of other bequests, and held that the above position had been accepted. He then sustained without further reasoning a bequest in favour of institutions for 'charitable and benevolent purposes' established or to be established in or near Glasgow.

"In *Crichton's* case, 1828, 3 W. & S. 329, Lord Lyndhurst, after laying down the proposition that to admit of discretion being conferred on trustees the object of their discretion must be a particular class, decided that 'charitable' by itself must be accepted as sufficiently particular. And that has been the law of Scotland ever since. But in determining this he had no direct authority except *Hill* v. *Burns*, *supra*, and it is clear that he went a good deal beyond it, and I cannot help thinking was much influenced by his English Chancery experience.

"But although *Crichton's* case is the rule of Scottish law, it does not determine what the limits of 'charitable' are, and it does not follow from that decision that the favour for charity which has induced the Court to accept 'charitable' as definitive of a sufficiently particular class of objects, will further induce the Court to give to 'charitable' a loose and vague meaning so as to cover anything which may be classed as benevolent.

"This subject has been matter of discussion in two later cases—in *Baird's Trustees*, 15 R. 685, and *Pemsel's* case, L.R., 1891, A.C. 531. In the former case in Scotland the opinion of the Court was that 'charitable' must, in interpreting the sections of the Income-Tax Act which gives relief to charitable institutions, have the meaning which they conceived it to have in the class of cases with which I am dealing, viz., the restricted sense of eleemosynary or material relief to physical necessity.

"In the latter case, where the same question under the income tax had arisen in England, opinions were expressed that too narrow a view had been taken by the Scottish Court in *Baird's Trustees*, *supra*, and that whatever the term 'charitable' might cover, if it required to be interpreted in applying a bequest such as that in the present case the statutory meaning of the expression was much wider than they had assumed. Perhaps the most general definition of the view of the majority of the Court, for Lord Halsbury (L. Ch.) and Lord Bramwell dissented, was that given by Lord Herschell, to the effect that charity included even in Scotland everything done in relief of human need, whether physical, educational, or religious.

"It has yet to be determined in a proper case of the application of such a bequest in Scotland, as distinguished from a case under

the Income Tax Acts, whether the view of the First Division in *Baird's Trustees* or that of the majority of the House of Lords in *Pemsel's* case is the correct view. But in no event is there any ground for saying that 'charity' and 'charitable' in Scotland can receive a wider signification than it has received in England, or than Lord Herschell's attempted definition in *Pemsel's* case, and that is, I think, and on the authorities I have cited, very far short of 'benevolent.'

"For these reasons I have come to the conclusion that I must hold the bequest void from uncertainty."

The pursuers (real raisers) reclaimed, and argued—(1) In using the words "charitable or benevolent" the truster did not intend to draw a distinction between the two, or to indicate two classes of beneficiaries. The word "or" was not disjunctive; "charitable" and "benevolent" were exegetic. The two words were nearly if not quite synonymous—*Income Tax Commissioners* v. *Pemsel*, [1891] A.C. 51, disapproving, *Baird's Trustees* v. *Lord Advocate*, June 1, 1888, 15 R. 682, 25 S.L.R. 533; *Allan's Executor* v. *Allans*, March 17, 1908, 45 S.L.R. 579. Where these words were both attached to institutions, that supported the view that they were exegetic. They were thus equivalent to "charitable and benevolent," and such a bequest was undoubtedly valid—*Dundas* v. *Dundas*, January 27, 1837, 15 S. 427; *Hill* v. *Burns*, 1826, 2 W. & S. 80; *Millar* v. *Black*, 1837, 2 S. & M'L. 866; *Cobb* v. *Cobb's Trustees*, March 9, 1894, 21 R. 638, 31 S.L.R. 506; *Dick's Trustees* v. *Dick*, 1907 S.C. 953, 44 S.L.R. 680. (2) *Esto* that the word "or" was disjunctive, "benevolent" was sufficiently definite, and was entitled to the same benignant construction as "charitable." It was impossible so to distinguish "charitable" and "benevolent" as to hold that a bequest to charitable institutions was good and one to benevolent institutions void from uncertainty. The cases of *Hill* v. *Burns*, *Millar* v. *Black*, *Cobb* v. *Cobb's Trustees*, *Dick's Trustees* v. *Dick* (*cit.*) negatived the view that "benevolent" was too indefinite, at all events where it occurred in connection with "charitable." Further, in a bequest to a class of objects from which the trustees must select individuals, all that was required was that the description of the class be sufficiently certain to enable men of common sense to carry out the expressed wishes of the testator—*Murdoch's Trustees* v. *Weir*, February 6, 1908, 45 S.L.R. 335 (*per* Lord Chancellor); *Allan's Executor* v. *Allan* (*cit.*) (*per* Lord Kinnear). If that criterion were applied to the present case it was impossible to hold that the bequest was void from uncertainty. The cases where bequests for charitable purposes had been held void from uncertainty were cases in which the words used in connection with "charitable" were wider and of more vague significance than benevolent—*Blair* v. *Duncan* (*Young's Trustee* v. *Young's Trustee*), December 17, 1901, 4 F. (H.L.) 1, 39 S.L.R. 212; *Grimond or Macintyre* v. *Grimond's Trustee*, March 6, 1905, 7 F. (H.L.) 90, 42 S.L.R. 466; *Shaw's Trustees* v. *Esson's Trustees*, November 2, 1905, 8 F. 52, 43 S.L.R. 21. The English decisions referred to by the Lord Ordinary did not affect the case, because in England the rules as to charitable bequests were different, owing to the technical meaning of "charitable," based on the statute of Elizabeth—*Morice* v. *Bishop of Durham*, 1804, 9 Ves. 399, 10 Ves. 521; *James* v. *Allan*, 1817, 3 Merivale 17; *Williams* v. *Kershaw*, 1835, 5 Cl. & Fin. 111., 22 R.R. 269; *Cobb* v. *Cobb's Trustees*, *cit.* (*per* Lord Stormonth Darling, Ordinary); *Blair* v. *Duncan*, *cit.* (*per* Lord Robertson).

Argued for the respondents (claimants)—The law in England and in Scotland was the same—that the testator must indicate a definite class of objects from which he desired his trustee to make a selection. Bequests for charitable purposes, it was true, received in both countries a benignant construction, and thus, though really indefinite, acquired an artificial definiteness by favour of the law. There was thus an *onus* on anyone seeking to uphold such a bequest as this to show that it was either definite or charitable. The word "or" was disjunctive, and "charitable" and "benevolent" were not exegetic of each other—*Grimond or Macintyre* v. *Grimond's Trustees*, *cit.*; *Duncan* v. *Blair*, *cit.* (*per* Lord Moncreiff). The cases referred to by the reclaimers, where bequests for "charitable and benevolent" purposes had been sustained, had no application, because such bequests were construed as bequests for such benevolent purposes as were charitable, while here the trustee might exercise a choice between such institutions as are charitable and such as are benevolent. The reclaimers must therefore show that a bequest to benevolent institutions was either definite or charitable. In England it had been held to be neither—*Williams* v. *Kershaw*, *cit.*; *in re Jarman's Estate*, 1878, 8 Ch. Div. 584; *in re Best*, [1904] 2 Ch. 354 (where a bequest to charitable and benevolent institutions was sustained, on the ground that the institutions must be both); *Hunter* v. *Attorney-General*, [1899] A.C. 309 (*per* Lord Shand, at p. 323). In *re Macduff*, [1896] 2 Ch. 451, a bequest to charitable or philanthropic institutions was held void, and philanthropic was certainly less vague than benevolent. The word "charitable," in the technical sense of English law, was wider than "charitable" in the Scots sense, for it certainly included things which would not come within the definition according to Scots law. In Scotland there was no case where benevolent had been held to be definite except where it was linked by "and" to charitable, and thus limited. The bequest here was accordingly void from uncertainty.

At advising—

LORD M'LAREN—The question we have to consider under this reclaiming note relates to the validity and effect of Mrs Hay's residuary bequest, under which her trustees are directed to apportion and pay over the free residue "to or amongst such

societies or institutions of a benevolent or charitable nature" as the trustees may approve, but to the exclusion of Roman Catholic institutions.

I desire to concur in the opinion which will be delivered by Lord Dundas, in which the authorities bearing on this interesting question are fully considered, and shall only add a short statement of my view as to the principles which I think should be applied in the construction of bequests of this character. And first in order, though not in importance, I may say that in many cases relating to special and general legacies, to ademption and the interpretation of ambiguous words of bequest, this Court has been aided by the consideration of the decisions of the English Courts, where it appeared that the principles which governed these decisions were such as we should ourselves apply; and in this case counsel have very properly and usefully brought under our notice the English decisions which may throw light on the question before us. It is a principle common to the two systems of law that bequests for charitable purposes should receive an indulgent and favourable criticism with a view if possible of giving effect to the testator's benevolent intentions. In the development of this principle the rule against giving effect to bequests of a wholly undefined character has been relaxed in favour of charities. I note in passing that it appears from the reported cases that the Courts of England in considering whether a particular bequest falls within the description of Charity have been guided by the Statute of Elizabeth and the judicial interpretation that has been put on the expressions 'charitable' or 'charity' as there defined. But the range of objects or purposes which have been considered to be charitable under the law of England is so wide that I think it may fairly be said that in the interpretation of bequests for charitable purposes the Courts of both countries may be taken as dealing with questions which are substantially the same.

The present case, however, does not raise any question as to the meaning of the word "charitable," because the direction is to apportion and pay the residue of the testator's estate "to or amongst such societies or institutions of a benevolent or charitable nature in such proportions" as the trustees in their discretion shall think proper. Now it is settled by a series of decisions of the highest authority that a bequest to charitable institutions or for charitable purposes to be administered by the testator's trustees is a valid bequest, and these decisions will govern the present case, unless the gift to the institutions which are there described is invalidated by the association of the word "benevolent" with "charitable."

In the arguments which were addressed to us the question was discussed whether the determination of this question would be different in the cases of a bequest to benevolent *and* charitable institutions, and the case of a bequest to benevolent *or* charitable institutions. There are cases where the use of "and" as contrasted with "or" may be important, but I do not think that this is one of them.

If in the present case we substitute "and" for "or" it is clear enough, and indeed it was not disputed, that the bequest would be valid, because there could be no difficulty in finding institutions which were alike benevolent and charitable in their objects; and, being charitable, such institutions would have the benefit of the rule that a charitable bequest to be administered by trustees would not fail for want of further specification. But it is impossible to state this proposition without seeing that in such a case the real ground of decision is that "charitable" is the determining characteristic, and that the addition of the word "benevolent" neither enlarges nor restricts the scope of the bequest.

In contrast to the case here put I will suppose the case of a bequest for charitable and public objects. Now a bequest for charitable *or* public objects has been held to fall within the rule against indefinite bequests, because the trustees might apply part of the money to public objects which are undefined; and I have difficulty in admitting that the use of the word "and" would make the bequest any better, because there are two objects, the one undefined and the other in contemplation of law sufficiently defined, and the trustees in fair administration would be bound to allot something to each class. I should therefore deprecate the use of a canon of construction which would make the validity or invalidity of the bequest to depend on the casual use of the word "and" in place of "or," or the use of the word "or" in place of "and," without any evidence from the context that the testator attached importance to the use of the conjunctive or disjunctive particle.

I agree with Lord Dundas that the true question in the present case must be, did the testator mean two classes of objects, one of which was not charitable in its nature, or did he mean one class which he described indifferently by the adjectives benevolent and charitable? If this is the question I think it admits of only one answer. "Institutions of a benevolent nature" is, as I think, just a periphrasis for "charitable institutions." It may be that in a somewhat strained interpretation of "benevolent" we might conceive of an institution to which the word benevolent would apply and which would not fall within the limits of charitable gift. But then we call in aid the principle of the benignant construction of charitable bequests. A construction which calls in aid the almost impossible case of a class of benevolent institutions which are not charitable, amongst which the residue is to be partitioned, and that for the purpose of defeating the expressed testamentary intention, would not, in my judgment, be a benignant or even a reasonable construction. But, applying the true canon of construction applicable to bequests of this description, I come without difficulty

to the conclusion that the testator meant to use "charitable" and "benevolent" as equivalent terms. On this construction the use of the word "or" is grammatically correct, because it implies that, whether you describe the objects of the bequest as "benevolent" or "charitable," the meaning is the same, and therefore the gift is not void in respect of uncertainty.

LORD KINNEAR—I am of the same opinion. We have in all cases of the validity of a bequest, two questions to consider—in the first place, what is the rule of law by which we ought to be governed in determining the question of validity? and secondly, what is the true meaning of the particular will which we have to construe? It is only with reference to the first of these questions that in my opinion we are bound or greatly aided by previous decisions. What the law is must be determined in accordance with the authorities by which we are bound. What the true meaning of a particular testator is we must ascertain for ourselves by reading the language which he or she has used, and putting upon it its natural meaning without any special reference to what previous judgments have held to be the meaning of other testators using different language. Now upon the first of these two questions I think it is clearly settled, in the first place, that a testator cannot commit to trustees the power of making a will for him. He must make the will for himself, and therefore he must define sufficiently the persons or purposes which he intends to be the objects of his bounty to enable the trustees to carry out the intention that he has expressed, instead of committing to a trustee an unlimited power to find out objects of bounty for himself. I take it to be settled, however, in the law of Scotland, that a bequest will be valid if a testator points out to his trustees a definite class of persons or objects to be favoured, although he leaves the trustee to select individuals within the class. It is probably a question of degree whether the circumscribing line by which he defines this class is sufficiently distinct or not, but of course I concur with what your Lordship has said, that we must take it as now settled that where a trustee is directed to select among charitable objects, there is sufficient definition to enable him to carry out the intention of the testator. So far I think the law is clear, but then the question comes to be, whether the objects of the bounty of this particular testator are sufficiently defined to enable a trustee of ordinary common sense and ordinary familiarity with the business of life to satisfy himself that he is selecting among the class pointed out to him by the testator. It is conceded that if this testatrix had directed her trustees to apportion her residue among societies and institutions of a charitable nature such as they should think proper, in their discretion, but excluding societies or institutions connected with the Roman Catholic Church, that would have been a good bequest, but then it is said to be an invalid bequest, because in place of confining herself to the word "charitable" she has used the words "of a benevolent or charitable nature." The real question is, whether upon the construction of that will, that is a wider class of purposes than the word "charitable" taken alone would have defined. It appears to me that the question whether this testatrix really meant—"You are to select between two distinct classes of institutions—charitable institutions on the one hand, and a different class of institutions altogether, which I call benevolent, on the other hand,"—is not a question upon which previous decisions can guide us at all. I think the question is, what the testatrix really means, and I do not think that is to be ascertained by strict grammatical analysis of the words she has used. Taking the whole will, taking the particular directions for the distribution of the residue with reference to its context, the question is, what did this testatrix mean? and I confess that I have no doubt that by "charitable or benevolent" she meant one thing and not two things. The whole difficulty arises from what I think is a mere redundancy of expression, and we had cited to us several examples of a similar redundancy in the expressions not of testators but of learned Judges who were discussing this kind of question. I do not think that in ordinary language when a testator describes institutions of a charitable or benevolent character, she means two different kinds of institutions, which she distinguishes from one another, and if not, I think that as she has given a sufficiently definite description of the class of institutions which she intends to favour, she will enable trustees of requisite common sense to carry out her intention. I wish to add that I also, like Lord M'Laren, have had an opportunity of reading Lord Dundas' opinion, and I entirely concur in the view which he has expressed.

LORD DUNDAS—I am of the same opinion, but I should like to add some words of my own, because the case is an interesting one, and because we are differing from an elaborately-expressed opinion of the Lord Ordinary.

The decision of the case must really depend on the intention of the testatrix—to be ascertained from the language she has used; and the Court will incline, if possible, to support the will rather than to set it aside as void by reason of uncertainty. Now, I think, as matter of ordinary construction, the words "benevolent or charitable" should be read, not as referring to two distinct and alternative classes of "societies or institutions," but rather as expressing, in an amplified and perhaps redundant fashion, the "nature" or quality which the societies or institutions must possess in order to come within the scope of the delegated bounty of the testatrix. Of the words "benevolent" and "charitable" the former is perhaps the more comprehensive; but they are closely cognate, and obviously have much in common. I observe that Dr Johnson, in his Dictionary (1755, folio ed.), defines "benevolent" as "kind;

having goodwill or kind inclinations"; and "charitable" as "(1) kind in giving alms; liberal to the poor; (2) kind in judging of others; disposed to tenderness—benevolent." In *Pemsel's* case, 1891, A.C. 531, Lord Watson (at p. 558) and Lord Herschell (at p. 572) seem to define "charitable" as being practically synonymous with "benevolent." At all events, I think the two words are not, in the will under consideration, used as alternatives, but may fairly be read exegetically, as if the testatrix had said "of a benevolent—by which I mean of a charitable—nature." I am unable to figure any kind of institution which should be of a charitable but not of a benevolent nature; nor—though the aid of the Bar was invoked at the discussion—was any satisfactory example of the converse proposition forthcoming. If the construction suggested is correct, the present case is at once differentiated from cases like *Blair*, 1901, 4 F. (H.L.) 1, and *Grimond*, 1905, 7 F. (H.L.) 90, where the word "charitable" was used as an alternative to "public" and to "religious" respectively; and the will was in each case held to be void from uncertainty, because the second adjective was of so vague and indeterminate a character as to be incapable of execution. With these cases one may contrast *Millar* v. *Black's Trustees*, 1837, 2 S. & M. 866, where the words were "benevolent and charitable purposes"; and Lord Brougham, in holding the gift valid, observed—"Suppose we read 'and' 'or,' the authorities in the Scottish law do not entitle us to hold that this is so uncertain as to be void'; and the opinions of the learned Judges—especially that of Lord Trayner—in *Cobb's Trustees*, 1894, 21 R. 638, where a bequest "to such useful, benevolent, and charitable institutions" as the trustees in their discretion might think proper, was sustained. The present case seems to me to fall well within the lines desiderated by the Lord Chancellor in the recent case of *Murdoch's Trustees*, 1908, 45 S.L.R. 335. There the residue was directed to be employed in the relief of persons who, with other qualifications, had "shown practical sympathy in the pursuits of science." The validity of the bequest was sustained. Lord Loreburn, after emphasising the rule that a benignant construction will be placed upon charitable bequests, said—"All that can be required is that the description of the class to be benefited shall be sufficiently certain to enable men of common sense to carry out the expressed wishes of the testator." I do not think men of common sense would have difficulty in apportioning Mrs Hay's residue among societies or institutions of the class described by her if the construction of her language, which I have indicated, is the natural and proper one.

I should be prepared to rest my decision upon the simple grounds now stated. But the Lord Ordinary has reached an opposite conclusion. His Lordship's opinion has been largely influenced by a consideration of certain English cases to which he refers. It seems, therefore, proper to make some general observations in regard to these cases. Most, if not all of them, have been cited in argument in the recent decisions in Scotland—*e.g. Cobb's Trustees* (*sup. cit.*) and *Grimond*, 6 F. 285. For my part I think a real danger may arise when this branch of the law is being considered, if judges in Scotland follow English decisions implicitly and without careful scrutiny, or judges in England so accept Scots cases. I am not sure that there is any real difference in principle between Scots and English cases on this question, because under both systems of law the rule against giving effect to an otherwise indefinite bequest is only relaxed in favour of "charitable" bequests. But, as observed by Lord Davey in *Blair's* case, 4 F. (H.L.), at p. 3, "there is no doubt that the English law has attached a wide and somewhat artificial meaning to the words 'charity' and 'charitable,' derived, it is said, from the enumeration of objects in the well-known Act of Elizabeth, but probably accepted by lawyers before that statute. In the law of Scotland there is no such technical meaning attached to the words." I gather that the English Courts are in use to construe such words as, *e.g.*, "benevolent" or "philanthropic"—occurring in a will in juxtaposition with "charitable"—in the light and by the standard of the peculiar meaning which the latter word has acquired in England. I think it is the case that the existence of the distinction pointed out by Lord Davey has resulted in decisions being pronounced by the English Courts which are not in harmony with the law of Scotland. A striking example is found by comparing the English case of *White*, 1893, 2 Ch. 41, with the Scots case of *Grimond* (*sup. cit.*). The two cases cannot stand together. Yet *Grimond* is undoubtedly Scots law, as I presume *White* to be good law in England. This is dealt with by Lord Moncreiff, 6 F. at p. 293, whose opinion, differing from the other Judges of the Second Division, was expressly approved by the House of Lords. I prefer, for my own part, to determine the question raised in this case upon a construction of the language used by the testatrix, with such light as can be obtained from decisions in Scots cases, which in this branch of the law afford, to my mind, safer confirmation of one's opinion than those pronounced by English Courts, unless it is clear that the latter were not influenced by the special meaning attached in England to the word "charitable."

For the reasons stated, I am of opinion with your Lordships that the Lord Ordinary's interlocutor ought to be recalled and the first branch of the claim for the trustees and executors of Mrs Hay sustained. It may be proper to observe that, since the interlocutor was pronounced, three important cases have been decided upon this branch of the law—two of them by the House of Lords, viz., *Murdoch's Trustees* (*sup. cit.*), *Allan's Executors*, March 17, 1908, 45 S.L.R. 579, and *Dick's Trustees*, May 26, 1908, *ibid.* 683.

The LORD PRESIDENT and LORD PEARSON were absent.

The Court recalled the interlocutor of the Lord Ordinary, repelled the claims for the next-of-kin, sustained the claim for the trustees, and preferred them to the whole fund *in medio*.

Counsel for Pursuers and Real Raisers (Reclaimers) — M'Lennan, K.C. — Mair. Agents—Macpherson & Mackay, S.S.C.

Counsel for Claimants (Respondents), Jessie Baillie and Others — Macmillan. Agents—Laing & Motherwell, W.S.

Counsel for Claimant (Respondent), Mrs Morrison—Black. Agents—Dove, Lockhart, & Smart, S.S.C.

Thursday, July 9.

SECOND DIVISION.

[Lord Salvesen, Ordinary.

GIERTSEN AND OTHERS *v.* GEORGE V. TURNBULL & COMPANY.

Shipping Law—Charter-Party—Off-Hire—"Breakdown"—Liability for Hire—Liability for Value of Coal Consumed during Off-Hire.

A steamship was chartered for six months under a charter-party which provided "that in the event of the loss of time from . . . breakdown of machinery, or damage preventing the working of the vessel for more than twenty-four running hours, the payment of hire shall cease from the time the breakdown, &c., occurred until she be again in an efficient state to resume service."

In a question between the owner and the charterer, *held* (1) that a "breakdown" occurred when a defect was discovered which rendered it necessary in the opinion of a prudent navigator that he should proceed to a harbour for repairs; and (2) that in respect that under a time charter, in the absence of special exemption, the charterers must suffer the consequences of all mischances to the vessel, where as here the charter-party provided that the charterers should provide or pay for all coal, the charterers could not charge the owners with the value of the coal consumed during the time of off-hire.

Shipping Law—Implied Warranty of Seaworthiness—Time Charter—Stages of Voyage—Provision in Charter-Party for Maintaining Vessel in Efficient State.

Held (1) that an article in a charter-party binding the owner "to provide and pay for the necessary equipment for the proper and efficient working of the said steamer, maintaining her in a thoroughly efficient state for and during the service," placed the expense of maintaining the vessel in an efficient state on the owner, but did not bind him to keep the vessel in that state; and (2) that the implied warranty of seaworthiness was satisfied when the vessel was originally delivered to the charterer, and that the voyage could not be divided into stages to the effect of imposing on the owner a warranty that the vessel when it left a port to which it had been sent by the charterer was fit for the ensuing voyage.

"*The Vortigern*," [1899] P. 140, *distinguished*.

Shipping Law—Off-Hire—Computation of Period.

When a vessel is off hire for some days and a fraction of a day, *held* (by the Lord Ordinary, Salvesen, and acquiesced in) that the hire falls to be calculated by hours and half-hours.

On 24th October and 4th July 1906 Giertsen and Others, owners of the steamship "Bauta," brought two actions against George V. Turnbull & Company, charterers of that vessel, to recover certain sums, being deductions made by the charterers when settling for the hire of the vessel. Turnbull & Company brought a counter-action to recover certain sums as being over-payments when so settling. The material questions between the parties arose out of detentions of the vessel during the period of hire on three separate occasions.

By charter-party dated 26th July 1905 the charterers hired the "Bauta" from the owners for a period of six months at the rate of £270 per month, and the "Bauta" was delivered to the charterers on 23rd September 1905.

The material clauses of the charter-party were as follows—"1. That the owners shall provide and pay for all provisions and wages of the captain, officers, engineers, firemen, and crew, and shall pay for the insurance on the vessel, and for all necessary stores, including fresh water required for the engine-room, and provide and pay for the necessary equipment for the proper and efficient working of the said steamer, maintaining her in a thoroughly efficient state for and during the service. Owners to pay consular expenses of ship and crew. 2. That the charterers shall provide and pay for all the coals, fuel, port charges, pilotages, agencies, and all other charges and expenses whatsoever, except those before stated. . . . 9. That the captain, although appointed by the owners, shall follow the instructions of the charterers, who will furnish him from time to time with the necessary sailing directions. . . . 12. That in the event of the loss of time from a deficiency of men or stores, breakdown of machinery, or damage preventing the working of the vessel for more than twenty-four running hours, the payment of hire shall cease from the time the breakdown, &c., occurred, until she be again in an efficient state to resume her service, but should the vessel be driven into port, or to anchorage, by stress of weather, or from any accident to the cargo, such detention or loss of time shall be at the charterer's risk and expense. Charterers to have the