COURT OF SESSION.

Friday, March 17.

SECOND DIVISION.

EDGAR'S TRUSTEES *v.* CASSELLS.

Succession—Trust—Uncertainty—"Other Benevolent, Charitable, and Religious Institutions in Glasgow and Greenock."

A testatrix directed her trustees to pay legacies to certain named institutions in Glasgow and Greenock of the nature of hospitals, and to the missions connected with the Independent or Congregational Churches in Scotland, to be distributed by the treasurer for the time being of Elgin Place Congregational Church, Glasgow. She further directed her trustees to divide the residue of her estate "among such of the other benevolent, charitable, and religious institutions in Glasgow and Greenock as they in their sole discretion may think proper." *Held* that the bequest of residue must be read as meaning benevolent institutions, charitable institutions, and/or religious institutions, but (*diss.* Lord Ormidale) that the limitations as to locality together with the use of the word "institutions," inferring existing institutions, made the bequest valid.

David Rennie and others, the testamentary trustees of Miss Rebecca Edgar, Glasgow, who died on 28th January 1893, *first parties*, and Mrs Isabella Thom Kirsopp or Cassells and others, the surviving nephews and nieces and the issue, so far as known, of any who had died, being the next-of-kin and others entitled to succeed to the estate of the testatrix in the event of the estate having fallen into intestacy, *second parties*, presented a Special Case for the opinion and judgment of the Court.

The Case stated, *inter alia*—"3. The deceased Miss Rebecca Edgar after making provision for certain legacies and annuities in her trust-disposition and settlement and codicil directed her trustees in the fifth purpose of said trust-disposition and settlement 'to hold the whole residue and remainder of my means and estate for behoof of Miss Maybel Jane Edgeware, sometime residing with me, presently residing at One hundred and sixty-six Boulevard Mont Parnasse, Paris, in liferent, for her liferent use allenarly, and her lawful children in such manner or way as she may direct by any writing under her hand, and failing appointment then equally among them and the survivors of them in fee. . . . In the event of the said Miss Maybel Jane Edgeware dying without leaving lawful issue, then I direct my trustees to make payment of the following legacies free of legacy duty, viz.—To the Glasgow Royal Infirmary the sum of One thousand pounds; to the Western Infirmary, Glasgow, the sum of One thousand pounds; to the Victoria Infirmary, Glasgow, the sum of One thousand pounds; to the Greenock Infirmary the sum of Two thousand pounds; to the Association for the Relief of Incurables in Glasgow and the West of Scotland the sum of Two thousand pounds; to the Sick Children's Hospital, Glasgow, the sum of One thousand pounds; to the Missions connected with the Independent or Congregational Churches in Scotland, to be distributed by the treasurer for the time being of Elgin Place Congregational Church, Glasgow, whose receipt shall be a sufficient exoneration to my trustees, the sum of One thousand pounds; and with regard to the whole residue and remainder of my means and estate I direct my trustees to divide the same among such of the other benevolent, charitable, and religious institutions in Glasgow and Greenock as they in their sole discretion may think proper.' None of the institutions mentioned in the said fifth purpose of the said trust-disposition and settlement exists for the furtherance of religion as a definite independent object. Provision is made as after mentioned, but not otherwise, for holding religious services for the benefit of the inmates. Such services are entirely undenominational, and may in the case of some of the institutions be non-Christian. Atheists, Moslems, Buddhists, Jews, or heathen of any kind, are eligible for admission, and in the case of a few of the institutions are admitted for treatment to any of the infirmaries or hospitals after mentioned. [*The Case then specified the nature of the services held in the different institutions.*] 4. The annuitants are now all dead, and the liferentrix, the said Miss Maybel Jane Edgeware, died unmarried on 27th August 1915. The first parties have paid the specified legacies detailed in the fifth purpose of said trust-disposition and settlement and are now in a position to distribute the residue and remainder of the estate. The present value of the residuary estate amounts to upwards of £40,000. Questions have, however, arisen as to the validity of the provision in favour of 'such of the other benevolent, charitable, and religious institutions in Glasgow and Greenock as they (the trustees) in their sole discretion may think proper,' and as to the interpretation to be put on that clause. 5. The first parties maintain that said bequest of residue is valid whether the adjectives qualifying the word 'institutions' be read conjunctively or disjunctively. They further maintain that each of the institutions specified in the third article is a benevolent, charitable, and religious institution within the meaning of the trust-disposition and settlement. 6. The second parties maintain that the testatrix's directions as to dividing the residue of her estate are too vague and indefinite to receive effect, and that the bequest of residue is void in respect that the beneficiaries cannot be definitely ascertained."

The *question of law* was—"Is the bequest of the residue and remainder of the estate a valid bequest?"

Argued for the first parties—Read conjunctively, the bequest was good. The word "and" showed that the testatrix meant that the money should go to institutions having all three characteristics—*Cobb*

v. *Cobb's Trustees*, 1894, 21 R. 638, 31 S.L.R. 506; *Grimond or Macintyre* v. *Grimond's Trustees*, 1905, 7 F. (H.L.) 90; *M'Conochie's Trustees* v. *M'Conochie*, 1909 S.C. 1046, 46 S.L.R. 707; *M'Phee's Trustees* v. *M'Phee*, 1912 S.C. 75, 49 S.L.R. 33. The word "other" meant any institutions other than those formerly mentioned of the same character—*Campbell's Trustees* v. *Campbell*, 1921 S.C. (H.L.) 12, 58 S.L.R. 69. Even if the words were read disjunctively, still a gift to charitable and religious institutions in a definite area was valid. The reason religious purposes had been held bad was that it was too vague to be applied, because of the great variety of these all over the world. In the present case, however, the word "institutions" presupposed something in existence of a definite nature and in a definite area. The ratio of Lord Halsbury's decision in *Grimond, cit. sup.*, was the lack of limitation. Further, in *Turnbull's Trustees* v. *Lord Advocate*, 1918 S.C. (H.L.) 88, 45 S.L.R. 209, the Lord Chancellor (Finlay) particularly reserved his opinion in the event of the gift having been made to institutions in that area, and he approved of *Shaw's Trustees* v. *Esson's Trustees*, 8 F. 52, 43 S.L.R. 21, where the same point was raised. "Institution" differed from "purpose" in respect that the latter did not imply anything actually in existence—*Haig's Trustees* v. *Baillie*, 1908 S.C. 1224, 45 S.L.R. 908.

Argued for the second parties—The rights of deceased's heirs could only be defeated by a will which was free from uncertainty. A testator could not leave the disposal of his estate to others, though he might leave the selection among a wide class to them. The words used by the testatrix in the present case could only be read disjunctively, and so read the bequest was void from uncertainty—*Williams* v. *Kershaw*, 1835, 5 Cl. and Fin. 111; *in re Eades*, [1920] 2 Ch. 353; *M'Conochie's Trustees* v. *M'Conochie*, 1909 S.C. 1046, 46 S.L.R. 707. The substitution of the word "institution" for "purpose" would not help the first parties—*Turnbull's Trustees* v. *Lord Advocate*, 1917 S.C. 591, *per* L.J.-C. (Scott Dickson), at p. 597, 54 S.L.R. 501. Further, if the words were read disjunctively, the local limitation would not vary the bequest—*Turnbull's Trustees* v. *Lord Advocate*, *cit.*; *Symmers' Trustees* v. *Symmers*, 1918 S.C. 337, 55 S.L.R. 280; *Campbell's Trustees* v. *Campbell*, *cit. sup.*

At advising—

LORD JUSTICE-CLERK—Questions similar to the question in this Special Case have on several occasions been the subject of judicial consideration and determination in recent years. Such questions depend largely for their solution on the precise terms of the particular will or trust deed which has to be considered, and it is not easy to reconcile all the decisions. The only question submitted for answer in the present case is, "Is the bequest of residue valid?" The objection to its validity is that in some respects the language employed by the truster is too vague and indefinite to be able to receive effect. In the particular clause of this trust deed which we have to interpret the truster first leaves certain sums to several institutions in Greenock and Glasgow, and then she adds—"And with regard to the whole residue and remainder of my means and estate, I direct my trustees to divide the same among such of the other benevolent, charitable, and religious institutions in Glasgow and Greenock as they in their sole discretion may think proper." The question is, Has she thus sufficiently designated a particular class from which her trustees are to select the objects of her bounty? In my opinion she has. The object must be an institution locally situated either in Glasgow or Greenock, for in my opinion the "and" between Glasgow and Greenock must be read distributively. She has given examples of the kind of institution she intends to benefit, and in my opinion the words "benevolent, charitable, and religious" must be read distributively, so that the bequest is to the benevolent institutions, charitable institutions, and/or religious institutions which her trustees may select. I adopt as applicable to this clause Mr Justice Sargant's distinction in *Eades'* case ([1920] 2 Ch. 353), where he said—"The three epithets here are epithets creating conjunctive or cumulative classes of objects, not epithets creating conjunctive or cumulative qualifications for each object." Of course this construction requires that some ground must be found to exclude from this bequest the operation of the canon of construction which was given effect to in *Grimond's* case, (1905) 7 F. (H.L.) 90, [1905] A.C. 124, and in the case of *Turnbull's Trustees*, (1918) S.C. (H.L.) 88, [1918] A.C. 337. In my opinion a sufficient ground for such an exclusion is to be found in the fact that in this case the bequest is confined to institutions in Glasgow or Greenock, which in my opinion means existing institutions in either of these towns. In *Turnbull's* case (at p. 90) Lord Chancellor Finlay says—"The addition of a local limit might well make a difference in favour of a bequest if the bequest was in favour of institutions within a certain area, the particular institution to be selected by the trustees. This distinction is pointed out by Lord Stormonth-Darling in his judgment in *Shaw's Trustees* v. *Esson's Trustees* ((1905) 8 F. 52, at p. 54), where the whole subject is discussed in a very lucid and valuable judgment." In my opinion this view as to the effect of a local limit is sound where the bequest is confined to existing local institutions, as in my opinion is the case here, and applies in the present case. In dealing with such a clause as that which we are now considering it is in my opinion a sound rule of construction that we ought, if possible, so to construe the clause expressing the truster's intention *ut res valeat potius quam pereat.*

In my opinion the bequest in question is valid.

LORD SALVESEN—This Special Case raises a point of difficulty in the construction of the will of the late Miss Rebecca Edgar. In an event which has now happened she

directed her trustees to make payment of legacies to certain named beneficiaries. All of these with the exception of one may be described as charitable or benevolent institutions, for I am unable to adopt the view that any hospitals, whatever provision they make for religious services for the benefit of their inmates, can properly be described as religious institutions. The other legatee is thus described—"The missions connected with the Independent or Congregational Churches in Scotland, to be distributed by the treasurer for the time being of Elgin Place Congregational Church, Glasgow, whose receipt shall be a sufficient exoneration of my trustees." The only statement with regard to these missions is that in the case of a few congregations they are entirely religious, and in the case of the others are religious, charitable, and benevolent, but we have no information as to the actual distribution by the treasurer selected for that purpose.

The will then proceeds to deal with residue after payment of the legacies, and does so in the following language:—"With regard to the whole residue and remainder of my means and estate, I direct my trustees to divide the same among such of the other benevolent, charitable, and religious institutions in Glasgow and Greenock as they in their sole discretion may think proper." Now it has been held by the House of Lords that a bequest "for religious purposes" is bad according to the law of Scotland, although apparently it would be held good in England. If therefore the bequest had been for "such benevolent, charitable, or religious purposes in Glasgow and Greenock" as the trustees might select, I apprehend that, following the authorities (of which we had an ample citation) we should have been obliged to hold that such a bequest failed on the ground of vagueness or uncertainty. On the other hand a bequest for such purposes as were at once benevolent, charitable, and religious would according to the decision in the case of *M'Phee's Trustees* (1912 S.C. 75, 49 S.L.R. 33) be a good bequest, because the addition of the word "benevolent" to "charitable and religious" would, I think, neither add to nor detract from the character of the bequest. I confess that I was at first disposed to hold that as the testatrix used the word "and" to connect "benevolent" and "charitable" with "religious," there was no sufficient ground for reading "and" as "or," or for holding that these three adjectives were not to be treated as cumulative. But I recognise the difficulty which is occasioned by the use of the words "the other" as qualifying the whole bequest when it is apparent that the legatees already mentioned were, at all events for the most part, not religious institutions but benevolent and charitable only. I have accordingly come to prefer the ground of judgment in supporting this bequest which your Lordship in the chair has formulated. The phrase "religious purposes" in a given area leaves far more latitude to the trustees than the words which are used here—"religious institutions." Such institutions in order to qualify for the bequest must be existing institutions, and accordingly the trustees would be bound to exercise their discretion if they chose to devote the whole legacy to religious institutions as distinguished from charitable within defined limits. No doubt they could select any existing institution of a religious nature whatever the particular form of religion that was taught. But the trustees selected were entrusted by the testatrix with this duty, and no doubt she had excellent grounds for thinking that they would exercise their discretion not merely wisely but having regard to her own views. It has never hitherto been decided that a direction to trustees to distribute estate amongst religious institutions in a limited area is bad, and the opinion of Lord Chancellor Finlay (*Turnbull's Trustees* v. *Lord Advocate*, 1918 S.C. 88, 45 S.L.R. 209) seems to favour the view that it should be regarded as good. I do not apprehend that the trustees will have the smallest difficulty in giving effect to the duty imposed upon them, although *per se* that is not a sufficient ground for upholding a bequest if it is in itself void from uncertainty.

On the whole matter I have come to the same conclusion as your Lordship in the chair, as I think it is our duty rather to support a bequest of this nature than to find reasons for throwing the estate into intestacy.

LORD ORMIDALE—Miss Rebecca Edgar died on 28th January 1893 leaving a trust-disposition and settlement and relative codicil dated in August 1892. *Inter alia* she directed her trustees to hold the residue of her estate for behoof of Miss Edgeware in liferent and her children in fee, and in the event of Miss Edgeware dying without leaving lawful issue she directed her trustees to make payment of legacies to certain infirmaries, three in Glasgow and one in Greenock, to the Association for the Relief of Incurables in Glasgow and the West of Scotland, to the Sick Children's Hospital in Glasgow, and to the Missions connected with the Independent or Congregational Churches in Scotland; "And with regard to the whole residue and remainder of my means and estate I direct my trustees to divide the same among such of the other benevolent, charitable, and religious institutions in Glasgow and Greenock as they in their sole discretion may think proper." The question we have to determine is whether this residuary bequest is valid or not. It was maintained by the next-of-kin of the truster that it is too vague and indefinite to receive effect. In my opinion, having regard to those of the many decisions quoted at the bar which appear to be most applicable, this contention is well founded.

It was argued for the trustees in the first place that the institutions among which the residue is directed to be divided are institutions which are at once benevolent, charitable, and religious. If this were so, then no exception could be taken to the bequest, but I cannot so read it. Such a construction gives no effect whatever to the words "the other." These words throw us

back to something already referred to by the truster, namely, the beneficiaries to whom she had directed her trustees in the immediately preceding clause to pay legacies. These, with the exception of the last of them, are fitly described as charitable and benevolent. The last of them is as clearly religious. To no one of them in my opinion can all the characteristics of benevolent, charitable, and religious be attributed. The detailed description of the infirmaries, &c., which is given in the case is to my mind entirely negative of the idea that the infirmaries, &c., are in the sense of the will religious institutions. The truster has in a foreword, as it were, given specimens of what in her conception are charitable and benevolent and religious institutions, and directs her trustees to divide the residue of her estate among the other charitable and benevolent and religious institutions in the locality named. It seems to me impossible so to construe the bequest as to limit it to a class possessed of each and all of the qualifications. I think the language of the bequest invokes and indeed necessitates the principle of construction enunciated by Sargant, J., in the case of *Eades*, [1920] 2 Ch. 353. I venture to quote the following passage from that learned Judge's opinion as expressing my own views with reference to the clause now under construction. "Such a construction . . . is sometimes referred to as a disjunctive construction and as involving the change of the word 'and' into 'or.' This is a short and compendious way of expressing the result of the construction, but I doubt whether it indicates accurately the mental conception by which the result is reached. That conception is one I think which regards the word 'and' as used conjunctively and by way of addition for the purpose of enlarging the area of selection, and it does not appear to be a false mental conception or one really at variance with the ordinary use of language merely because it involves in the result that the qualifications for selection are alternative or disjunctive."

If I have construed the clause correctly, then on the authorities—*e.g.*, *Grimond's Trustees*, (1904) 6 F. 285, (1905) 7 F. (H.L.) 90, [1905] A.C. 124; *Williams*, (1835) 5 Cl. & Fin. 111—if the bequest had been "to religious institutions" without any limitation as regards locality or otherwise, it must have been held bad. But it is said that this result is avoided by the selected class of institutions being restricted to those to be found in Glasgow and Greenock, that is, in Glasgow and in Greenock. Now the addition of a local limitation has been referred to in more than one case as a factor which might make for upholding the validity of a bequest otherwise void from uncertainty—*Shaw's Trustees*, (1905) 8 F. 52; *Turnbull's Trustees*, 1918 S.C. (H.L.) 88, [1918] A.C. 337; but no case where "religious" was the sole qualification of the object was cited to us in which this effect was given to such a limitation. It has been rejected where the bequest was for religious "purposes" within the city of Aberdeen—*Shaw's Trustees*, for "public purposes" in the parish of Lesmahagow; *Turnbull's Trustees*, and for "deserving agencies in Aberdeen and Stonehaven"; *Symmers' Trustees*, 1918 S.C. 337, and I note that in *Campbell's Trustees*, 1920 S.C. 297, Lord Dundas thought that the result would have been the same if the bequest in *Symmers'* case had been for "deserving institutions." In the present case I am unable to agree that the local limitation to Glasgow and Greenock makes valid the bequest to "religious" institutions, and for this reason, that what renders void from uncertainty a bequest where the sole characteristic of the object of the bequest is "religious" is the vagueness and want of precision inherent in and inseparable from the attribute itself. That is the inference to be drawn, I think, from what was said of the term "religious" in *Grimond's* case, both by Lord Moncreiff in this Division and by the Lord Chancellor (Halsbury) in the House of Lords. The vice is not cured by substituting "institutions" for "purposes," or by the addition of a local limitation especially where the area is so extensive as in the present case. The uncertainty remains. Is the benefaction to be restricted to institutions professing the Christian religion or the Protestant religion, or where is the limit to be drawn?

In my opinion the question should be answered in the negative.

The Court answered the question of law in the affirmative.

Counsel for the First Parties—Chree, K.C.—J. Stevenson. Agent—Campbell Faill, S.S.C.

Counsel for the Second Parties—Henderson, K.C.—Burnet. Agent—J. S. M'Culloch, W.S.

Friday, March 17.

SECOND DIVISION.

[Lord Blackburn, Ordinary.

MACKENZIE'S TRUSTEES *v.* MACKENZIE.

Succession—Liferent and Fee—Liferenter Born after Date of Deed—Right to Fee—Trusts (Scotland) Act 1921 (11 *and* 12 *Geo. V, cap.* 58), *sec.* 9.

The Trusts (Scotland) Act 1921, section 9, enacts—" . . . Where any moveable or personal estate in Scotland shall by virtue of any deed dated after the 31st day of July 1868 (the date of any testamentary or *mortis causa* deed being taken to be the date of the death of the granter. . .) be held in liferent by or for behoof of a person of full age born after the date of such deed, such moveable or personal estate shall belong absolutely to such person, and where such estate stands invested in the name of any trustees, such trustees shall be bound to deliver, make over, or convey such estate to such person."

A testator who died in 1890 provided an annuity of £1000 a-year to his son,