was really no more than a certificate. Without such a certificate the Chancery could never have been put into operation so as to enable the title to be completed. But the service never could operate to make a person *hæres propinquior* who was not in fact such. The fallacy which underlies Mr Gilchrist's ingenious argument is in supposing that upon the decree of the Sheriff Court of Chancery depends the capacity of heir—that it confers the quality or the rights of heir upon the person named in the decree. It does not; and the adjection to it of the effect of a disposition by the deceased does not cure an error as to the identity of the hypothetical disponee. Death and propinquity are *facta propria*, the most difficult of all to establish by proof in a Court; but they remain radically fundamental in a question as to the right of the heir. If that is correct then (like other radical defects) the defect which the pursuer alleges against the service in this case—whatever potentialities have been added to it by statute—is inherent in it; and a radical defect of that kind always stands, and must stand, in the way of third party acquirers, however good their faith.

It seems to me accordingly that the judgment reclaimed against must be affirmed.

LORD MACKENZIE—This is one of the unfortunate cases in which loss has to fall on one or other of two innocent parties. I agree with your Lordship that the able argument adduced on behalf of the reclaimers fails. On the first branch of it I think it fails because it is an attempt to read into section 46 of the Titles to Land Act 1868 a great deal more than the section will bear. On the second branch I think the argument fails because a decree of service does not and cannot make a person the heir who is not the heir. Therefore the onerous *bona fide* third parties in this case are just in the position of having acquired their right from one whose *ex facie* title depended upon a *funditus* nullity.

LORD SKERRINGTON — The defenders' counsel submitted an argument which was novel, and for which, as far as I know, there is no authority. He maintained that a person who in good faith buys heritable property from a seller who has an *ex facie* valid feudal title, one of the links of which is a service as heir, is entitled without appealing to prescription to retain the property, even although it afterwards appears that the person who served as heir was not in fact the true heir. I have always understood that, until a retour or service had been fortified by prescription, it was open to the true heir to come forward and set it aside, together with the titles which depended upon it for their validity. That I think has always been the law, and it was not altered in any way by the conveyancing legislation of 1847 and subsequent years.

The case is a hard one for the compearing defenders. At the same time I cannot help regretting that the Sheriff of Chancery did not dismiss the petition for service as irrelevant, but proceeded to pronounce a decree which seems to me to contain a *non sequitur*. It was quite true as the petitioners averred that they were "the only children" of a certain Robert Stobie, but they did not aver, and the decree of service does not bear, that they were Robert Stobie's only descendants. Accordingly it did not follow that the petitioners were the nearest and lawful heirs of Robert Stobie's childless brother David. In point of fact David's heir was the pursuer, the daughter of Robert's deceased son, and the niece of the petitioners who improperly obtained the service.

LORD CULLEN—I think that this is a case of a radical defect of title, and that the judgment of Lord Stormonth Darling in the case of *Mackie* (34 S.L.R. 34), cited to us, rightly proceeded on the ratio that a disposition granted by a person wrongly served as heir is of the nature of a conveyance *a non domino*, and therefore will not support a right to property in the disponee unless fortified by prescription. There is no analogy between a disposition voluntarily granted by the true owner under the inducement of fraudulent misrepresentation and a service of the wrong person as heir. The service is fundamentally vitiated by falsity, and the analogy is rather that of a forged writ. The defenders founded specially upon section 46 of the Act of 1868, but that enactment merely says that unless and until reduced a service shall operate to transmit property in a particular way. If the service be reduced then the natural effect of that is that subsequent writs have no foundation to rest on and that they fall also, and section 46 says nothing to the contrary. In the cases to which our attention was called relating to sales under judicial sanction (*Wilson* v. *Eliott*, 3 W. & S. 60; *Baird* v. *Neill*, 13 S. 927), the authority of the Court was granted for the purpose of enabling a good title to be offered in the market to the purchaser of the land authorised to be sold.

The Court adhered.

Counsel for Pursuer — King Murray. Agent—Donald Shaw, S.S.C.

Counsel for Compearing Defenders — Mitchell, K.C.—Gilchrist. Agents—Welsh & Forbes, W.S.

HOUSE OF LORDS.

Monday, July 25.

(Before Lord Buckmaster, Lord Atkinson, Lord Shaw, Lord Sumner, and Lord Wrenbury.)

CALDWELL'S TRUSTEES *v.* CALDWELL AND OTHERS.

(In the Court of Session, June 22, 1920 S.C. 700, 57 S.L.R. 593.)

Charitable Bequests and Trusts — Uncertainty — "Charitable and Benevolent Institutions."

Held (*aff.* judgment of the First Division) that a residuary bequest in favour

of "such charitable and benevolent institutions in Glasgow and Paisley" as the testator's trustees might think best was not void from uncertainty.

The case is reported *ante ut supra.*

Walter Caldwell and others, the testator's next-of-kin and the second parties to the case, appealed to the House of Lords.

At delivering judgment—

LORD BUCKMASTER—The question that arises for decision in this case is as to the effect of a gift contained in a mutual settlement and trust-disposition of James Caldwell and Margaret Telfer or Caldwell, which was registered in the Books of Council and Session on the 29th December 1917.

By this will a considerable number of pecuniary legacies were given to a variety of specified benevolent and charitable objects. These objects were all either included under the phrase "institution" or "association" or "incorporation," not necessarily meaning that they were thereby distinct, but that the name in each case involved either the one qualification or the other. Consequently no help can be obtained from these words in construing a similar phrase in other portions of the settlement. After these provisions the trust-disposition continued in these terms —"And in the last place, should there be any further funds available we direct the trustees to divide the whole of the residue and remainder among such charitable and benevolent institutions in Glasgow and Paisley, and in such sums not exceeding the sum of Three hundred pounds sterling to any institution as in their discretion may seem best, and the trustees shall be the sole judges as to charitable and benevolent institutions which may participate in such residue, and as to the sum or sums which may be so paid to each." It is contended on behalf of the next-of-kin, who are the present appellants, that this gift is too vague to be valid; that the words "charitable" and "benevolent" are not capable of such a construction as will cause the wider meaning of the word "benevolent" to be controlled by the less extensive significance of the word "charitable"; and that in consequence there is imposed upon the trustees a duty which is impossible for reasonable men adequately to discharge, and that therefore by reason of the uncertainty of the gift it fails and there is an intestacy.

It is unnecessary for this House to decide whether or no a gift to benevolent institutions alone in the words that are contained here would or would not be adequate. In the authority that has been referred to in 1918 Appeal Cases, p. 337, there are statements to be found in the judgment of my Lord Atkinson which certainly suggest that even such a gift might be good because the limitation of the area within which the institutions are to be selected, and the fact that the benevolent gifts themselves must be confined to something in the nature of an institution, would sufficiently limit the gift to enable it to be effectively carried out by the trustees. But it is unnecessary to decide that point, for this reason—The judgments appealed from are based upon the view that "charitable and benevolent" really mean such charitable gifts as are benevolent, and there is considerable authority both in Scotland and in England to show not only that such a construction is possible, but that in the absence of words to the contrary it is the one that ought to be adopted. The case of *Hill* v. *Burns*, reported in 2 Wilson & Shaw, accepts that as the true view of the will in that case where a similar phrase was used, although I agree with Mr Sandeman that the actual point does not appear to have been the subject of elaborate discussion. To the same effect is the case of *Miller* v. *Black's Trustees*, reported in 2 Shaw & M'Lean; and finally in the English Courts in the case of *Jarvis* v. *The Corporation of Birmingham*, [1904] 2 Ch. 354, the actual words "such charitable and benevolent institutions as the trustees shall in their discretion determine" were the subject of examination by Lord Justice Farwell, then Mr Justice Farwell, who, after investigating both the Scotch cases and the earlier English cases which appear to favour the contention of the appellants in this case, decided without hesitation that the gift ought to be so construed that the word "and" should be given its proper literary meaning, and that the word "benevolent" should be subject to the control effected by its conjunction with the word "charitable." The learned Judge stated his view in these words—"Having regard to the curiously technical meaning which has been given by the English Courts to the word 'charitable,' I am not surprised that the testator should have desired that the institutions should be not only charitable but should be also benevolent. There are certainly some which I think it would be difficult to say are benevolent, such as the distribution of the works of Joanna Southcote, although that was held to be charitable. I think the testator here intended that the institutions should be both charitable and benevolent, and I see no reason for reading the conjunction 'and' as 'or.'" With those observations I am in entire agreement. I see no reason why a word which has a perfectly plain meaning and should ordinarily be read as signifying something conjoined with what has gone before should have its meaning altered in order that a gift which upon the face of it would be good should be made bad by severing two things which the testator had himself joined together.

For this reason I think that the judgment appealed from is correct, and that this appeal should be dismissed, with costs.

LORDS ATKINSON, SHAW, SUMNER, and WRENBURY concurred.

Their Lordships dismissed the appeal, with costs.

Counsel for the Appellants — Sandeman, K.C.—Graham Robertson. Agents—Maclay, Murray, & Spens, Glasgow—J. & J. Ross, W.S., Edinburgh—Sherwood & Company, Westminster.

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