Friday, March 9.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

COBB *v.* ROBERTSON AND OTHERS (COBB'S TRUSTEES).

Trust-Disposition — Charitable Bequest — Uncertainty—Direction to Pay to "Useful Benevolent and Charitable Institutions."

A truster directed his trustees to pay and apply the residue of his estate "to such useful benevolent and charitable institutions as they in their discretion may think proper, it being hereby declared that the decision of my said trustees, or the majority of them, in regard to said useful benevolent and charitable institutions shall be final and binding upon all concerned."

Held that the word "useful" was used to qualify both "benevolent" and "charitable," and that the bequest was not void through uncertainty.

Opinion (by Lord Stormonth Darling) that a direction to trustees to give trust funds to "useful institutions" would not be void from uncertainty.

David Cobb, who resided at Taypark near Dundee, died in the month of January 1892, leaving a trust-disposition and settlement dated 2nd October 1883, whereby he conveyed to trustees his whole means and estate, heritable and moveable. After providing for payment of his debts, and any legacies he might thereafter leave, he directed his trustees, in the event of his sister Miss Matilda Johnston Cobb surviving him, to pay over to her during her life the free yearly income arising from the residue and remainder of his means and estate. The testator then directed his trustees as follows:—"Upon the death of the survivor of me and the said Matilda Johnstone Cobb, and after answering the foregoing purposes, I farther direct my said trustees to pay and apply whatever residue and interest thereon may remain in their hands to such useful benevolent and charitable institutions as they in their discretion may think proper, it being hereby declared that the decision of my said trustees, or the majority of them, in regard to said useful benevolent and charitable institutions shall be final and binding upon all concerned."

Miss Matilda Johnston Cobb predeceased the testator.

In September 1892 Peter Cobb, one of the testator's next-of-kin, brought an action against the trustees to have it declared that the bequest of the residue was void, and that the residue fell to be divided among the testator's next-of-kin, according to the rules of intestate succession, and to have the defenders ordained to give an account of their intromissions as trustees.

The pursuer averred that the bequest of residue was "vague, indefinite, and uncertain, and its terms are in law impracticable and incapable of being carried out."

The defenders pleaded—"(2) The pursuer's averments are irrelevant. (3) The residuary bequest in the said trust-disposition and settlement not being invalid on the grounds stated, the defenders should be assoilzied."

Upon 2nd February 1894 the Lord Ordinary (STORMONTH DARLING) sustained the second and third pleas-in-law for the defenders, and assoilzied them from the conclusions of the summons.

"*Opinion.*—The late Mr David Cobb of Taypark, near Dundee, who died in January 1892, left the residue of his estate, estimated at £60,000 or thereby, to be paid and applied by his 'trustees' to such 'useful benevolent and charitable institutions as they in their discretion may think proper, it being hereby declared that the decision of my said trustees or the majority of them, in regard to said useful benevolent and charitable institutions, shall be final and binding upon all concerned.'

"Mr Peter Cobb, alleging himself to be a second cousin and one of the next-of-kin of the testator, has brought this action against the trustees to have it declared that the bequest is void for uncertainty. The defenders refused to admit his relationship, and a proof was allowed, in which the pursuer succeeded in establishing his title to sue. It is, therefore, now necessary to decide the legal question.

"The pursuer cannot point to any Scottish decision in support of his contention, but he cites a number of English authorities which, if I understand them aright, establish the rule that a bequest for distribution at the discretion of trustees for any other than charitable purposes is void, and that where other purposes of an indefinite nature are named along with charitable purposes, so that the whole might be applied for either purpose, the English courts will not sustain even the charitable part of the bequest, which if it stood by itself would be good. The reason for this somewhat artificial rule seems to be that as the execution of every English trust is held to be under the control of the court, it must be of such a nature that the court itself can, if necessary, execute the trust. It can execute a trust for charitable uses, because the word 'charitable' has in England a well ascertained legal meaning (much wider than its natural meaning), derived from the Statute of Elizabeth and the decisions of the Court of Chancery thereupon; but other words, though of similar import, are held to constitute too vague a direction for the court to administer, and if for the court, so also for trustees.

"I refer particularly to the judgment of Lord Eldon in *Morice* v. *The Bishop of Durham*, 1804, 10 Vesey, 521, now reported in 7 Revised Reports, 232.

"It seems to me that there is no such rule in Scotland, and that the reason for it does not exist. Our courts do not supervise or execute trusts, and the recent case

of *Robbie's Judicial Factor* v. *Macrae*, 20 R. 358, shows that they will not transmit to a judicial factor appointed by them the discretion as to the selection of objects of the testator's bounty, which had been validly committed by the testator to his own trustees.

"Nothing can illustrate more strongly the vital distinction between the two systems than to contrast the English cases of *Williams* v. *Kershaw*, 5 Cl. and Fin. III., and in *re Jarman's Estate*, 8 Ch. Div. 584, with the judgments of the House of Lords, sitting as a Court of Appeal from Scotland in *Hill* v. *Burns*, 2 Wilson and Shaw 80, and *Millar* v. *Black's Trustees*, 2 Sh. and Maclean 866. In *Williams* v. *Kershaw* Lord Cottenham, when Master of the Rolls, held that a direction by a testator to his trustees to apply the residue of his personal estate to and for such benevolent, charitable, and religious purposes as they in their discretion should think most advantageous and beneficial, was void for uncertainty. In *Jarman's Estate*, Vice-Chancellor Hall decided that a direction to trustees to apply the residue to any charitable or benevolent purpose they might agree upon was indefinite and inoperative, and therefore bad. But in *Hill* v. *Burns* the House of Lords sustained a bequest whereby a testatrix appointed the residue of her estate to be applied by her trustees in aid of the institutions for charitable and benevolent purposes established or to be established in the city of Glasgow or neighbourhood thereof, coupled with a declaration that they should be the sole judges of the appropriation of the residue for these purposes. Still more significantly, in *Millar* v. *Black's Trustees*, the House decided that a bequest to trustees to apply the residue to such charitable and benevolent purposes as they might think proper, was not void for uncertainty. In *Crichton* v. *Grierson*, 3 Wilson & Shaw 329, Lord Lyndhurst stated the rule of Scots law in perfectly general terms. That was a case where the testator declared his wish to be that the residue should be applied in such charitable purposes and in bequests to such of his friends and relations as might be pointed out by his wife, with the approbation of the majority of his trustees. Lord Lyndhurst, in holding the direction to be good, stated (at p. 338) the question to be 'whether it is competent for the disposer by a deed of this description to point out particular classes of persons and objects which are intended to be the object of his favour, and then to leave it to an individual or a body of individuals after his death to select out of those classes the particular individuals or the particular objects to whom the bounty of the testator shall be applied?' And he added, 'I apprehend that according to the authorities in the law of Scotland it is quite clear a party has this power.' Towards the end of his opinion (at p. 343) his Lordship took occasion to say that in respect to bequests for charitable purposes the law of England was 'more strict than the law of Scotland.'

"It seems to me impossible, in the face of these decisions, to say that this bequest is void. The testator here has been more precise than some of the testators in the cases I have mentioned, because he does not content himself with the phrase 'useful benevolent and charitable purposes'; he points out 'useful benevolent and charitable institutions' as the objects of his bounty. The trustees have a free hand in selecting the particular objects, but they must be 'institutions,' which implies a definite organisation and some element of permanence. Except for the introduction of the word 'useful,' the case is precisely ruled by *Millar* v. *Black's Trustees*. Now, does the word 'useful' vitiate the whole bequest? I think not. Suppose the expression 'useful institutions' had stood alone. They are a class of objects as to which no doubt opinions might widely differ, but I know of no authority in the law of Scotland for saying that a testator might not delegate to his trustees the duty of selecting from among that class, according to their own opinion of what constituted a useful institution. Some fanciful illustrations were put by the pursuer's counsel of institutions which most men would admit to be useful, but which would not be appropriate recipients of a testator's bounty. Similar things might be said of every discretionary trust, because all discretion is liable to be abused. This Court has power to restrain abuses in the administration of trusts at the suit of the testator's next-of-kin, or perhaps of the Lord Advocate, however wide the discretion of trustees may be. But we are not to anticipate the abuse of discretion. It seems to me that the word 'useful' may to some extent be explained and controlled by the company in which it stands, but that even by itself, it sufficiently designates a large class of institutions to which the testator's bounty might properly enough be applied, and which might not in strict language be covered by the words 'charitable' or 'benevolent.' The word 'charitable' in England, according to the definition in the Statute of Elizabeth, covers schools of learning and scholarships in universities, and it has been held to extend to such bodies as the British Museum and the Geographical Society, and to such purposes as public religious instruction (Jarman on Wills, 208-9). These are purposes which might not fall within the ordinary meaning of 'charitable,' or even of 'benevolent,' and it would be a singular result if the freer scope of the law of Scotland with respect to bequests of this kind were found to leave less latitude to testators than the narrower rule of the law of England. But while my own opinion is that the trustees might allocate the testator's money to institutions which are useful without being either charitable or benevolent, there is another construction of the clause which would remove all difficulty on this head. I mean the construction that any institution receiving benefit must be at once charitable, benevolent, and useful. Such a construction is by no means a forced one, and at all

events I should prefer it to holding that there was intestacy.

"With regard to expenses, I think the pursuer ought to have his expenses in connection with the proof, because he was successful in proving his propinquity, and it was only the extreme caution incident to the position of the defenders as trustees which led them to deny it. *Quoad ultra* I shall follow the example of this Court in *M'Lean* v. *Henderson's Trustees*, 7 R. 601, by finding no expenses due to or by either party."

The pursuer reclaimed, and argued—The bequest could not stand. It was admitted that both in Scotland and in England a bequest to trustees allowing them to distribute the funds at their disposal among "charitable" institutions was good, but this rule applied where the direction was to divide the funds among "charitable" institutions only—*Morice* v. *The Bishop of Durham*, March 20, 1805, 10 Vesey 521, and 7 Revised Rep. 232; *Millar* v. *Black's Trustees*, July 14, 1837, 2 Sh. & Maclean, 866. It was also admitted that the addition of the word "benevolent" made no difference, all charitable institutions being by their nature benevolent, but the addition of the word "useful" rendered the bequest null upon the ground of vagueness, because there might be many institutions which were useful, and yet were not charitable. The words must be read disjunctively, and not collectively. [LORD RUTHERFURD CLARK—I suppose I am bound to read this will so as to give effect to the desire of the truster, and if I find two meanings of the words possible, one of which enables me to give effect to the will, and the other destroys it, must I not take the view which will enable me to give effect to the testator's purpose? Here the words could be read "a useful benevolent institution," or "a useful charitable institution."] No doubt in the usual case a benignant construction was given to testamentary settlements, but where there were two meanings possible, a natural meaning and a strained one, the Court was bound to take the natural one. No benignant construction, however, was given to wills where the testator did not take the trouble to make a will for himself, but had merely handed over all his property to trustees to dispose of in their discretion. 2. The Lord Ordinary was wrong when he said that a bequest to "useful institutions" would be good by the law of Scotland; it was only "charitable" institutions that were so favoured—*Williams* v. *Kershaw*, December 11, 1835, 5 Cl. & Fin. 111; *Ellis* v. *Selby*, February 1, 1836, 1 Mylne & Craig, 286; *in re Sutton*, February 10, 1885, L.R., 28 Chan. Div. 464; *in re Jarman's Estate*, April 8, 1878, L.R., 8 Chan. Div. 584; *Sutherland's Trustees* v. *Sutherland's Trustee*, July 6, 1893, 20 R. 925; *Magistrates of Dundee* v. *Morris, &c.*, May 1, 1858, 3 Macq. 134; *Kendall* v. *Granger*, July 2, 1842, 5 Beavan, 300; *Vesey* v. *Jameson*, November 19, 1822, 1 Simson & Stuart, 69; *Tilden* v. *Green*, October 27, 1891, 44 Albany Law Journal 368.

The respondent argued—This bequest was not void from uncertainty. The English cases which the pursuer cited were not in point, because in the law of England "charitable" bequests were construed to include only a certain number of institutions which were enumerated in the Act of Elizabeth, as that Act had been interpreted by the English Court—*Black's Trustees* v. *Miller*, February 23, 1836, 14 S. 555. There was no such restricted meaning in Scotland. The law in this country was that a testator might select certain classes of objects which he wished to benefit, and leave it to the discretion of his trustees to choose individuals out of this class. Much broader words than those here had received effect—*Kelland, &c.* v. *Douglas*, November 28, 1863, 2 Macph. 150; *M'Lean* v. *Henderson's Trustees*, February 24, 1880, 7 R. 601.

At advising—

LORD JUSTICE-CLERK—The question here is whether a bequest to trustees, with directions to them to apply the amount to "useful benevolent and charitable institutions" is void from uncertainty. There can be no doubt that a bequest which directs trustees to apply its amount for the benefit of charitable institutions would be valid. The cases leave that matter in no uncertainty. But it is contended that the use in this testament of the word "useful" renders the bequest void, because useful is a vague expression, and that it is separable from the other expressions. The contention is that the three expressions, useful, benevolent, and charitable, are not to be read together, but to be read as alternatives to one another as if they were disjoined by the word "or." I do not think that they should be so read if a reasonable reading can be found when they are read as they stand, joined by a copulative and not a disjunctive. And I am of opinion that the words can, without any straining, and rather in accordance with their natural sequence, be read so as to refer to institutions of a benevolent and charitable character, such as the trustees may select, they being called upon in doing so to consider and form an opinion as to whether the institutions being benevolent and charitable, were also doing useful work in the community. The words "benevolent and charitable" may be held to form one expression in which the words are truly used as exegetical of each other respectively, the word "useful" overriding both. That is my view of how this phrase may be read and should be read. So reading it, the contention that this bequest is null from uncertainty must fail, and I think that your Lordships should adhere to the Lord Ordinary's interlocutor.

I do not go into the matter more fully, or into the consideration of the question whether, if the words of the bequest were to be read as disjoined, the request might not be valid, for I have had an opportunity of reading an opinion prepared by Lord Trayner in which I entirely concur.

LORD YOUNG and LORD RUTHERFURD CLARK concurred.

LORD TRAYNER — The testator in this case directed his trustees, *inter alia*, "to pay and apply whatever residue and interest thereon may remain in their hands to such useful benevolent and charitable institutions as they in their discretion may think proper." This direction, the pursuer maintains, is void through uncertainty, and if that contention were sustained the result would be that *quoad* the residue thus directed to be distributed according to the discretion of the trustees there would be intestacy. That is a result not easily to be arrived at, because the truster certainly did not intend that his estate or any part of it should be distributed according to the law of intestate succession, but intended it to go according to another rule, namely, the discretion and choice of his trustees. It may be, however, that a direction by a testator is so vague and uncertain as to be void, although the Court will be disposed, if it can, so to read the direction that it may have effect, rather than construe it so as to render it unavailing. It does not appear to me to be necessary in this case in order to sustain the direction in the will before us, to have recourse either to our general rules of construction, or to that tendency of our law to avoid intestacy where this can reasonably be done, for in my opinion the direction in question cannot be considered as void through uncertainty, when regard is had to a series of decisions already pronounced, and of authority, in our Courts.

The view of the direction in question which the pursuer presents is that there are three classes of institutions mentioned therein, to any one of which the trustees may give the benefit of the testator's bounty, namely, useful institutions, benevolent institutions, or charitable institutions; that while the two latter are sufficiently defined to sustain the direction, the first, "useful institutions," to which according to his view the whole of the directed residue might be given, is too vague. I reserve my opinion upon the question whether a direction to trustees to give a portion of the trust estate under their charge to "useful institutions" would be void through uncertainty according to the law of Scotland. It is not necessary, in the view I take of this case, to consider or decide that question, for in my opinion the testator here did not direct anything to be given to merely "useful institutions." I read his direction as one to his trustees to favour benevolent and charitable institutions, which are at the same time useful. The word "useful" is used to qualify both "benevolent" and "charitable." In that view of the clause it is a matter of indifference whether the "and" is read as conjunctive or as equivalent to the disjunctive "or." Now, if the clause can fairly be read as I propose to read it, the pursuer's argument fails. He does not dispute that a gift or direction to benefit a "useful benevolent institution," or a "useful charitable institution," would be valid. He argues against this construction, however, that it is employing two adjectives, the one to qualify the other; whereas in his reading of the clause "useful" is used to qualify the substantive, just as the other adjectives do. I think this, in any view, an extremely narrow ground on which to proceed with the result of frustrating the intention of a testator. But I find no difficulty in reading the two words as adjectives qualifying each other, as well as qualifying the substantive which follows, and I see that the same view about the use of double adjectives was taken by Mr Justice Pearson in the case of *Sutton* cited during the debate.

The pursuer relied very much upon the decision pronounced in *Williams* v. *Kershaw*, where it was held that a direction by a testator to trustees to apply the residue of his estate "for such benevolent, charitable, and religious purposes" as they should think right, was void through uncertainty. In that case the Master of the Rolls held, in construing the direction before him, that the intention of the testator was to leave his trustees a discretion in the choice of purposes which were benevolent or charitable or religious. So read, the deed gave the trustees the power of bestowing the whole of the truster's residue on objects which were, in their opinion, benevolent; and that being by the law of England void through uncertainty, the truster's residue was held to be undisposed of. The decision in that case was not cited as an authority in any way binding upon us, or as one which we ought to follow, and indeed it could not be so, for the law of Scotland recognises as sufficiently certain to be valid, a direction to trustees to distribute or bestow trust-estate on benevolent objects or purposes. The case was cited I understood chiefly as an instance where a learned judge had construed the language in a will as disjunctive, which apparently was conjunctive, and it was suggested that the same course should be followed here, so as to make the direction before us read as if the truster had directed his trustees to bestow his bounty on useful or benevolent or charitable institutions, and so to read the word "useful" as qualifying institutions, and as altogether independent of the terms benevolent and charitable. But even for this limited purpose I think the case of *Williams* does not help the pursuer. The terms there used were such as might lead, and in fact did lead, to the conclusion that they must be read as descriptive or designative of independent objects and purposes. "Benevolent" would scarcely be used as qualifying "charitable," and "benevolent and charitable" if read together as qualifying "religious" led to the result, as the Master of the Rolls said, that "every application must be to a religious purpose," a construction which he rejected. But here there is no such difficulty to contend with — "useful benevolent and charitable institutions" are terms which may fairly, and I think in this case pro-

perly, be read as indicating institutions benevolent or charitable in their character, and useful in their operations. The adjectives used are such as may reasonably be read together as qualifying the substantive, and do not point to their being used as independently designative. I am, on these grounds, for affirming the judgment reclaimed against.

The Court adhered.

Counsel for the Pursuer—H. Johnston—M'Lennan. Agent—Alexander Morison, S.S.C.

Counsel for the Defenders—C. S. Dickson—Salvesen—Robertson. Agent—J. Smith Clark, S.S.C.

Friday, March 9.

SECOND DIVISION.

[Lord Low, Ordinary.

OBAN POLICE COMMISSIONERS *v.* COUNTY COUNCIL OF ARGYLLSHIRE.

County Council — Burgh — Assessment— Parliamentary Burgh Liable to be Assessed for County General Assessment— Rogue Money Act 1839 (2 *and* 3 *Vict. cap.* 65), *secs.* 1 *and* 3—*County General Assessment Act* 1868 (31 *and* 32 *Vict. cap.* 82), *secs.* 1, 2, 4, *and* 10—*Local Government (Scotland) Act* 1889 (52 *and* 53 *Vict. cap.* 50), *secs.* 11, 12, *and* 27.

Held that a county council had power to levy the county general assessment upon lands and heritages within a parliamentary burgh, which was neither a royal burgh nor had a Police Act, nor had taken the benefit of the Act 3 and 4 Will. IV. c. 46, intituled "an Act to enable Burghs in Scotland to establish a general system of Police."

By the Rogue Money Act 1839 (2 and 3 Vict. cap. 65) it was provided that "Whereas an Act was passed in the eleventh year of the reign of His Majesty George the First, intituled, an Act for more effectual disarming the Highlands in that part of Great Britain called Scotland, and for better securing the peace and quiet of that part of the kingdom, whereby the freeholders of every shire, county, or district in Scotland were authorised to assess the several shires or stewartries for raising a sufficient fund to defray the charges of apprehending, subsisting, and prosecuting criminals; and whereas the collection and application of the fund thereby authorised to be raised, commonly called the 'rogue money,' was, by an Act passed in the second and third year of the reign of his late Majesty, King William the Fourth, intituled, an Act to amend the representation of the people in Scotland, transferred from the freeholders to the commissioners of supply; and whereas such fund has heretofore been raised by assessment on the valued rent of lands and heritages; and whereas it is expedient to authorise the commissioners of supply of the several counties, if they should think fit, to extend the purposes for which such assessment may be made, and to adopt other means of assessing the same: Be it therefore enacted . . . that it shall be lawful for the commissioners of supply of any county, if they shall so determine at any meeting, due notice having been given by advertisement in some newspaper published or usually circulated in such county at least one month previous to such meeting by the clerk of supply, on requisition to him to that effect (stating the purpose of such meeting) by not less than ten of such commissioners, to make an additional assessment for establishing and maintaining an efficient constabulary or police force in the county for the prevention of crime, including any charge for special constables who may have been duly appointed for the preservation of the peace in such county, and such additional assessment shall be deemed and taken to be, and shall be levied and collected, as part of the rogue money. (3) Provided also, and be it enacted, that the said commissioners shall not be entitled for the purposes of this Act to assess any lands, houses, or other heritages situated within the boundaries of any royal burgh, or to assess any lands, houses, or other heritages situated within the boundaries of any burgh or town which either has a Police Act, or which has taken the benefit of an Act passed in the third and fourth year of the reign of his late Majesty King William the Fourth, intituled, an Act to enable Burghs in Scotland to establish a general system of Police."

By the Lands Valuation (Scotland) Act 1854 (17 and 18 Vict. cap. 91), which established one uniform valuation of lands and heritages in Scotland, according to which all public assessments leviable or that may be levied, according to the real rent of such lands and heritages, are assessed and collected, the valuation rolls being made up annually by the commissioners of supply of every county, and magistrates of every burgh, showing the yearly rent or value for the time of the whole lands and heritages within such county or burgh respectively, it is enacted, sec. 40—"After the completion of the first valuation under this Act, it shall be in the power of the commissioners of supply to assess on the said valuation, and any subsequent valuation, the rogue money and all other assessments now levied on the valued rent, provided that the resolution so to assess be given at the meeting of the commissioners previous to the meeting at which such assessment is to be made, but after such resolution has once been adopted by the said commissioners, it shall not be in their power to revert to the former mode of assessment." Sec. 41— . . . "Nothing contained in this Act shall exempt from or render liable to assessment any person or property not previously exempt from or liable to assessment."