

to an English conveyancer may seem superfluous.

This second deed is the one which the Commissioners called a settlement, and on which they founded their claim to settlement duty. There is no definition of the term "settlement" in the body of the Stamp Act. In the schedule "settlement" is explained as "any instrument . . . whereby any definite and certain principal sum of money . . . or any definite and certain amount of stock or any security is settled or agreed to be settled in any manner whatsoever." And so the Commissioners, finding definite and certain sums of money mentioned in the deed of substituted security, boldly claimed settlement stamp duty upon them all. The simple answer is that a mortgage or a deed of security by which the destination of the equity of redemption is not altered is not a settlement in the ordinary and proper acceptation of the term, even though the mortgage or security be couched in the form of a trust, and the trust be developed or unfolded in a series of provisions which have the semblance of successive steps or stages. Subject to the charge created by the deed, Mr Turnbull was the owner of the property after the deed was executed just as he was before, and no other person acquired any interest in the property under the instrument in question.

The claim, whether it is to be regarded as an ingenious experiment or an unhappy blunder, fails altogether, and the appeal must, I think, be dismissed with costs, and I move your Lordships accordingly.

The other Lords concurred.

Their Lordships dismissed the appeal with expenses.

Counsel for the Appellants—The Lord Advocate (Ure, K.C.)—Umpherston. Agents—P. J. Hamilton Grierson, Solicitor of Inland Revenue, Edinburgh—Sir F. C. Gore, Solicitor of Inland Revenue, London.

Counsel for the Respondents—D. F. Scott Dickson, K. C. — MacRobert. Agents—Sibbald & Mackenzie, W.S., Edinburgh—Marchant & Company, London.

## COURT OF SESSION.

Thursday, May 27.

### FIRST DIVISION.

[Lord Johnston, Ordinary.]

#### MACKINNON'S TRUSTEES v. MACKINNON AND OTHERS.

*Charitable and Educational Trusts—Uncertainty—“Such Charitable or Philanthropic Institutions” as my Trustees may Select.*

A trust-disposition and settlement contained this clause—“(Eighth) I direct that the residue of my means and estate shall be paid to such charitable or philanthropic institutions, one or more, in Glasgow or the West of

Scotland, as my trustees may select as in their opinion the most deserving, and that in such proportions in the case of their dividing it as they in their sole discretion may consider best.”

*Held* that the bequest was to be construed as a bequest in favour of charitable objects, the term “philanthropic” being merely exegetical, and that it was not void from uncertainty.

On 13th February 1908 R. B. Paterson, Bothwell Street, Glasgow, and another, trustees of the late Charles Mackinnon, 21 Roselea Drive, Glasgow, brought an action of multiplepointing and exoneration against Hector Mackinnon (address and designation unknown), and others, the testator's next-of-kin, who maintained that the testator had failed to dispose effectually of the residue of his estate.

The bequest of residue is given *supra in rubric*.

Claims were lodged by (1) the trustees, who maintained that the bequest was valid; and (2) by the next-of-kin, who contended that it was void from vagueness and uncertainty, and that the residue accordingly fell to be distributed as intestate succession of the deceased.

On 29th October 1908 the Lord Ordinary (JOHNSTON) repelled the claim for the trustees and sustained that of the next-of-kin.

*Opinion.*—“Charles Mackinnon, the testator, left the residue of his estate to be paid ‘to such charitable or philanthropic institutions, one or more, in Glasgow or the West of Scotland, as my trustees may select.’ The question raised in this multiplepointing is, whether ‘charitable or philanthropic’ is a sufficiently definite description of a class of institutions to admit of the bequest being sustained, or whether it is void from uncertainty. In the most recent case on this subject—*Hay's Trustees v. Baillie*, 45 S.L.R. 908—in reversing my judgment Lord Kinnear says—‘A testator 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;’ and his Lordship adds that it is ‘a question of degree whether the circumscribing line by which he defines the class is sufficiently distinct or not.’ This states more concisely than I am afraid I succeeded in doing, the view on which I had proceeded. I think, further, that it has been generally accepted that the term ‘charitable’ is in itself not sufficiently definitive of a class to satisfy the above requirement, but that in the case of *Crichton*, 1828, 3 W. & S. 329, favour for charity induced the Court to determine that it should be conventionally accepted as sufficiently definitive, and that it has accordingly been so accepted ever since. There is therefore now no question that a bequest to ‘charitable’ purposes must be sustained. And the question therefore which I have to determine in this case is, Whether a bequest to ‘charitable or philanthropic’ purposes is also to be accepted as

sufficiently definitive? This I assume it will be if 'charitable or philanthropic' be nothing else than 'charitable' writ in two words instead of in one, or if 'philanthropic' be in itself sufficiently definite so as not to detract from the conventional definiteness of 'charitable.' I quite accept that this is a question of the testator's intention, to be deduced from the particular words he has used.

"I have read with attention the decision of the Inner House in *Hay's Trustees v. Baillie, supra*. I am glad to say that I not only bow to it as a superior authority, but that it has fully satisfied me that my judgment in the case was erroneous. I had not sufficiently adverted to the fact that in using the definition 'benevolent or charitable' the testatrix had placed the wider word 'benevolent' first, and that in the circumstances the subsequent narrower word 'charitable' must on a fair construction be treated as exegetical of the previous wider term 'benevolent,' with the result that the combined expression is merely a pleonasm for 'charitable.' But I remain of the opinion, which I ventured to express, that it does not follow from the decision in *Crichton's case*, and the practice which has ensued, '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,' and accordingly were 'charitable or benevolent' found occurring in that order I should till further instructed repeat my judgment, and if so, I must *pari ratione* treat 'charitable or philanthropic' in the same way.

"I have here to construe that expression 'charitable or philanthropic.' There is nothing in the settlement to assist in the interpretation. For it is an ordinary family settlement containing this one discretionary direction as to residue. I cannot read the word 'philanthropic' as synonymous with charitable. It is one of wider and more indefinite meaning. Nor can I discard it. The testator has used it, and I cannot reject it. His intention must guide to a conclusion. But I must find his intention from his words. If I am to do so I have to choose between holding—(1) 'charitable' and 'philanthropic' as synonymous, and the testator's use of both expressions therefore as merely pleonastic. This, as I have already said, I am unable to do; or holding (2) 'philanthropic' as either an alternative for or exegetical of 'charitable,' but in itself sufficiently definite to sustain the bequest; or holding (3) the term 'philanthropic' as alternative for or exegetical of 'charitable,' but in itself too indefinite to support a discretionary bequest.

"As between alternative and exegetical I think I should most nearly reach the testator's meaning by accepting that 'philanthropic' was exegetical of charitable. But if so, it conveys the governing idea, and the testator might have expressed, and indeed must be held to have expressed, nothing but 'philanthropic,' and had

philanthropic occurred alone as a description of the objects of the testator's bounty, I could not have held it otherwise than so indefinite as to void the bequest.

"The result of treating the expressions as alternative would be to reach the same result in a different way.

"I was much pressed in argument by the contention, founded, I think, upon expressions used by the present Lord Chancellor in the case of *Murdoch's Trustees*, 1908 S.C. (H.L.) 3, 45 S.L.R. 335, that it must be prefaced, in the consideration of all such cases as the present, that a benignant construction is to be put upon charitable bequests, and that in so doing all that the Court needs to be satisfied of is that the description of the class of objects to be selected is sufficiently certain to enable men of common sense to carry out the expressed wishes of the testator.

"It is always very difficult, and not always productive of good result, to attempt to apply general expressions used in a case in which they were apposite, to the different circumstances of another case. And to try and make a general rule of the above expression creates in my mind more difficulty in the application than it relieves. I have first to ask myself, Is this a charitable bequest? Give it, say the trustees, a benignant construction and there is no doubt that it is. This appears to me to beg the question. You must first, I think, determine that the bequest is a charitable bequest, before you apply a benignant construction to it. I do not think that I am entitled to say that the testator clearly meant nothing more than 'charitable,' and that unless I reduce the exegetical or alternative 'philanthropic' to a mere synonym of 'charitable,' I will not be giving to his bequest a benignant construction, but will be straining his words in order to avoid doing so. It may be a matter of impression. But it appears to me that I strain the testator's words more by reducing the wider term 'philanthropic,' following the narrower term 'charitable,' to merely a synonym of 'charitable,' than by giving to the words he uses their natural meaning. As I think I must be satisfied that the bequest is a purely charitable bequest and nothing more, before I can give it a benignant construction, on the best consideration I can give to the case I am led to the conclusion that it is not purely a charitable bequest. And though I have no doubt that in attempting to execute the trust, the trustees, if men of common sense, may be relied on to apply the fund to purposes properly charitable and to discard purposes philanthropic but not charitable, I am unable to say that that is the expressed wish of the trustor.

"There is, I think, more assistance to be got from what I regard not as a general expression but a definite principle in regard to such cases, repeatedly enunciated since but thus stated by Sir William Grant, M.R., so far back as 1804, in the case of *Morice v. Bishop of Durham*, (1804) 9 Ves. 399—"The question is, not whether

the trustee may not apply it (the bequest) upon purposes strictly charitable, but whether he is bound so to apply it.' In the present case I must answer the latter part of that question in the negative, and am therefore obliged to hold that the whole bequest is void from uncertainty.

"In this judgment I trust I have not been unduly influenced by English authority. I certainly have read English cases, but I have not accepted them as guides without a careful scrutiny. I am perfectly aware that there is a distinction between the accepted meaning of the word 'charitable' in England and in Scotland. But the difference is this, that the word 'charitable' in England covers not only all that it covers in Scotland, but covers a great deal more. It is a case of the greater including the less. Were a Scottish case to involve the determination of the limits of the word 'charitable,' I quite assent to this, that no assistance could be got from the English cases, because in the definition of 'charitable' English views and ours would be different. In England it receives a general *plus* a technical meaning. In Scotland only a general. But if the question, as here, has nothing to do with the limits of charitable, but has to do with the comparison between the term 'charitable' and some other expression alternative or exegetical, such as 'benevolent' or 'philanthropic,' I cannot see why a judgment in England should not be a good guide, though it be not an authority in Scotland, because if charitable is not synonymous with 'benevolent' or other term of that description in England, then *a fortiori* it ought not to be so here. I may be wrong in my view of 'philanthropic.' Others may consider that the term 'philanthropic' is just another expression for charitable. I can only say that that is not my view. I hold it to be a word of much wider and more indefinite meaning. It has not yet been accepted by the Court here, as 'charitable' has been, as conventionally definite. I do not consider myself justified for the first time in putting upon it such a construction. And I shall therefore sustain the claim for the next-of-kin in the present case.

"The expenses of the competition will come out of the fund *in medio*."

The trustees reclaimed, and argued—The bequest was valid. The question really was, Were there two categories here or one? "Philanthropic" as used by this testator was exegetical of "charitable," and that being so the bequest was clearly good—*Hay's Trustees v. Baillie*, 1908 S.C. 1224, 45 S.L.R. 908; *Paterson's Trustees v. Paterson*, 1909 S.C. 485, 46 S.L.R. 406; *Weir v. Crum Brown*, 1908 S.C. (H.L.) 3, 45 S.L.R. 335.

Argued for the next-of-kin—The Lord Ordinary was right. "Philanthropic" was not a synonym for "charitable." There were many philanthropic institutions which were not charitable. There were really two alternative categories here, and the bequest was therefore void—*Macduff v. Macduff*, [1896] 2 Ch. 451.

LORD PRESIDENT—The point here raised arises upon the will of a Mr Mackinnon, the last purpose of which was in the following words—" . . . (*quotes, v. sup. in rubric*) . . . " The point is whether that is a good bequest, or whether it is void from uncertainty. This question is one that in various forms has been very frequently before the Court recently, and I do not think it is at all necessary to say anything on the general law of the subject; and, in particular, the cases of *Hay's Trustees* and *Paterson's Trustees* are both very recent, following as they did upon the case of *Murdoch* in the House of Lords. Now, the question always comes back to be whether, in the words that Lord Kinnear used in the case of *Hay's Trustees*, "the circumscribing line by which the testator defines the class is sufficiently distinct?" I humbly think that in this case it is sufficiently distinct. The testator here points out a particular neighbourhood, and he indicates as the objects of his bounty the institutions in that neighbourhood which his trustees may select as in their opinion the most deserving, those institutions being described to be "charitable or philanthropic." Now, it is not easy to give a precise definition of the words used, and one cannot fail to see that particular individuals will use words of a rather different shade of meaning from others, but reading this bequest as a whole, I personally do not feel any doubt that this testator meant to indicate one class of institution and not two different classes of institutions, and that class he described as "charitable or philanthropic." It may be quite easy to take particular instances to some of which the epithet "charitable" would be the more appropriate, and to others of which the epithet "philanthropic" would be the more appropriate. But even in doing so I think one would be guided by one's own particular use of language; but I do not think there is any difficulty in holding that "philanthropic" is, I ought not to say synonymous, but that it is just in so far resembling "charitable," that it can easily be understood as exegetic of the word; and if that is so, then, following the decisions, there can be no doubt as to the answer to the question. We have already had to apply that test to the other epithets "benevolent" and "beneficent," each of these having been held to be a word which is appropriately linked up with the word "charitable," however indefinite in itself, and yet which by the law has been held to be sufficiently definite to guide a trustee of common sense. Really, if you compare "philanthropic" with "benevolent" the only difference between the two words seems to be that the one is derived from the Latin and the other from the Greek, and that while the one rather directs your attention to a state of mind in general, the other directs your attention to a state of mind with regard to your fellow-men. I cannot think that is a limitation that tends to render the general design less "charitable" than it was before, and accordingly I think this case must follow the only

cases which I have referred to. It is quite true that we have been referred to a case of *Macduff v. Macduff*, in which the English Court of Appeal seems to have come to an opposite conclusion. That case is not binding upon us, but of course one always looks to these decisions as worthy of the greatest respect. But my commentary upon that case is that that was a case of 1896, and that since then I think there have been decisions in a still higher Court, the House of Lords, which make me greatly doubt whether that judgment would be repeated. These decisions are binding upon us, having been given on Scotch cases, and I am bound to say that I have come to the decision that in the position we are placed in to-day we are more within our duty in following the case of *Murdoch* in the House of Lords, and the other cases which have gone there, than we should be if we slavishly followed the case of *Macduff*.

LORD PEARSON—I agree with your Lordship.

LORD DUNDAS—I quite agree. As a matter of impression—and I think cases of this sort must always be to some extent a matter of impression—I should have read the words used by this testator in the sense in which your Lordship proposes to read them; but further, I agree with your Lordship in thinking that we are conclusively bound by the two latest authorities at any rate, namely, the cases of *Hay's Trustees* and *Paterson's Trustees*.

LORD M'LAREN and LORD KINNEAR were absent.

The Court recalled the Lord Ordinary's interlocutor, sustained the claim for the reclaimers (Charles Mackinnon's trustees), and ranked and preferred them accordingly.

Counsel for Claimants (Reclaimers) Chas. Mackinnon's Trustees—Fleming, K.C.—Lippe. Agent—Campbell Fails, S.S.C.

Counsel for Claimants (Respondents) Lachlan Mackinnon and Others—J. A. T. Robertson. Agents—J. Miller Thomson & Company, W.S.

Tuesday, June 1.

### FIRST DIVISION.

[Lord Salvesen, Ordinary.]

#### DRYSDALE v. EARL OF ROSEBERY.

*Slander—Slander by Actions—Innuendo—Relevancy.*

A factor brought an action for slander against his employer, a landed proprietor, in which he averred that on a certain day the defender's law agent called at the estate office; that he presented a letter from the defender desiring the pursuer to give the agent possession of all books, documents, and papers, and the contents of the safe, on

presentation of the said letter; that on his demanding the meaning of such a proceeding, the agent stated that the defender wished "to hold an investigation"; that pursuer explained that the keys of the cash drawer of the safe were kept by a clerk who was away on holiday; that the agent then insisted on sealing up the office safe; that two days later two of the law agent's clerks presented a letter from him authorising them to break the said seals, examine and remove the contents of the safe, and to search the office for documents they might consider necessary for the investigation; that they did so in presence of certain pupils of the pursuer, and thereafter took away with them certain books and papers; and that all this was done with the authority of the defender.

*Held* that the averments were irrelevant and would not bear the innuendo; that by the said letter, words, and actions the defender falsely and calumniously represented that the pursuer had been unfaithful in the discharge of his duty.

*Per* Lord President—"I think there may be an actionable wrong of the nature of slander by actions alone; but the question must always be whether the innuendo sought to be put upon such actions can in truth reasonably be drawn from them."

Andrew Learmont Drysdale, residing at The Leuchold, Dalmeny, raised an action of damages for slander against the Right Honourable the Earl of Rosebery, Dalmeny House, Edinburgh.

The pursuer averred—" (Cond. 1) The pursuer has acted as factor and commissioner on the defender's estates in the counties of Edinburgh and Linlithgow since August 1890, conform to factory and commission granted by the defender in his favour, dated 9th and registered 13th August 1890. He received part of his original training in the Dalmeny estate office, and has been in the defender's service about twenty-five years. . . (Cond. 2) From the date of his appointment the pursuer has regularly and properly discharged the duties of his office, ingathered the rents of the said estates and other revenues, submitted accounts which have been duly audited and found correct, and paid over the said rents and other revenues to the defender. The accounts have been audited annually and monthly, the last annual audit being for the year to 31st December 1907, and a formal and absolute certificate of accuracy is appended by the auditors to the annual statement of accounts for 1907. Statements of accounts up to 30th November 1908 and estimates up to 31st December 1908 have been rendered monthly, and these have been approved and passed by Mr T. S. Esson, W.S., on behalf of the defender. The pursuer has been prevented from rendering the statement of account for the month of December 1908, and the annual statement for that year, by the action of the defender, but the