ously as it unhappily turned out, that the machinery had come to a final stop. In my judgment the arbitrator was well entitled to hold that a workman who with his eyes open uses a dangerous piece of mechanism as a seat trusting that it will remain inert does not suffer from an accident arising out of his employment if his expectations prove erroneous. There is a real difference between an accident arising in this way and one which is due to casual negligence. In the former case the voluntary and deliberate act of the workman whereby he exposes himself to a wholly unnecessary risk is the sole cause of the accident, though the dangerous surroundings are of course a necessary condition for its occurrence.

For these reasons I am of opinion that upon the facts which were admitted or proved the award was one which the arbitrator could competently pronounce.

LORD CULLEN—Assuming that the appellant was justified by an implied authority in being in the heading in question while he awaited the cage, it is clear that such authority did not extend to his sitting on the pulley. He was entitled *ex hypothesi* to resort to the heading as a shelter from the draught coming down the shaft, and he could have waited there safely by standing in the adequate space if he had chosen to do so. But for his personal convenience he chose while waiting to expose himself gratuitously to a risk which was an obvious one. In so doing he exceeded his permission to use the heading as a place of waiting. His act in seating himself on the pulley was not incidental in any way to his work, or connected in any way with his employers' interests. It was simply an abuse of his leisure while waiting, which he committed for a personal end of his own. In these circumstances I am unable to hold that the accident which he so brought on himself was one which arose out of his employment, and I agree with your Lordships in thinking that the question in the case ought to be answered in the affirmative.

The Court answered the question of law in the affirmative.

Counsel for the Appellant—The Dean of Faculty (Constable, K.C.)—Scott. Agents—Alexander Macbeth & Company, S.S.C.

Counsel for the Respondents—Sandeman, K.C.—Wallace. Agents—Wallace & Begg, W.S.

Tuesday, June 22.

FIRST DIVISION.

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

Succession — Charitable and Educational Bequests and Trusts — Construction — Uncertainty—Charitable and Benevolent Institutions.

Held that a residuary bequest in favour of "charitable and benevolent institutions" was not void for uncertainty.

James Caldwell and others, the testamentary trustees of the deceased James Caldwell and the deceased Margaret Telfer or Caldwell, his wife, *first parties*, and Walter Caldwell and others, the brothers and children of a deceased sister of James Caldwell, *second parties*, brought a Special Case to determine questions relating to a residuary bequest in the mutual settlement of James Caldwell and his wife.

The *mutual trust-disposition and settlement*, after conveying the whole estate to the first parties for a variety of purposes, provided—"*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."

James Caldwell died on 23rd December 1917, Mrs Caldwell having predeceased him on 9th August 1917. All their children predeceased them without leaving issue.

The first parties *contended* that the residuary bequest was valid and effective.

The second parties contended that the residuary bequest was void on the ground of uncertainty.

The *question of law* was—"Is the bequest of residue void?"

Argued for the first parties — The residuary bequest was void. The object of the gift might be a charitable but not a benevolent institution, or a benevolent but not a charitable institution, and on a just construction of the deed need not be an institution both benevolent and charitable. As the objects of the bequest might be benevolent institutions the bequest was void for uncertainty—*James* v. *Allen*, 1817, 3 Mer. 17; *In re M'Duff*, [1896], 2 Ch. 451, *per* Lindley, L.-J., at p. 464 and Lopes, L.-J., at p. 468; *Paterson's Trustees* v. *Paterson*, 1909 S.C. 485, 46 S.L.R. 406; *Campbell's Trustees* v. *Campbell*, 1920, 57 S.L.R. 243.

Argued for the second parties — The objects of the gift were institutions which were both charitable and benevolent; and such a bequest was valid—*Hill* v. *Burns*, 1826, 2 W. & S. 80; *Miller* v. *Black's Trustees*, 1837, 2 S. & M. 866; *Cobb* v. *Cobb's Trustees*, 1894, 21 R. 638, 31 S.L.R. 506; *Blair* v. *Duncan*, 1901, 4 F. (H.L.) 1, 39 S.L.R. 212; *Hay's Trustees* v. *Baillie*, 1908 S.C. 1224, 45 S.L.R. 908; *Mackinnon's Trustees* v. *Mackinnon*, 1909 S.C. 1041, 46 S.L.R. 792. *In re Best, Jarvis* v. *Corporation of Birmingham*, [1904], 2 Ch. 354; *In re Sutton*, 1885, L.R., 28 Ch. D. 464, were referred to.

At advising—

LORD MACKENZIE—The question in this case appears to me to admit of only one answer. The bequest of residue is not void.

In every case two questions have to be considered—(1) What is the meaning of the particular will; and (2) What rule of law is

to be applied in determining whether the testator's direction is valid?

Upon the first question, apart from any authorities, I am of opinion that the testator intended that the institutions should be not only charitable but should also be benevolent. I do not see sufficient reason for reading the conjunction "and" as equivalent to "or."

Upon the second question the authorities from *Hill* v. *Burns* (1826, 2 W. & S. 80) to *Turnbull's Trustees* (1918 S.C. (H.L.) 88, 55 S.L.R. 208) are conclusive.

The query ought to be answered in the negative.

LORD SKERRINGTON — I am of opinion that the residuary bequest is valid, though none of the three arguments adduced in favour of its validity appears to me to be satisfactory. In the first place it was argued on the authority of the case of *Weir* v. *Crum Brown* (1908 S.C. (H.L.) 3, 45 S.L.R. 335) that the legacy being charitable was entitled to a benignant construction. This argument involves a *petitio principii*, and overlooks the fact that in the case cited the testator had stamped his bequest as charitable, seeing that the beneficiaries were to be indigent. In the second place, it was argued that according to Scots law the word "benevolent," without any context to control it, and when applied to institutions or objects, has the same meaning as "charitable," or (what comes to much the same thing) that the word "benevolent," like the word "charitable," designates when so applied a definite and particular class of institutions or objects from which a testator may, if he so pleases, validly direct his trustees to select such institutions or objects as they may consider to be deserving of his bounty. There are expressions of judicial opinion which imply the affirmative of this proposition, notably the dictum of Lord Brougham in *Miller* v. *Black's Trustees*, 1837, 35 Macph. 866, at p. 891. In other cases, such as *Cobb* v. *Cobb's Trustees* (1894, 21 R. 638, 31 S.L.R. 506), the identity in meaning and effect of the two adjectives was admitted by the parties and was assumed by the bench. In the absence of any decision to the contrary I am free to construe the word "benevolent" in what seems to me to be its natural and primary sense, viz., as descriptive of institutions or objects which, according to Scots law, may be, but are not necessarily and always, charitable. Even when the benevolence has for its objects the sick and the poor connected with a particular body, the latter may not be a charitable institution in the legal sense but a friendly society—*Smith* v. *Lord Advocate*, 1899, 1 F. 741, 36 S.L.R. 547. Benevolence, however, is much wider in its objects than charity as that word has hitherto been construed and defined by decisions in this country. To increase the virtue and happiness of persons who are already virtuous and happy is essentially benevolent, but is not necessarily charitable. "Benevolent" when used alone and without any limiting words, *e.g.*, words referring to institutions existing at a particular time in a particular locality, seems to me to be so vague and indefinite as not to comply with the test proposed by Lord Robertson in *Blair* v. *Duncan*, 1901, 4 F. (H.L.) 1, 39 S.L.R. 212. Lastly, it was argued that there were decisions to the effect that the expression "charitable and benevolent," when used by a testator with reference to institutions or objects to be selected by his trustees, must be construed as meaning the same thing as "charitable." There are cases where that has been held, but it cannot seriously be maintained that there is any general canon of construction to that effect. On the assumption that the question is an open one, I prefer, if possible, to avoid an interpretation which gratuitously attributes to a testator the use of meaningless words when there is another construction available which is equally legitimate and which gives its proper significance to every word that he has used. Expressions such as "charitable and useful," or "charitable and deserving," are intelligible when used cumulatively, seeing that some charities are not useful and some are not deserving, but the expression "charitable and benevolent," as applied to the same institution or object seems to me to be mere verbiage. In view of the difference between the laws of the two countries I do not think it material that in England an institution may apparently be charitable and yet not benevolent—*In re Best*, [1904], 2 Ch. 354. Charities have been founded from malevolent motives, but the author of a business document would not direct the attention of his trustees to this fact. On the contrary, he would, I think, assume that every institution or object which the law regarded as charitable was also benevolent, though he might describe the charity or the benevolence in any particular case as unintelligent or eccentric or misplaced. Of course I am here using the word "benevolent" in its primary and wide sense, and not in the secondary and narrow sense in which one might correctly say that a charitable society is not a benevolent or friendly society. *Prima facie*, therefore, the expression "charitable and benevolent," as applied to institutions or objects, ought to be construed not conjunctively and tautologically but disjunctively and so as to give to each adjective its full value. In the clause which we have to construe the disjunctive construction seems to me to be consistent with good grammar and with good sense. It was not argued that the phrase "in Glasgow and Paisley" must be read conjunctively, and that no institution was eligible unless it operated in both cities. The testators, in my judgment, invited every charitable institution and every benevolent institution in existence either in Glasgow or in Paisley at the death of the survivor of them to submit its claim for a dole not exceeding £300, and conferred upon every such institution a legal right to have its claim considered and disposed of by the testamentary trustees in the exercise of an honest discretion, they being the sole and final judges whether any particular institution so qualified ought or ought

not to participate in the residue, and if so to what extent.

For the reasons above indicated institutions in Glasgow or Paisley which are benevolent but not charitable fall, in my opinion, within the scope of the testator's bounty, and they ought not to be deprived of the chance of participating in the residue merely because of something which has been said or done by judges, however eminent, with reference to a similar but different controversy. It is not stated in the Special Case that the trustees are unable to perform the duty entrusted to them by the testator because of their inability to decide whether certain institutions in Glasgow or Paisley are or are not benevolent. Even if that statement had been made I should have been slow to believe it.

For the reasons indicated in the opinion of Lord Stormonth Darling in the case of *Shaw's Trustees* v. *Esson's Trustees* (1905, 8 F. 52, 43 S.L.R. 21)—an opinion which was referred to with approval in the case of *Turnbull's Trustees* v. *Lord Advocate* (1918 S.C. (H.L.) 88, 55 S.L.R. 208)—I have come to the conclusion that as the law at present stands no ground exists for setting aside the residuary bequest.

LORD CULLEN—I am of opinion that the question submitted is ruled by the cases of *Hill* v. *Burns* (1826, 2 W. & S. 80) and *Miller* v. *Black's Trustees* (1837, 2 S. & M'L. 866), and that it should be answered in the negative.

The LORD PRESIDENT (CLYDE) was absent.

The Court answered the question of law in the negative.

Counsel for the First Parties—M'Robert, K.C.—Fenton. Agents—Cowan & Stewart, W.S.

Counsel for the Second Parties—Sandeman, K.C.—T. Graham Robertson. Agents—J. & J. Ross, W.S.

Tuesday, June 22.

FIRST DIVISION.

[Lord Sands, Ordinary.

GAVIN'S TRUSTEE *v.* FRASER.

Contract—Sale—Right in Security—Sale or Security—Contract in the Form of Sale with Pactum de Retrovendendo—Sale of Goods Act 1893 (56 *and* 57 *Vict. cap.* 71), *sec.* 61 (4).

A contractor agreed on 18th October 1917 to haul timber to rail for a timber merchant at 12s. 6d. per ton, providing his own plant, horses, &c. Soon after that contract began, the contractor got as advances from the timber merchant two sums of £200 and £400 respectively, and credit of £5, the price of coals supplied. He applied in December for further money; the timber merchant was unwilling to give him more. On 24th December 1917 the parties interchanged letters which bore that the timber merchant had bought the contractor's plant, horses, &c., for £1200, the previous advances being imputed *pro tanto* against that sum, the timber merchant agreeing to return the plant, horses, &c., to the contractor "say by 31st December 1918" on repayment of the £1200 plus interest at 6 per cent. per annum. A payment of the balance of £1200 was made *unico contextu* with the agreement. The price of £1200 represented an adequate price for the plant, horses, &c. There was no personal obligation of repayment upon the contractor's part, and no obligation to account for the proceeds on the timber merchant's part if he sold the plant, horses, &c. The plant, horses, &c., were left on the haulage contract, the terms of which remained unaltered. There was no arrangement for the repair and upkeep of the plant. The contractor was sequestrated in May 1918, the first deliverance in the sequestration being dated 20th May 1918. The trustee in the sequestration thereafter sued the timber merchant, who had taken possession of the plant, horses, &c., for delivery thereof and for damages for retention thereof. *Held* (1) that the transaction between the contractor and timber merchant was in form and in substance a sale, and (2) (*rev.* Lord Sands) that it was not a transaction "intended to operate by way of mortgage, pledge, charge, or other security," in terms of section 61 (4) of the Sale of Goods Act 1893, in respect that the act which the parties were agreed in intending to produce was a sale, though their ultimate motives may have been in effect to create a security, and defender *assoilzied.*

Observations per the Lord President (Clyde) and Lord Skerrington on the class of transactions falling under section 61 (4) of the Act of 1893.

The Sale of Goods Act 1893 (56 and 57 Vict. cap. 71), enacts, section 61 (4)—"The provisions of this Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security."

William Craighead, trustee on the sequestrated estates of Duncan Loggie Gavin, farmer and contractor, *pursuer*, brought an action against George Lindsay Fraser, timber merchant, *defender*, concluding (1) for decree of delivery of "(First) eight horses which were at or about the months of November and December 1917 and January, February, March, and April 1918, or any of the said months, in the possession, custody, and control of the said Duncan Loggie Gavin, the bankrupt, together with the harness for the said horses; (Second) five lorries, one steam-engine, and two waggons attachable thereto, one steam waggon with detachable trailer, one steam waggon without trailer, and five wood waggons, all of which were, at or about the dates foresaid or any of them, in the possession, custody, and control of the said Duncan