there is no averment on the record and no expression in the deed to show that its inclusion contributed any material addition to the value of the fund.

I therefore think that the case for recal of the arrestments has been made out, because *ex facie* of the deed it appears that this is a good alimentary liferent provision, and one which is not prohibited by law.

LORD KINNEAR—I concur, and only desire to add that I entirely agree in all that your Lordship has said with regard to the case of *Barclay, Curle, & Company.*

LORD PEARSON was absent.

The Court granted the prayer of the petition and recalled the arrestments.

Counsel for the Petitioner—Hunter, K.C. —Hon. Wm. Watson. Agents — Hope, Todd, & Kirk, W.S.

Counsel for Respondents—Fleming, K.C. — Macphail. Agents — Tods, Murray, & Jamieson., WS.

Friday, July 17.

FIRST DIVISION.

[Lord Johnston, Ordinary.

CROWE *v.* COOK (HALL MAXWELL'S EXECUTOR).

Succession—Testament—Words Importing Gift of Heritage.

Terms of testamentary writing which were *held* to carry heritage.

On 24th December 1907 James F. Crowe, 2 Ashbrook Terrace, Dublin, brought an action against James Cook, Wrangholme Lodge, Portobello, executor-nominate of the late Mrs Mary MacNeil Jolly or Hall Maxwell, Wrangholme Lodge aforesaid, in which he sought declarator that Mrs Hall Maxwell died intestate *quoad* her heritable estate, and that he, as assignee of her heir-at-law, was entitled thereto. At the date of her death Mrs Hall Maxwell possessed heritable property to the value of about £2000. The net value of her moveable estate was about £10,750.

Mrs Hall Maxwell left three testamentary writings, with only the last of which, however, this report is concerned. It was as follows:—

"39 Melville Street, Edinburgh,
"March 20th 1903.

"I, Mary M'Neill Hall Maxwell, being in my proper mind, do herebye leave and Bequeath to James Cook the sum of ten thousand pounds Sterling—*my* that is the said ten thousand that is at present lent to the Borough of Motherwell. I also wish him in case any thing happens to me to see to my funeral and that all my animals are shot, and I appoint Mr Wedderburn of Carmet Wedderburn and Watson to assist him, all my Jewels—save a diamond Broch Diamond pendant, which Mrs Jolly gave me, to be retured to her. eveythg else to be sold. I leave one hndred ponds to the Home for falln Sisters and one hundred to prevention of Cruelty to Animals, and Five hundred to my Mother, Mrs Magaret Jolly. Thre Hundred to my Aunt Miss Doro Fitzgerald who will also get all my clothes that are of any use and I leave the remainder to fond and endow a small Home for old Colliers that have become unable to work, and the same to be furnished & a dinner given at Xmas and New Year, the same to have Beer and tobocoa, and I appnt the before said Mr Wedderburn and James Cook to see that this is carried out A site to be got on Newarthill grond but not on that owned by Messrs Nimo the preference to be given to those Colliers that may have worked in Stevenston and Newarthill Pits. And I sign this on the above date being of sond mind. (*Signed*) MARY M'NEILL HALL MAXWELL. Witnessed by Jemina Sutherland (*Signed*) JEMIMA SUTHERLAND, Wittness." [The word *my* (in italics) was deleted.]

The defender, *inter alia*, pleaded—"(3) The heritable estate of the testatrix being carried by her testamentary writings, the declarator sought should be refused."

On 25th June 1908 the Lord Ordinary (JOHNSTON) granted decree as craved.

Opinion.—"In the application of the enactments of the 20th section of the Titles to Land Act 1868, to concrete circumstances, there are many cases, as was said by Lord M'Laren, as Lord Ordinary, in *M'Leod's Trustee*, 10 R. 1056, which come near the dividing line. It may be that this is one of them, though for my own part I think it not only does not cross, but is a good long way from reaching the rubicon.

Mrs Hall Maxwell left three documents of a testamentary nature. The first two, though informal, are exceedingly concise, businesslike, and clear in their intention. Mrs Hall Maxwell was in 1899 possessed of certain heritable property in Leith Walk, not, I gather, in itself of much intrinsic value, but possessing a potential or fictitious value, because it was known that the Caledonian Railway Company wanted it for the purposes of their line. By a very brief document, dated 29th March 1899, by which time I think the Railway Company must have actually entered on possession, she bequeathed this property expressly to the defender James Cook, and there is no doubt that by virtue of the 20th section of the Act of 1868 this document would have been a valid conveyance.

"But the sale to the Railway Company at £9000 was completed very shortly after, and on May 30th of the same year Mrs Hall Maxwell, on the narrative of the sale, bequeathed 'the said sum to James Cook.' Four years afterwards Mrs Hall Maxwell executed the third document, which is the cause of the present question. It does not expressly appoint executors. But it does so, I think, impliedly, and is an effectual though informal testament, and so good to transmit moveables. The question is, does it also carry heritage?

"It first bequeaths to James Cook £10,000, at present lent to the burgh of Motherwell.

I think it was assumed that this included the £9000 derived from the Caledonian Railway Company, and that the prior bequest of this sum had been adeemed by its merger in Mrs Hall Maxwell's general estate, and its investment in this particular bond. The document then proceeds—'I also wish him, in case anything happens to me, to see to my funeral, and that all my animals are shot, and I appoint Mr Wedderburn of Carment, Wedderburn, & Watson, to assist him.' She then gives directions as to her jewels, leaves two small legacies to charities, two personal legacies, and a bequest of 'all my clothes that are of any use,' and then concludes—'I leave the remainder to found and endow a small home for old colliers that have become unable to work, and the same to be furnished and a dinner given at Christmas and New Year, the same to have beer and tobacco, and I appoint the before said Mr Wedderburn and James Cook to see that this is carried out, a site to be got on Newarthill,' &c.

"As I have said, I think that this must be read as, at least by implication, an appointment of executors, and therefore, in the language of the above-mentioned section, confers upon such executors 'a right to claim and receive' the granter's moveable estate—in fact, to confirm and administer. But I think that there is superadded to the executry appointment something of the nature of a continuing trust.

"But that does not naturally result in the granter's heritage being carried to the executors or trustees, even if they be regarded as having the wider title and functions. That result must be reached, if at all, by virtue of the provisions of the 20th section of the Titles Act 1868. Now in applying that section, if a testator has not only failed to convey his heritage, but even shown himself so incapable of expressing his intention as to have failed to bring himself within the provisions of that section, I do not think that the Court is concerned with conjectures as to whether he did, notwithstanding, really intend to convey his heritage. As the late Lord President (Inglis) said in *Pitcairn's* case, 8 Macph. 608, the statute did not intend 'to make every will of a proprietor of land effectual as a conveyance of heritage.'

"I do not think it necessary to quote the section which has been so often canvassed. Shortly it provides that it shall no longer be necessary in the *mortis causa* conveyance of land to use words of *de presenti* conveyance or any *voces signatæ*, provided the document *purports* to convey or bequeath land, and by way of making this operative adds, that where such document 'shall contain with reference to such lands any word or words which would, if used in a will or testament with reference to moveables be sufficient to confer upon the executor of the granter, or upon the grantee or legatee of such moveables a right to claim and receive the same,' such document shall be deemed and taken to be equivalent to a general disposition of such lands. The essential words are then 'purports to convey or bequeath lands' and 'with reference to such lands.' Now, what the statute intended to cover was, I think, such a case as *M'Leod's Trustee*, 2 R. 481. But though in my view it was contemplated that the 'purporting' and the 'reference' to land, either in general or special, was to be express, I recognise that by a series of decisions it has been accepted that the 'purporting' and the 'reference' may be implied. Still the question must always be, as put by Lord Young in *Forsyth* v. *Turnbull*, 15 R. 176, shortly repeating what had already been said by the Lord President Inglis in *Pitcairn's* case, *supra*, the question is not as to the sufficiency of the language to convey property, but as to the sufficiency to include land of the description of the property intended to be conveyed.

"In the present case there is certainly nothing which in the document of 1903 under construction expresses the intention to convey lands. But counsel for the defender sought to imply such intention from words which I have not yet quoted, viz., "everything else to be sold," as raising the implication of a universal settlement. I abstained from quoting these words till now because I think their meaning and relation has been entirely misunderstood. They occur in connection with the direction as to jewels, thus—'All my jewels save a diamond brooch, diamond pendant, which Mrs Jolly gave me, to be returned to her, everything else to be sold.' This is ungrammatical and elliptical, but what it clearly means is, 'my two special jewelled ornaments, which Mrs Jolly' (her mother) 'gave me are to be returned to her, and all my other jewels are to be sold.' By no admissible construction can the words be twisted to imply the description of the lady's *universitas*, heritable and moveable. But it was on this premiss only that it was contended that when the testator came to leave 'the remainder' to found her endowment, she meant the remainder of the realisations from her universal estate after paying her legacies. Neither can I accept the premiss nor can I accept the conclusion without the premiss—indeed it was not pressed that I should do so—for this could only be on the suggestion that the testator was not likely to found such a charity unless she contemplated devoting to it the whole residue of her estate both heritable and moveable. It may be so, but the conclusion would require an excursion into the realms of conjecture which I am not entitled to make.

"I have carefully considered all the other cases cited:—*M'Leod's Trustee* v. *M'Luckie*, 10 R. 1056; *Forsyth* v. *Turnbull*, 15 R. 172; *Copland's Executor*, 15 S.L.T. 733; *Hunter, Jack's Executor*, 15 S.L.T. 989, for the defender; and *Urquhart*, 6 R. 1026; *Campbell*, 15 R. 103; *Grant* v. *Morren*, 20 R. 404, for the pursuer—and they confirm me in the conclusion which I have reached.

"I shall therefore grant decree as craved."

The defender reclaimed, and argued—The question was, Did the words used by the

testatrix show an intention to deal with her heritable estate, for if they did the absence of technical words was immaterial —*Jack's Executor* v, *Downie*, March 7, 1908, 45 S.L.R. 545. In considering that question the presumption against partial intestacy must be kept in view. The expressions "everything else to be sold," and "I leave the remainder," &c., showed that the testatrix meant to dispose of her whole estate. If the heritage were not disposed of by the will there would not be enough to pay the legacies in full. Heritage had been held carried by such expressions as "all my estate"—*Jack's Executor, cit. sup.* — "my whole estate"— *Copland's Executors* v. *Milne and Others*, 1908 S.C. 426, 45 S.L.R. 314; "remainder of my property"— *M'Leod's Trustee* v. *M'Luckie*, June 28, 1883, 10 R. 1056, 20 S.L.R. 714; "means and effects"—*Forsyth* v. *Turnbull*, December 16, 1887, 15 R. 172, 25 S.L.R. 168; "all the rest"—*Attree* v. *Attree*,, 1871, L.R., 11 Eq. 280; *Smyth* v. *Smyth*, 1877, L.R., 8 Ch. Div. 561. The words "everything else to be sold" could not refer merely to the jewels, for their value was only about £30, a sum quite insufficient to meet the legacies. They could only refer therefore to the totality of the estate. That was the only reading which would make sense of the document.

Argued for the respondent—The Lord Ordinary was right. The law presumed that a testator intended his estate not otherwise destined to go to his heir or next-of-kin. In order that a deed should convey heritage it was essential that the words used should clearly import an intention to convey land. That could not be said here, for the words used were neither habile to convey land nor words importing universality, and both qualifications were essential. There was no appointment of trustees or even of executors. The words "everything else to be sold," on which the reclaimers founded, plainly referred only to the jewels. In addition to the cases cited *ut sup.*, reference was made to the Titles to Land (Scotland) Act 1868 (31 and 32 Vict. c. 101), sec. 20, and to *Pitcairn* v. *Pitcairn*, February 25, 1870, 8 Macph. 604, 7 S.L.R. 329; *M'Leod's Trustees* v. *M'Leod*, February 28, 1875, 2 R. 481, 12 S.L.R. 349; *Urquhart* v. *Dewar*, June 13, 1879, 6 R. 1026, 16 S.L.R. 602; *Campbell* v. *Campbell*, November 30, 1887, 15 R. 103, 25 S.L.R. 97; *Grant* v. *Morren*,, February 22, 1893, 20 R. 404, 30 S.L.R. 442.

At advising—

LORD PRESIDENT—In this case the question is whether the will of the late Mrs Hall Maxwell does or does not carry heritage. I need not minutely examine the law generally on the subject, because the matter was so recently before us in the case of *Jack's Executor* v. *Downie*, and I have nothing to add to what was then said. The only point is the application to this particular case. The case is doubtless a narrow one, and is narrow because of the very inartistic language in which the will is founded, but on the whole I have come to a conclusion adverse to that of the Lord Ordinary. We have got the length in *Jack's Executor* of holding that where an executor was told to realise "all my estate," and then the residue was disposed of, that indicated a clear intention to dispose of the testator's whole estate and could receive effect. Now here we have got almost the same thing. We have got "everything else to be sold," and "I leave the remainder to found and endow a small home." I think the Lord Ordinary would have come to the same conclusion had he not considered that the "everything else to be sold" was limited by the context in which the expression is found to everything of a class which had been mentioned before, namely, jewels. I do not think that is the meaning. The will is the will of a very uneducated person. It is full of mistakes in spelling, and it complies with no rules of grammar. It shows evidently that the writer just put down things which came into her head and then broke off as occasion offered. After making a special bequest, and then providing for her funeral, and for the feeding of certain animals of which she seems to have been fond, she appoints certain gentlemen to assist the person already named to whom she has left this legacy and the care of these animals, and then she goes on thus—"All my jewels, save a diamond brooch, diamond pendant, which Mrs Jolly gave me, to be returned to her—everything else to be sold." If you take that sentence as it stands it is hopelessly ungrammatical. The words "all my jewels" are never followed by any verb at all. Accordingly I think the natural meaning of what she wrote is this. She began by talking about her jewels. Then the mention of her jewels suddenly brought into her mind the existence of this particular brooch and diamond pendant which she wished to be given to Mrs Jolly (who, I believe, was her mother), and having provided for that she then forgets that she has not supplied any verb to the jewels, and goes on — "everything to be sold." I think what she means is "all my jewels and everything else to be sold," and I think that is pretty apparent from what follows afterwards. She immediately goes on to leave a legacy of a hundred pounds to certain homes and a hundred pounds "to Prevention of Cruelty to Animals," five hundred pounds to her mother, and three hundred pounds to her aunt, "who will also get all my clothes that are of any use." There again is an instance of how this testatrix had her memory suddenly spurred by the phrase she used. I cannot accept the idea that she was leaving these legacies out of the proceeds of her jewels. We are told that the jewels were valued at the time of her death at about thirty pounds. Whether that valuation was small or large it is perfectly evident that the testatrix never could have had the idea that she had jewels to such an amount as would meet these legacies. Then she goes on and leaves the remainder to found and endow a small home. The result of the whole matter is that I have no moral doubt that the testatrix meant to deal with her whole estate.

Of course I quite recognise that there must be words which carry out that intention, but I think that there are such words if you take "everything else to be sold" in a general sense and not merely as applicable to the jewels. I am prepared to take them in a general sense, because I think that is the meaning with which they were written in a badly constructed sentence. The result is, in my opinion, that the will carries heritage as well as moveables.

LORD M'LAREN—I incline to think that in this case we are going further in the direction of giving a liberal construction to the 20th section than has been found necessary in previous cases. As to the word "estate" I have never had any difficulty. It is not ambiguous. It has been described as *genus generalissimum*, and it includes heritable estate not in virtue of a special meaning derived from the context, but because in its primary and proper meaning the word applies to immoveable as well as moveable subjects. The same may be said of the word "property"; in the absence of limiting words property means everything that belonged to the testator, with the possible exception of an unexercised power of appointment.

But the word "remainder" is ambiguous, or at least incomplete, because it means the result of subtraction, or what is left over out of property which the testator has announced an intention of dealing with. We must therefore look to the antecedent clauses of the will to discover whether this is a remainder of the heritable and moveable estates or of the moveable estate only. Now I confess I have difficulty in finding in Mrs Hall Maxwell's will an antecedent to the word "remainder" from which I can infer an intention to deal with heritable estate. But I think I may say that such difference of view as exists does not touch any question of principle, because I think we are agreed that in order to the 20th section taking effect on the heritable estate we must find in the will evidence of an intention to dispose of a remainder which includes heritable estate. It has not been shown that the money and household effects if sold would have sufficed to endow the home for old colliers which the testatrix meant to establish, and this is an element of evidence of intention to bring the heritable estate within the scope of the will. My doubt is whether in this particular will the word "remainder" is sufficiently proved, or defined, to be a remainder of the whole estate. But where so much depends on impression I cannot say that my doubt is so strong as to induce me to dissent from the judgment proposed.

LORD KINNEAR—I agree with your Lordship in the chair. I do not think that any difficulty arises in this case from the construction of the statute or from the general rules of law, because I take the law to be well settled as it is stated by Lord President Inglis in the case of *Pitcairn*. The statute requires, in order to give effect to what is called a "bequest of heritage," that such words of bequest shall be used with reference to lands or heritable estate as would be sufficient to make a good bequest if they were used with reference to moveables; and, as the Lord President says, that is a provision which does not dispense in the least, in regard to a bequest of land any more than of any other property, with the necessity for specification of what is meant to be bequeathed. Therefore it appears to me that the only real difficulty that arises in this case is not in the construction of the statute but in the construction of the will. As to that I may say that I am not surprised that there should be a difference of opinion. It is extremely difficult to make out what this lady meant. I do not think we are advanced very far by any attempt at grammatical analysis of language that was never intended to be grammar. We must take the words as they stand and try to get at what the testatrix really meant. If we read the words of her direction "everything else to be sold" as covering everything except what has previously been otherwise bequeathed, then the conclusion that when she goes on, after directing "everything to be sold," to provide for the application of "the remainder" in a certain way, she intends to dispose of her whole estate follows of necessity. But then the sentence in which these words occur is so incoherent that it is impossible to be confident as to its meaning; and I am by no means certain that when she directs "everything else" to be sold she does not mean merely that all her jewels are to be sold except the diamond brooch. She begins to explain what is to be done with her jewels in general, and before she has explained it she turns off to make an exception, and having made that clear enough she goes back again to her original notion about the other jewels and says what she wishes to be done with them. This is, I think, a possible construction, but supposing it to be correct there still remains a distinct bequest of "the remainder," which she directs to be applied for a certain purpose. Now it appears to me that the natural and ordinary meaning of these words is "the remainder of my estate." "I direct certain jewels to be sold. I direct certain provisions to be made for animals, and I leave certain sums of money and certain personal clothing, and all the remainder is to go to found and endow a home for old colliers." I should say that means the remainder of her estate, that is to say, all that is left after the previous bequests have been satisfied, and if that be a right construction of these words then it is quite as effectual a method of describing her whole estate, heritable and moveable, as if she had inserted the word "whole" before the word "remainder," and the words "of my estate" after it. If she directed "the whole remainder of my estate" to be applied in founding a home for colliers there could be no difficulty in the construction of these words and no doubt as to the effect of the law introduced by the Act of 1868. On the

whole, therefore, I come to the conclusion that there is a good bequest of the residue of this lady's estate, heritable and moveable, for the purpose of founding and endowing a home for colliers.

LORD PEARSON was absent.

The Court recalled the Lord Ordinary's interlocutor and assoilzied the defender.

Counsel for Pursuer (Respondent)—Scott Dickson, K.C.—A. M. Anderson. Agents—Inglis, Orr, & Bruce, W.S.

Counsel for Defender (Reclaimer)—Clyde, K.C.—R. S. Horne. Agent—A. C. D. Vert, S.S.C.

Saturday, July 18.

FIRST DIVISION

[Lord Johnston, Ordinary.

HAY'S TRUSTEES *v.* BAILLIE AND OTHERS.

Succession—Trust—Uncertainty—Charitable Bequest—Direction to Trustees to Divide Estate "Amongst such Societies or Institutions of a Benevolent or Charitable Nature" as they Think Proper.

A testatrix directed her trustees to divide the residue of her estate "amongst such societies or institutions of a benevolent or charitable nature in such proportions as they shall in their own discretion think proper, but excluding all societies or institutions either connected with the Roman Catholic body or under the control or management or even general management of those connected with that body."

Held (*rev.* Lord Johnston) that the bequest was not void by reason of uncertainty.

Mrs Margaret Baillie or Hay, who resided at Holmwood, Uddingston, died on 29th December 1898, leaving a trust-disposition and settlement, dated 9th March 1896, by which she assigned and disponed her whole means and estate to and in favour of William Jackson Andrew, solicitor in Coatbridge and another, as trustees for certain purposes.

The trust-disposition and settlement contained this clause:—"In the last place, I direct my trustees or trustee, on the death of the survivor of me and the said Margaret M'Donald," (a servant of the testatrix to whom she had made certain bequests, including the life-rent of Holmwood), "to apportion and pay over the free proceeds of the whole residue of my means and estate, after giving effect to the above provisions, to and amongst such societies or institutions of a benevolent or charitable nature in such proportions as he or they shall in their own discretion think proper, but excluding all societies or institutions either connected with the Roman Catholic body or under the control or management or even general management of those connected with that body."

The trustees being advised that the validity of the above provision ought to be determined by the Court, raised an action of multiplepoinding in which the residue of the estate formed the fund *in medio*. Claims were lodged by the trustees and by Miss Jessie Baillie and others, the next-of-kin of the truster.

The trustees claimed primarily to be ranked and preferred to the whole fund *in medio* in order that the same might be administered by them in terms of the residuary clause of the trust-disposition and settlement. And they pleaded—"(1) Said bequest of residue being valid and falling to receive effect, the claimants are entitled to be ranked and preferred to the whole fund *in medio* in terms of their primary claim."

The claimants, the next-of-kin, claimed to be ranked and preferred to such shares of the fund *in medio* as they were entitled to as heirs *ab intestato* of the truster.

On 14th November 1907 the Lord Ordinary (JOHNSTON) pronounced an interlocutor finding that the said bequest of residue was void from uncertainty.

Opinion.—"The late Mrs Hay of Holmwood, Uddingston, directed her trustees to apportion and pay over the free portion of the residue of her estate 'to or amongst such societies or institutions of a benevolent or charitable nature in such proportions' as in their discretion they should think proper, but always to the exclusion of Roman Catholic societies or institutions. The validity of this bequest is challenged by the testator's next-of-kin, who maintain that it is void on the ground of uncertainty in respect that though 'charitable' has, since the case of *Crichton* in 1828, 3 W. & S. 329, been recognised as sufficiently descriptive of a class of objects or institutions, to receive effect in discretionary bequests of this nature, the alternative word 'benevolent' is not so descriptive, and has not been so recognised.

"The trustees, who support the bequest, did not, I think, go the length of maintaining that 'benevolent' and 'charitable,' taken by themselves as words in common use in the English language are identical in meaning.

"But I think I may state their contention as embraced in these three propositions:—

"(1st) That in the collocation of words used by the testatrix the disjunctive 'or' must be read as equivalent to the conjunctive 'and.'

"(2nd) That 'benevolent' is identical with 'charitable,' or at least is used by the testatrix as equivalent to 'charitable,' so that the use of both words is a mere redundancy or surplusage.

"(3rd) That the law of Scotland shows such favour to charitable bequests that to give effect to the bequest it will read 'benevolent or charitable' as intended to express no more than charitable—in fact, appeal is made to the principle of benignant interpretation of charitable bequests.