parties then believed that the customs would not be exigible without an express contract. They may have been mistaken, and their successors are certainly not estopped or precluded thereby from now asserting their real title.

From what I have said it follows that in my opinion the customs claimed are not a causeway mail within the definition in section 3 of the Act of 1878, or abolished by section 33 of that Act.

LORD BRAMPTON — Some time ago I availed myself of the opportunity afforded me to read and carefully to consider the judgment which has been delivered by my noble and learned friend Lord Robertson, with this result—that I so entirely concur in the view he has stated and in the reasons he has given for the conclusions at which he has arrived, that I could not usefully add one word beyond an expression of my concurrence in that judgment.

LORD LINDLEY—I have carefully studied these charters and documents, and I have come to the conclusion that the judgment of my noble and learned friend Lord Robertson is unanswerable and absolutely right.

LORD CHANCELLOR—I also concur.

Interlocutor appealed from affirmed, and appeal dismissed with costs.

Counsel for the Pursuers, Reclaimers, and Respondents—Lord Advocate (Graham Murray, K.C.)—Clyde, K.C. Agent—John Kennedy, for Strathern & Blair, W.S.

Counsel for the Defenders, Respondents, and Appellants—Asquith, K.C.—Ure, K.C. —Deas. Agents—Faithfull & Owen, for Davidson & Syme, W.S.

Tuesday, December 17.

(Before The Lord Chancellor (Halsbury), Lord Shand, Lord Davey, Lord Brampton, and Lord Robertson.)

YOUNG'S TRUSTEES *v.* YOUNG'S TRUSTEE.

(*Ante*, December 14, 1900, vol. xxxviii. p. 209; and 3 F. 274.)

Succession—Testament—Trust—Vagueness—Uncertainty—Bequest for such Charitable or Public Purposes as my Trustee Thinks Proper—Charitable Bequest.

A testatrix by a codicil to her last will and testament directed that in a certain event which happened the half of the residue should "be applied for such charitable or public purposes as my trustee thinks proper."

Held (*affirming* the judgment of the Second Division) that this direction was invalid on the ground of vagueness and uncertainty.

This case is reported *ante, ut supra.*

Miss Agnes Young's trustee, defender and respondent in the Court of Session, appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—In this case I do not propose to repeat what I said at some length in the *Commissioners for Special Purposes of Income-Tax* v. *Pemsel* ([1891], A.C. 531, at p. 539), nor do I think it is necessary to appeal to the decision in that case for the purpose of the decision of this. I will only say that in my view the decision of that case is an authoritative determination, and in speaking of a Taxing Act which applies to both countries the decision of that case must of course be supreme. But speaking of a Scotch instrument and the interpretation to be given to the word "charitable" in Scotland, I should regard the decision of *Baird's Trustees* (15 R. 682, 25 S.L.R. 533) as still an authoritative exposition of the law of Scotland. I am not quite certain that it is important to consider that question at any length here, because in the view that I take of this particular testamentary disposition it appears to me that it is impossible to deny that the words on which the main question turns, namely, "charitable or public," are used disjunctively. Under those circumstances it appears to me that it would be equally the law of England as it would be the law of Scotland that the disposition here given to A B to determine what particular public purposes should be the objects of the trust is too vague and too uncertain for any Court either in England or Scotland to administer. The result of that is, as it appears to me, that the decision of the Court below was perfectly right, and I move your Lordships therefore that this appeal be dismissed, with costs.

LORD SHAND—I am of the same opinion. The whole argument of the appellant was founded on the alleged analogy between a bequest for public purposes and a bequest for charitable and benevolent purposes which are objects of peculiar favour in the law both of Scotland and of England. In my opinion the analogy clearly fails, and I concur in thinking that a bequest for public purposes to be taken by a person or persons named by the testator, unlike a bequest expressly limited to a charitable purpose, is not sufficiently definite, but is too vague and wide to form the subject of a valid bequest.

I will only add that I concur in the judgment of my noble and learned friend Lord Robertson, which my noble and learned friend has given me the opportunity of reading and considering.

LORD DAVEY—The short question on this appeal is whether a trust for such "charitable or public purposes" as the executor may select is a valid disposition of the testator's property according to the law of Scotland, or is void for uncertainty.

Your Lordships were exhorted by the Lord Advocate to dismiss from your minds all preconceived notions derived from the English law of charities, and I have done my best to humbly obey that exhortation. There is no doubt that the English law has attached a wide and somewhat artificial

meaning to the words "charity" and "charitable," derived (it is said) from the enumeration of objects in the well-known Act of Elizabeth, but probably accepted by lawyers before that statute. In the law of Scotland there is no such technical meaning attached to the words. In the course of the argument there was some discussion as to the meaning attached by Scotch Judges to the words "charitable purposes." I think that those words include a wider range of objects than such as are of a merely eleemosynary character, and I find authority for saying so in the opinion of Lord Watson in the case of *Pemsel* [1891], A.C. 531, see pp. 560-561.

But I do not find it necessary to pursue or elaborate the discussion of this topic in the present case, because it is, in my opinion, clearly established that whatever may be the legal definition of the expression, the Courts of Scotland will give effect to a disposition in favour of charitable purposes to be selected by a named individual. In other words, such a trust is treated as being sufficiently definite to be the subject of a valid disposition.

There are three cases in this House to which your Lordships' attention was called. In *Hill* v. *Burns*, 2 W. & S. 80, a bequest to trustees was held valid 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," to be appropriated in such manner as to the trustees might seem proper. In *Crichton* v. *Grierson*, 3 W. & S. 329, a gift to trustees of a residue to be applied in such charitable purposes and bequests to such of the testator's friends and relations as might be pointed out by his wife with the approbation of the majority of the trustees was also held valid. Lastly, in *Miller* v. *Black's Trustees*, 2 Sh. & Mac. 866, a bequest for such charitable and benevolent purposes as the trustees might think proper was held valid.

If, therefore, the words in the present case were merely "charitable purposes" or were "charitable and public purposes," I think effect might be given to them, the words in the latter case being construed to mean charitable purposes of a public character.

But the words we have here are "charitable or public purposes," and I think these words must be read disjunctively. It would therefore be in the power of the trustee to apply the whole of the fund for purposes which are not charitable though they might be of a public character. Now, I am not aware of any case in which effect has been given in the Scotch Courts to a trust for "public purposes," and I find in the cases which have been referred to indications that such a trust would not be considered valid. In *Crichton* v. *Grierson* Lord Lyndhurst states the question thus, whether effect may be given to a power of selection amongst the individuals comprised in "particular classes of individuals and objects," and he answers the question by saying that according to the authorities in the law of Scotland, a person may make such a disposition. Can it be said that "public purposes" is within the description of a particular class of individuals or objects? I think not. Illustrations were given at the bar, and might be multiplied to any extent, of purposes which would come within the description of "public," and the statement of which would reduce the gift almost *ad absurdum*. The Lord Advocate argued that the expression "public" was no more vague than "charitable." I do not agree, although an exhaustive definition of "charitable" might be difficult, and to attempt it would be unwise. At any rate it is *positivi juris* that the Courts will give effect to a gift for charitable purposes to be selected by an individual. It may be that the law of Scotland is more liberal to the interpretation of bequests for charitable purposes than other bequests, as was said by Lord Gifford in advising this House in *Hill* v. *Burns*, 2 W. & S. 86, and in *Maclean* v. *Henderson's Trustees*, 7 R. 601, at p. 611 (17 S.L.R., at p. 463), Lord Moncreiff expressed himself in words which show that in his opinion a bequest might be void for uncertainty if not within the category of charitable bequests.

It appears to me that the point to which I have directed my observations is put clearly and concisely by Lord Young when he says that he could not on authority or principle sustain public purposes as a valid direction to a testamentary trustee.

For these reasons I am of opinion that the appeal should be dismissed with costs.

LORD BRAMPTON—In an event which has happened, the testatrix by a codicil to her will directed that one-half of the residue of her estate shall be applied for such "charitable or public purposes" as the testamentary trustee nominated in her will should think proper. It is not disputed that if the word "charitable" had stood alone the devise would have been sufficiently definite and valid, but it is urged by the respondents that the addition of the words "or public purposes" renders the devise indefinite and void because of its vagueness. It seems to me that the addition of those words would confer upon the trustee the power at his option to set aside charitable purposes altogether and apply the whole of the bequest solely to any one or more of innumerable public purposes comprised within an unlimited area. In short, the intentions of the testatrix are on the face of the will and codicil left, so far as relates to the "public purposes" to be benefitted, in absolute uncertainty.

I think therefore that this appeal should be dismissed with costs.

LORD ROBERTSON—The argument at your Lordships' bar, able and ingenious as it was, makes it necessary to remember that the question now before the House is, whether a bequest of money for such public purposes as the trustee under the will thinks proper is or is not valid, for I am clearly of opinion with your Lordships that the gift

to public purposes is disjoined from that to charitable purposes.

Now, it is a significant fact that this question on its merits has been little or at all discussed by the learned counsel for the appellants. If a bequest by A to any public purpose to be selected by B is defensible on its merits, it must be on one of two grounds —either that by law A may validly leave money to be given to any purpose whatever named by B, or that the purposes named, viz., "public" purposes, are not vague and uncertain.

The former of these propositions was asserted by the appellant, but no more than asserted, on the authority of the opinions delivered in the Court of Session in *Hill* v. *Burns*. When those opinions and the authorities cited in them are examined, it will be found that they give no support to the proposition that a bequest is valid which consists merely of a direction that a certain sum of money shall go to any purpose that a nominated trustee may think proper. The case then before the learned Judges was not such an unlimited power at all, but a direction to trustees to select as the object of the legacy such of the benevolent and charitable institutions in Glasgow as they thought fit. And in speaking of *alienum arbitrium* they were defending the bequest against the objection that the intervention of *alienum arbitrium* to any extent made the legacy void. This is made perfectly plain by the reference by the Lord President (2 W. & S., at p. 82) to the cases of *Brown* (August 3, 1762, M. 2318), and of *Buchanan* (December 16, 1806, M. App., Service of Heirs, No. 1), in both of which the *alienum arbitrium* was invoked merely to select from among the testator's own relations. There is, so far as I know, no authority for the broader proposition that according to Scotch law a good bequest is made by A when he directs B to make a will for him as regards either the whole or a part of his estate, and it is contrary to the fundamental idea of testamentary disposition.

What has been established as regards the intervention of a trustee is thus stated by Lord Chancellor Lyndhurst in *Crichton* v. *Grierson*, and the passage touches the very core of the present case. He says that "according to the authorities in the law of Scotland it is quite clear that a man may, in the disposition of his property, select particular classes of individuals and objects and then give to some particular individual a power after his death of appropriating the property or applying any part of his property to any particular individuals among that class whom that person may select." That is the rule which has got to be applied in the present case, and the question is, Has this testatrix done what Lord Lyndhurst describes—has she selected a particular class or particular classes of objects among which her trustee is to select?

Now, as I have already remarked, we have not had much argument from the appellant on this question by itself, and apart from the medium of the decisions about charities. I cannot say that I am surprised, for it seems to me that this testatrix has done nothing like selecting a particular class or particular classes of objects. She excludes individuals, and then leaves the trustee at large with the whole world to choose from. There is nothing affecting any community on the globe which is outside the ambit of his choice.

Now, I have not heard anyone say that this bequest is not vague and uncertain; what is said is merely that a gift to any charitable purpose to be selected by a trustee is equally vague, and that the law allows the validity of a gift to any charitable purpose to be selected by a trustee. The soundness of this argument must therefore be considered.

First of all, I do not agree that charitable purposes is as wide or nearly as wide as public purposes. Even giving to the word "charitable" the widest extension ever allowed to it, there are, as I should believe, many public purposes completely outside it. Giving to the word charitable its proper meaning, as it occurs in a Scotch testament, its comprehensiveness still further falls short of the word "public." As was suggested at the bar, the trustee would be within his powers if he gave this £1000 to the election fund of any of the political parties that he pleased. It would be equally within his powers to subscribe the money towards raising a yeomanry regiment. Each of these purposes is public, none is charitable. Innumerable other illustrations might be given.

A great deal of the appellant's argument was directed to enforcing the relevancy of the decisions about the word "charitable" by showing that they could not be distinguished from the present case. With this view your Lordships had presented to you an elaborate and interesting discussion of the difference between the law of charities in England and the law of charities in Scotland.

Much that was thus advanced is unquestionably sound (although I consider it inconclusive of the present question). "Ever since its institution," said Lord Watson in *Pemsel*, A.C. (1891), at p. 560, "the Court of Session has exercised plenary jurisdiction over the administration of all trusts, whether public or private, irrespective of the particular purpose to which the estate or income of the trust may be appropriated; and there has consequently been no room for those numerous questions as to a trust being charitable or not, which have arisen in England under the statute of Elizabeth." The relations of the Court of Session to charities had been based on the same general ground by Lord Cunninghame and Lord Cockburn in *Ross* v. *Heriot's Hospital*, 5 D. 589, and it cannot be doubted that this is an accurate statement of the law. Nor do I think that exception can be taken to the interesting comparison of the laws of the two countries given by Lord Stormonth Darling in the case of *Cobb* (21 R. 638, 31 S.L.R. 506), although I do not concur in the deductions drawn by that learned Judge, so far as bearing on purposes other than charitable.

But while charitable trusts are, as matter of legal doctrine, merely one class of trusts, and while their prominence in legal decisions results from nothing more than their being the most numerous class of public trusts, I do not think that it is true that they have been uniformly treated by the Courts in Scotland exactly as other trusts would be treated. The Courts have, I think, as matter of historical fact, reflected more or less, consciously or unconsciously, the bias which disposes everyone favourably towards charity; and this never appeared more plainly, or was avowed more frankly, than in the decision of your Lordships' House in the case of *Morgan (Magistrates of Dundee* v. *Morris*, 3 Macq. 134). To this favour of charities I ascribe the decision in favour of the validity of a bequest for such charitable purposes as a trustee may select. Accordingly when I am asked to apply, by analogy, to public purposes decisions about charitable purposes, I decline to do so. The proper inference from those cases is not that the law that the testator must select a particular class or particular classes of objects before he can leave it to a trustee to select the object of the bequest is relaxed, but merely that it is settled that charitable purposes form such a particular class. On the merits of the question now before your Lordships I am unable to hold that the designation of public purposes is a compliance with the rule.

Interlocutor appealed from affirmed, and appeal dismissed.

Counsel for the Pursuers, Reclaimers, and Respondents — Solicitor-General for Scotland (Dickson, K.C.) — Younger, K.C. — Duncan Miller. Agents—A. & W. Beveridge, for Duncan & Black, W.S.

Counsel for the Defender, Respondent, and Appellant — Lord Advocate (Graham Murray, K.C.)—J. Wilson, K.C.—Scott Brown—Allan J. Lawrie. Agents—Faithfull & Owen, for Davidson & Syme, W.S.

COURT OF SESSION.

Thursday, November 28.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

NORTH BRITISH RAILWAY COMPANY *v.* STEVENSON.

Railway—Compulsory Taking of Lands—Tenant's Interest—Right of Company to Take Less from Tenant than what Acquired from Landlord—Compensation—Notice to Treat—Lands Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 19), *secs.* 6, 17, *and* 112.

By agreement a railway company acquired from a landlord his interest in certain lands, part of a farm. Thereafter they obtained an Act which conferred powers upon them to acquire these lands compulsorily. After the passing of the Act, which incorporated the Lands Clauses Consolidation (Scotland) Act 1845, the railway company served a notice to treat upon the tenant of the farm, but this notice only referred to a portion of the part of the farm acquired from the landlord. In a suspension and interdict brought by the tenant, *held* that the railway company were not bound to take the tenant's interest in the whole of that part of the farm which they had acquired from the landlord.

By agreement dated 11th May 1900 the North British Railway Company acquired *inter alia* 23·983 acres of land, part of the farm of Lochgrog in the parish of Cadder and county of Lanark, from the proprietor, Archibald Stirling of Keir, and the latter agreed to withdraw his opposition to a bill then before Parliament for the purposes of which the land was acquired. The current tacks and rights of possession of tenants were to be excepted from the disposition, and the Railway Company was to relieve the proprietor of all tenants' claims, excepting deductions of rent for land taken, which were to be dealt with in terms of the Lands Clauses Consolidation (Scotland) Act 1845. No disposition of the said 23·983 acres of land had been granted at the date of this action. The bill became the North British Railway Company (General Powers) Act 1900. It received the Royal Assent on 6th August 1900. This Act conferred power to enter upon, take, and use for the purposes of the undertaking certain lands in the parish of Cadder belonging to Mr Stirling, but this power did not cover all the land acquired by the agreement, and the agreement did not include all the land to which this power extended.

On 15th May 1900 the Railway Company wrote to John Stevenson, the tenant in possession of the farm of Lochgrog, informing him of the purchase, and that possession would at once be taken of a portion only of the land acquired, and that the rent for the balance should be paid to them instead of to the former proprietor. Certain correspondence followed, but as no agreement was arrived at, on 22nd August 1900 the company served a notice to treat upon Stevenson. This notice related merely to 13·181 acres, being the amount of land proposed to be taken at once. Stevenson claimed to be compensated for the whole 23·983 acres acquired from the landlord, and brought the present suspension and interdict to prevent any proceedings under the said notice to treat.

The Lands Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. c. 19) enacts as follows:—Section 6—"Subject to the provisions of this and the Special Act it shall be lawful for the promoters of the undertaking to agree with the owners of any lands by the Special Act authorised to be taken, and which shall be required for the purposes of such Act, and with all parties having any right or interest in such lands, or by this or the Special Act enabled to sell and convey the