his trustees should direct. That necessarily vests in the annuitant a right to it, in whatever way it might be paid. Then follows a clause which gives a discretion to the trustees—[*His Lordship here read the clause giving the trustees power to retain the annuity and apply it for the pursuer's behoof, quoted supra*]. That means that instead of paying it the trustees may retain it as they should think proper, and that such part so retained must be applied for behoof of the annuitant. But it is the contention of the trustees that they are entitled to retain any portion they may think proper without applying it in any way for his behoof during the year. I cannot adopt that reading of the clause at all. The right to the annuity is from the testator's death, and it is to the sum of £52 yearly. I think it is plain that the testator intended this to be an annuity, either paid or applied to the benefit of his brother each year by itself, and that there is no ambiguity about the clause at all.

Lord Young—I am of the same opinion, and very clearly so. Mr Strachan admitted, as I think he was constrained to admit, that the pursuer has under this deed a vested annuity of £52, and that it is an alimentary annuity for his personal "support and subsistence only." This is *prima facie* inconsistent with an intention of giving power to his trustees of keeping it back and accumulating it to go to the annuitant's heir, or in contemplation of the possibility of its doing so. The truster might have done that inconsistent thing, but it is not likely and is not to be presumed. He gives his trustees power to lay out the annuity for the support and subsistence of his brother if they did not trust him with the expenditure of it. Now, a truster in making such a provision for a friend or relation may say to his trustees—"If you think he can be trusted, pay it regularly from time to time, or if you think otherwise, then as much as you think fit, or none at all." There a discretionary power is given to trustees to be benevolent in a certain direction, the truster putting it within their power whether they shall or not. But that is in marked distinction from a case like the present, where a vested right is given to an alimentary annuity, and where the testator limits the power of the trustees to applying the amount specially for behoof of the annuitant.

Lord Craighill—I also agree with the opinion of your Lordship in the chair. I think this deed gives a vested annuity of £52. It is true a certain discretion is given to the trustees as to whether they shall pay the yearly amount to the annuitant or retain it to be applied for his behoof. But it is declared that the portion which they may so retain shall be applied for his benefit. They have no discretion to diminish the annuity, and in the last clause we find it said that is to be for personal support and subsistence of the annuitant. It is clear that retaining a portion from each year's annuity and abstaining from applying it for the annuitant's benefit is not carrying out the directions of this testator, for that is to withhold the annuity which he has given. I agree with Lord Young that this is not the least one of these cases where power is given to trustees to give or withhold what they think fit.

Lord Rutherfurd-Clark—I am of the same opinion. I rather imagine it would have been better in the circumstances disclosed here if the testator had allowed his trustees a larger discretion, but as we have it I think there has been given a vested right to the annuity.

Counsel for Pursuer (Respondent)—J. Reid. Agent—Frank Hunter, W.S.

Counsel for Defenders (Reclaimers)—Strachan. Agents—Welsh & Forbes, S.S.C.

Wednesday, November 15.

FIRST DIVISION.

GOLDIE (LIQUIDATOR OF GLENDUFFHILL COMPANY) *v.* TORRANCE.

Public Company — Winding-up — Contributory— Register of Members—Agreement to Take Shares.

The promoters of a limited company placed upon their provisional list of directors, and also after the company was formed upon the register of shares, the name of a person who was expected to take shares, and who had in conversations with one of their number given him to understand that he intended to take shares. He received a letter of allotment and various calls to meetings of directors, and letters intimating calls on his shares, but returned no answer to any of them. The only evidence adduced to show that he had agreed to take shares was parole evidence that he had done so verbally in conversation with one of the promoters. In the judicial winding-up of the company, *held* that the facts proved showed no completed agreement on his part to take shares, but only an intention which he had never carried into effect.

This was a note at the instance of James Goldie, official liquidator of the Glenduffhill Coal Company (Limited), asking the Court, *inter alia*, to settle the list of contributories of the said company, in conformity with a list contained in a schedule annexed to the note. In this schedule there appeared, *inter alia*, the name of William Torrance, lime and coal merchant, as the holder of 100 shares of £10 each. Torrance lodged answers in which he stated that he never applied for or agreed to take shares, and that he had never consented to become a shareholder in the company.

A proof was allowed of the averments in the note and answers, and was taken by Lord Shand. From this proof it appeared that certain coal and mineral fields in the neighbourhood of Glasgow had been leased by a Mr Robert Brand, coalmaster, Coatbridge; that Mr Brand had got into difficulties, and a number of his friends and creditors proposed to start a limited liability company to acquire his properties and mineral leases. By article 8 of the articles of association, prepared for the proposed company, the capital stock of the company was to consist of £50,000, in 5000 shares of £10 each. The company was incorporated, and began business in March 1879. 1420 shares were taken up, of which 812 were issued as fully paid-up shares, and 458 were fully paid up before the liquidation began. Several preliminary meetings were held in Glasgow in the early months of the year 1879, at which draft

articles of association were considered, and a provisional list of directors agreed upon. Among the names which appeared in this list was that of the respondent. The respondent, as it appeared, was first approached upon the subject of joining the company by Mr Brand about the beginning of 1879. At that time he refused to have anything to do with it. Mr Brand, however, left some papers with him to look over before finally making up his mind in the matter. These he returned to Mr Brand on the 22d January 1879, along with a letter, in which he said—"I have read carefully the report of the Glenduffhill Colliery, and decline having anything to do with it. Had trade been in an improving state it would have given me more encouragement." Mr Waddell, one of the promoters of the company, thereafter spoke to Mr Torrance about taking shares, and had several interviews with him on the subject, the result of which, on Mr Waddell's mind, was that he thought Mr Torrance had consented to take shares, the question being rather as to the amount which he would take than as to his willingness to become a shareholder. One of these meetings was on 12th February 1879, when Mr Waddell and Mr Torrance met accidentally in Edinburgh, and the result of the conversations which then took place was that Mr Waddell telegraphed to Glasgow intimating to a meeting of directors which was then being held there that Mr Torrance would take 100 shares. After this meeting, and the telegram that followed upon it, Mr Torrance's name continued to appear in the provisional list of directors, and a letter of allotment was sent him on 5th April 1879, which was followed between that date and the beginning of February 1881, when the company went into voluntary liquidation, by numerous circulars calling him to meetings of the company, and by various calls on the shares allotted to him. To none of these various communications did Mr Torrance ever return any answer. He did not destroy these communications, but kept them, and they were recovered under a diligence. On the 17th November 1880, at a meeting of the company, Mr Waddell reported that he had had a conversation with Mr Torrance, and that he had promised to remit the amount due to the company in the course of a few days. On the strength of what was said at that conversation, several other directors joined with Mr Waddell in advancing money as the price of Mr Torrance's shares, and Mr Waddell communicated this fact to Mr Torrance by letter upon the 22d November, and requested him to repay the amount advanced as soon as possible. No answer was returned to this letter, the substance of which was repeated by Mr Waddell in a letter of 29th December of the same year, to which the following answer was returned the next day:—"Dear Sir,—In reply to your letter of the 29th inst., when I last met you you spoke to me about the shares of the Glenduffhill Coal Coy. At that time you will remember I gave you the reason why I never accepted the shares. You also said the company would draw on me, and this I wouldn't allow. I do not know who put these shares in my name, as no one had authority from me to do so.—I am, yours truly," &c.

On the 20th January 1881 Mr Torrance advertised in the newspapers that he "had no connection, nor ever had," with the company. His own evidence at the proof was that he had never, either at any of his meetings with Mr Waddell, or at any other time, agreed to take shares, or gave any authority for the placing of his name on the list of shareholders. He deponed that both at his meetings with Mr Waddell, and with other persons who spoke to him on matters connected with the company, he had expressed himself to the effect that it was a rotten concern, and that he would not take shares, and, indeed, to the effect that he had no available funds to invest in it even if he thought better of it.

Argued for the petitioner — Looking to the fair import of the evidence, Mr Torrance had consented to take these shares. He had tacitly authorised his name to be inserted in the list of shareholders, and to remain there for a long time. The mere fact of his not repudiating the letter of allotment and the calls on his shares showed that he knew that he was considered as a shareholder of the company. It was clear enough had the concern been a success he would have paid up the calls and claimed a share in the profits. In these circumstances the respondent's name ought to be continued on the list of contributories to the effect of making him now liable to meet the calls of the liquidator.

Authority—*Somerville*, January 11, 1871, L.R., 6 Ch. 266.

Argued for respondent—After Torrance's letter of 22d January 1879, his name could only have been put upon the list of shareholders wilfully or through gross carelessness. Waddell's telegram seems to have been the cause of the whole mistake, and this was sent through a misunderstanding. Shareholders were wanted who were not creditors of Brand, and who would pay up in full; hence the great desire of the promoters for Torrance as a shareholder. There was nothing here but a mere intention to take shares, which was never carried out.

At advising—

Lord President—The issue in fact which is raised by the present case is, whether the respondent ever agreed to become a member of the Glenduffhill Coal Company? Now, this is purely a question of evidence, and it is much to be regretted that a matter of such importance should ever be left to depend upon anything but writing. There can be no doubt that the parties acted from beginning to end of this transaction with great looseness. The principal difficulty that I have in the case is to find out at what point of time it is alleged that Torrance became a member of this company, as no allegation on this point is made by the liquidator. By letter dated 22d January 1879 the respondent declined to become a member of the company and expressed his refusal in writing to Mr Brand, the vendor of the works, and one of the chief promoters of the concern, and from that date down to the 30th December of the following year there is not a scrap of writing produced under the hand of the respondent. But it is said that between these two dates the respondent verbally promised to take shares in the company, but what I fail to find out is the time at which he consented to take these shares, if indeed he ever agreed to do so.

On the 10th February 1879 the secretary Mr Smellie writes to Mr Waddell, one of the promoters of the company, as follows . . . "No

doubt you will have seen Mr Torrance ere this, whose name appears on the prospectus as one of the provisional directors, but who up to the last meeting had not subscribed any of the capital, in consequence, I presume, of you not having had an opportunity of seeing him personally." . . .

And on the 11th of February, the following day, Waddell's clerk writes to Torrance as follows:—"Dear Sir,—Enclosed is prospectus and form of application, which I trust you will fill up for 100 shares or so, and send it in at once, as, if the matter is to be gone on with it must be done at once, otherwise we will lose it, and, as you know, it is really a good thing. Of course you know it is not proposed to call up but a small part of the capital, as it is all ready for starting to-morrow for that part of it. I also enclose copy of special note I am writing to my friends, and have no doubt if we all put our shoulders to the wheel the thing will be a success. Place send in your application to-morrow.—Yours truly," &c. The special note here referred to was a letter recommending the company, which was sent to a number of Waddell's friends. Now, I think that down to this date it is not suggested that Mr Torrance had agreed to become a member of this company, because even the number of shares which he was to hold was not fixed.

On the 15th of March 1879 the secretary writes to Mr Waddell in these terms—"All the applications must be in by Wednesday; would you kindly get the following gentlemen to send theirs, viz., Mr Torrance and Mr J. Currie." . . . So that up to this date the secretary did not understand that Mr Torrance had made any application for shares. But previous to this, there is some parole evidence which must be taken into consideration. On the 12th of February 1879, Mr Waddell met Mr Torrance in Princes Street, Edinburgh, and had a conversation with him with reference to his becoming a shareholder of this company, and also as to the number of shares which he should subscribe for. The import of that conversation was that Waddell asked Torrance how many shares he would be willing to take, but there was no reference to any antecedent agreement to take shares. No doubt Mr Waddell thought that there was some agreement of this character, and assumed this throughout the whole negotiations, for in his evidence at the proof he thus explains his understanding on the matter—"We were also anxious to get in new blood,—shareholders who would pay the full amount of their shares. I was not anxious to get Mr Torrance or anyone in unless they had a mind to subscribe, and I may state that I never asked Mr Torrance to take shares; it was put before me that Mr Torrance had promised to take shares, and upon that information I spoke to him. I think it was Mr Brand and Mr Smellie who told me that Mr Torrance had promised to take shares. All my communications with Mr Torrance proceeded on the footing that he had already undertaken to subscribe for shares."

Now, in all this there is nothing to show that Torrance at this time was or had consented to become a shareholder of this company. Mr Waddell further says—"I did not in any way press him on the subject of the shares, or trouble him about it, because I had got his promise before that, and I knew him so well that I did not like to be always speaking to him on the subject. I never heard Mr Torrance express an unfavourable opinion of the company at any conversation I had with him. I never spoke to Mr Torrance about the number of shares after the meeting I have referred to. On that occasion he said, 'Fifty, I think, is as many as I can take.' I said, 'I think you ought to take 100. I am going to take 200.' 'Very well,' he said, 'I will endeavour to take 100;' and he led me to believe he would take 100. He said if it were necessary for him to take 100 he would do so." And there ends Waddell's evidence as to the number of shares which he thought Torrance had taken. Now it is very doubtful if the import of all this was not merely an intention at some future time to take shares in this company, whereas up to that time Torrance had refused to have anything to do with it.

In that state of matters I cannot affirm the proposition that Torrance is to be held as a member of this company. As to Torrance's position in this transaction, as it appears from his own evidence, it is simply untenable, and must be put out of consideration and the case must be viewed apart entirely from his account of the matter, and so viewed, I fail to see anything from beginning to end of this whole transaction to constitute him a member, and so to render him liable for calls in the present liquidation. I am therefore for refusing the prayer of this petition so far as regards Torrance.

Lord Mure—I agree with your Lordship in the result at which you have arrived. The question whether or not Mr Torrance is to be put upon the list of contributories of this company depends really upon oral evidence, and that the evidence of one who took a very leading part in floating this concern. No doubt Waddell and Torrance contradict each other directly as to the result of the conversation which took place in Edinburgh on the 12th of February 1879. It certainly was Waddell's impression that Torrance had taken or was about to take shares, and on the strength of that impression he sent a telegram to the directors of the company intimating what he considered to be the result of the interview. As far as the documents are concerned there is not only no agreement to take shares, but on the contrary a positive refusal to have anything to do with them. Nothing could have been stronger than Torrance's letter to Brand on 22d January 1879, in which he distinctly declines having anything to do with the concern, and it clearly appears from the secretary's communication, to which your Lordship referred, that at that date he did not consider Torrance a partner, and no application for shares was made thereafter. The mere fact that Waddell paid up the calls upon the shares on the belief that Torrance had consented to take them, and the fact of the want of repudiation of liability on Torrance's part, are not sufficient to my mind to constitute him a member of this company.

Lord Shand—The usual way in which a person becomes a partner in a company like the present is by making a written application for shares, and receiving an allotment letter, or by some other writing expressive of assent. But when the case depends upon a verbal agreement, I am clearly of opinion that very distinct evidence is necessary—much more distinct than anything which is alleged here. No doubt Waddell believed that Torrance

had undertaken to take up these shares; the telegram which he forwarded to the meeting of shareholders, and the fact that he persuaded two of the directors along with himself to advance the payment of these shares, brings out very distinctly his view of the matter, but that cannot be said to be sufficient.

My impression is that while Waddell thought that Torrance had already taken these shares, what Torrance really said was that he might some day take them. One must throw overboard entirely Torrance's evidence. At the time of the proof I did not believe Torrance when he said that "he had all along thought the thing a rotten concern and he would have nothing to do with it." If Torrance had maintained that his position was that at some future date he might be persuaded to take shares in the company that would have been intelligible. His whole actings from beginning to end were very unlike those of a business man, and his not repudiating the letters of allotment and keeping them among his papers are not satisfactorily accounted for. The liquidator, it appears to me, was put in a very peculiar position, after all that had taken place in the matter, and he was bound I think to try this question.

Lord Deas was absent.

The Court directed the liquidator to remove the name of William Torrance from the register of shareholders of the Glenduffhill Coal Company.

Counsel for Liquidator — Lorimer. Agent — John Latta, S.S.C.
Counsel for Torrance—Mackintosh—Darling. Agents—Waddell & M'Intosh, W.S.

Thursday, November 16.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

ANDERSON *v.* ALSTON AND ANOTHER.

Sale—Mineral Field—Mode of Estimating Profits—Depreciation—Interest on Price.

A right to work the minerals in an estate was sold in consideration of a certain sum paid by the purchaser, and of a further sum of £200 to be paid by him out of "the first and readiest of the profits." The field remained unworked for nineteen years, and was thereafter let to tenants. In an action under the clause in the disposition to obtain payment of the said £200, *held* that before "profits" in the sense of the disposition could be said to exist, interest on the sum already paid by the purchaser, as well as a sum to meet the depreciation of the subject by partial exhaustion of the minerals, must be taken into account.

By disposition dated 9th June 1853 Thomas Anderson of Langdales and Robert Anderson, one of his sons, who were *pro indiviso* proprietors of Langdales, sold to James Thomson Rankin two-thirds *pro indiviso* of the whole coal and ironstone, &c., in and under and unwrought from the mineral field of Langdales and Luckenhill. The consideration stated in the disposition was the sum of £800, and also a further sum of £200 to be paid by the purchaser to the sellers out of "the first and readiest of the profits which may be derived from the said minerals."

Thomas Anderson of Langdales, who died in 1869, by disposition and settlement conveyed to his son Thomas Anderson, the pursuer of the present action, his half *pro indiviso* of the said lands of Langdales, reserving to the said James Thomson Rankin and his heirs and assignees the minerals conveyed by the foresaid disposition.

Robert Anderson, by disposition dated 30th May 1857, sold to Thomas Waugh, Slamannan, and Mrs Elizabeth Waugh, his spouse, his half *pro indiviso* of the said lands, substituting them in his full right to call for implement of the whole stipulations prestable in the said disposition of the minerals. Under this disposition Thomas Waugh and his wife were infeft, and on the 16th May 1873 they disponed to the present pursuer their half *pro indiviso* of the said lands.

By assignation dated 2d and 20th October 1880 the whole children of the deceased Thomas Anderson, and one of them, Robert Anderson, as his heir-at-law, conveyed to the pursuer, Thomas Anderson the younger, above mentioned, absolutely and irredeemaby, their whole interest under the foresaid disposition of minerals granted by Thomas and Robert Anderson in favour of James Thomson Rankin, and, *inter alia*, the sum of £200 already mentioned, and their whole right to demand the portion of the price still unpaid. Thomas Anderson, the pursuer, was executor-dative *qua* one of next-of-kin to his father. James Thomson Rankin had died intestate in 1861, and was succeeded by his son Patrick Rankin, who died on 10th January 1880, and was succeeded by Mrs Alston and Anne Rankin, the present defenders, as his general disponees. During the lifetime of James Rankin the minerals had never been wrought, but a lease was entered into by his son Patrick Rankin in 1872 for a period of twenty-one years from Martinmas of that year. By the terms of this lease various annual sums were to be received by the landlord between the years 1876 and 1881 in name of rents, or, in the landlord's option, of lordship.

In this action the pursuer claimed payment of the sum of £200 as profits earned under the lease, and due to him in respect of the clause in the original disposition giving a right to £200 out of "the first and readiest of the profits." He averred that the profits claimed by the pursuers and their authors greatly exceeded £200. Alternatively he asked an accounting of the rents and profits derived by the defenders from the minerals, and payment of such sum, not exceeding £200, as should be due to him on such accounting.

The total sum received for rents from Whitsunday 1876 to Martinmas 1881 was shown by a statement produced with the defences to be £877, 17s. 7d. The defenders averred—"No interest or return was received from said minerals or for the said sum of £800 originally paid by James Thomson Rankin therefor from 1853 till 1873, and the statement produced shows the whole return that has yet been received. The whole of the said minerals were valued as at January 1880, so far as belonging to the said Patrick Rankin, and the value did not amount to over £570. No profits whatever have been derived from the mine-