were quite plain from the rest of this will that such was the intention of the testatrix, I think Thomas Forrest would be entitled to prevail. But so far as we can see at present that was not her intention. Her intention appears to have been that the residue of her estate, after deducting special legacies, should go to a certain person named; and that if she would not take it then it should go to the Bible Society. I do not see any ground for holding that we must interpret a will containing such provisions as meaning that Thomas Forrest was to be the testator's universal legatee. It cannot be said that that can be safely held on the terms of the will as we find them. Mrs Jerdon, on the other hand, apart from the will, would be entitled as next-of-kin to be decerned executrix-dative to the deceased. The only objection stated to her being appointed is, that she is resident in Canada. We are told that she is not settled there permanently, and that she intends to return to this country. In any case she cannot be decerned executrix-dative without finding caution, and the actual management of the estate is a matter of business which will be carried on by business men in the ordinary way. In these circumstances my opinion is that Mrs Jerdon is entitled to be decerned executrix-dative, and that we should recal the Sheriff-Substitute's interlocutor and remit to him to decern her executrix-dative accordingly.

LORD YOUNG — The Sheriff-Substitute has found "that it was evidently the intention of the late Miss Hall to make Thomas Forrest her heir, and that he should succeed to whatever she had not willed to others; in fact, he was to be her 'universal disponee or residuary legatee,' and that the word 'heir' must thus be interpreted;" and found "in point of law that the Court is bound to prefer the claim of Thomas Forrest, as universal disponee, to be executor-nominate to the late Miss Hall, to that of the petitioner Mrs Jerdon, who is undoubtedly the next-of-kin." I dissent entirely from these findings. If we are not in a position to affirm that Thomas Forrest by being named heir has been appointed universal legatee, then we cannot pronounce a judgment which will preclude other persons from taking under the will. I am not prepared to affirm the proposition that Thomas Forrest was intended by the deceased to be her universal legatee. Unless we are prepared to affirm that, we cannot sustain his petition to be decerned executor as against the claim of the next-of-kin. I therefore think that the Sheriff-Substitute's interlocutor should be altered, and that we should remit to him to decern the other claimant executrix-dative. The decision leaves the question open whether anything is given to Thomas Forrest by the will beyond £1000. So much is clear that he gets £1000. Whether he gets more or not is a question still quite undecided.

LORD TRAYNER and LORD MONCREIFF concurred.

The Court pronounced the following interlocutor:—

"Having heard counsel for the parties on the appeal, Sustain the same, and recal the interlocutor of the Sheriff-Substitute of Berwickshire, &c., dated 26th November 1896, and remit to the said Sheriff to appoint Mrs Margaret Hall or Jerdon executrix-dative *qua* next-of-kin to the deceased Miss Jane Hall, otherwise Miss Jane Theresa Hall, in terms of her petition: Find the petitioner entitled to the expenses incurred by her in this and in the inferior Court in consequence of the respondent's opposition to her petition," &c.

Counsel for the Appellant—Salvesen—P. J. Blair. Agents — Strathern & Blair, W.S.

Counsel for the Respondent—Jameson—A. S. D. Thomson. Agents—W. & J. L. Officer, W.S.

Thursday, January 28.

SECOND DIVISION.

M'MURDO'S TRUSTEES *v.* M'MURDO.

Marriage-Contract—Trust—Whether Right Conferred on Grandchildren as "Issue of Marriage"—Renunciation of Liferent, and Distribution of Estate.

By antenuptial contract of marriage it was provided that on the death of the wife the marriage-contract trustees should pay the free interest or income of the residue of her estates to her husband "during all the days of his life, for his own use, and for the maintenance and education of the issue, if such there be, of the said intended marriage," and should hold the fee and capital of such estate for behoof of "the whole children" of the marriage, in such proportions as the spouses or the survivor of them should appoint, and failing such appointment "for behoof of her whole lawful children" and the survivors, share and share alike, "the issue of any of them predeceasing her succeeding to their parent's share."

The wife died in 1869 without having executed the power of appointment, and survived by her husband and four children. In 1883 the husband executed a deed of appointment whereby he directed the trust-estate to be divided equally among the children. In 1896 the husband and the four children—all of whom were of full age, and three of whom were married and had issue—became desirous of winding-up the trust. The husband having agreed to renounce his liferent, they called on the trustees to divide the estate among the children according to the deed of appointment. The trustees refused to do so without judicial authority, as they had doubts whether the grandchildren

of the marriage had not an interest in the estate, and whether the husband's liferent was not alimentary.

Held (1) that the term "issue of the marriage" in the clause of the marriage-contract, meant immediate issue of the marriage, that is, children, and that no right was conferred on grandchildren; and (2) that the trustees on receiving a renunciation of his liferent from the husband, and a discharge from the children of the marriage, were bound to divide the funds among the children, according to the deed of appointment.

By antenuptial contract of marriage, dated 30th September and 1st October 1861, between Lieutenant Charles Edward M'Murdo and Miss Madeline Susan Baxter, the latter conveyed to trustees the whole estate, moveable and heritable, then belonging to her, or which should belong to or become vested in her during the subsistence of the marriage. The fifth purpose of the said antenuptial contract of marriage is in the following terms:—"In the event of her predeceasing her said intended husband, they shall pay to him the free interest or income for the time being of the residue of her estates foresaid during all the days of his life, for his own use and for the maintenance and education of the issue (if such there be) of the said intended marriage; and the said trustees shall hold and apply the fee or capital of the residue of the said estates and income arising therefrom after his death, for behoof of the whole children of the said intended marriage, in such proportions and under such conditions as the said Madeline Susan Baxter and Charles Edward M'Murdo may appoint in any writing to be executed by them during their joint lives, or if no such writing be executed by them jointly, then by any writing to be executed by the survivor of them; and failing such writings, for behoof of her whole lawful children and the survivors and survivor of them, share and share alike, the issue of any of them predeceasing her succeeding to their parent's share in equal proportions."

On 6th April 1869 Miss Madeline Susan Baxter or M'Murdo died leaving estate under the charge of the marriage-contract trustees worth £10,827, 8s. 1d. She was survived by her husband Captain M'Murdo and four children.

Mrs M'Murdo and her husband did not exercise the power of appointment reserved to them by the marriage-contract during the life of the former. On 19th March 1883 Captain M'Murdo executed a deed of appointment, whereby he directed the trust-estate to be divided equally among his said children, the share of any child dying without issue before division to be divided equally among the survivors.

In 1896 Captain M'Murdo and the children of the marriage, who had all attained majority, became desirous to have the trust wound up, and the trust-funds divided among the children in the proportions directed by the deed of appointment, and they accordingly called upon the trustees to do so. Captain M'Murdo agreed to renounce his liferent, and to join in the discharge to be granted to the trustees.

Three of the children of the marriage were married, each of whom had issue. The grandchildren were all in pupilarity.

The trustees although desirous of meeting the wishes of Captain M'Murdo and his children, were of opinion that they were not entitled to divide the trust-estate until the death of Captain M'Murdo.

For the settlement of the point a special case was presented to the Court by (1) the marriage-contract trustees; (2) Captain M'Murdo; (3) the children of the marriage; and (4) the issue of the children of the marriage.

The question of law was—"Whether the first parties are bound, on receiving a renunciation from the second party of his liferent and a discharge by the third parties, to wind-up the trust-estate under their charge, and divide the funds in their hands among the said third parties in the proportions specified in the said deed of appointment?"

Argued for the first and fourth parties—(1) In terms of the marriage-contract the income was to be used, *inter alia*, for the maintenance and education of the "issue" of the marriage. "Issue" had been held to include grandchildren—*Macdonald* v. *Hall*, July 24, 1893, 20 R. (H.L.) 88. Besides, the word "issue" occurred twice in the clause. On the second occasion it referred to the grandchildren of the marriage, and it could not be held to have a restricted meaning on the first occasion. The fourth parties had thus a right which could not be defeated by any agreement between the second and third parties. (2) The income was for the use of the second party "during all the days of his life," and was therefore of the nature of an alimentary provision. The trustees must therefore retain the trust-estate till the death of Captain M'Murdo—*Muirhead* v. *Muirhead*, May 12, 1890, 17 R. (H.L.) 45.

Argued for the second and third parties—(1) If the clause of the marriage-contract was read as a whole, it was plain that the first word "issue" meant the children of the marriage, and that there was conditional institution of grandchildren only in the case of children predeceasing the mother and leaving issue. (3) The liferent to the second party was not alimentary, and the second party was entitled to renounce it if he chose. He having done so, and the children of the marriage being of full age, they were entitled to unite in demanding the estate from the trustees, and to give them a valid discharge—*Pretty* v. *Newbigging*, March 2, 1854, 16 D. 667; Lord Watson in *Muirhead, supra*, 17 R. (H.L.) 48.

At advising—

Lord Justice-Clerk — The late Miss M'Murdo by antenuptial contract disponed her estate, present and prospective, to trustees, and appointed that in the event of her predeceasing her husband they were to pay

to him the interest or income during his life, "for his own use and for the maintenance and education of the issue" of the marriage, and to hold the fee and income after his death for the children in such proportions and under such conditions as the spouses or the survivor of them might appoint in writing, and failing such writing for all the children and the survivors, the issue of any predeceasing child taking the parent's share.

Mrs M'Murdo is now dead, being survived by her husband and all her children, and her husband has executed a deed of appointment by which the estate is to be divided equally among the children, the share of any child dying without issue before division to be divided equally among the survivors.

The question now before the Court is, whether the trustees may now divide the fund among the children of the marriage. All the children are major, and desire that this should be done, and the father, who is also desirous to the same effect, has agreed to renounce all rights he may have to the liferent or income settled upon him.

When the purposes of the trust are looked at, it is seen that there is here provision for the support of the other spouse and the upbringing of the family. There is no express declaration of an alimentary character attaching to the provision, and there is nothing from which such an intention is to be implied. The purpose is stated as one "for his own use and for the maintenance and education of the issue." This latter part of the purpose has been fulfilled so far as upbringing and education are concerned, as the family are all grown up. There therefore remains only as regards the purposes that which applied to the payment of interest to the survivor of the spouses. There is really no question as regards issue of children, for there is in the deed no destination-over. It is only the issue of any child "predeceasing her" that is to take the parent's share, and she was survived by all her children.

In this case the children of the marriage have a right of fee, and it is only the father's right to a liferent interest which stands in the way of their shares being made over to them. I think that he can discharge his claim, and that if he does so the trustees are entitled to wind up the trust and to hand over their shares to the beneficiaries.

LORD YOUNG—I assume from the manner in which the trustees express their views that the request of the beneficiaries for the immediate distribution of the estate appears to them to be quite reasonable, and that in their opinion the purpose of the deceased will not be defeated by such distribution. I therefore concur in answering the question as suggested.

I think it proper to add that in my opinion the raising of questions as to whether a liferent or annuity is alimentary or not ought to be avoided, as they easily might, by conveyancers bringing the matter under the notice of the granter of such deeds and seeing that the words of the deed clearly express the granter's intention.

LORD TRAYNER—By the antenuptial contract now under consideration it was provided that on the death of Mrs M'Murdo (which has happened) the marriage-contract trustees should pay the fee, interest, or income of the residue of her estates to her surviving husband "during all the days of his life," for his own use, and for the maintenance and education of "the issue of the marriage," and should hold the fee or capital of such estate for behoof of "the whole children of the said intended marriage" in such proportions as the spouses, or the survivor of them, should appoint. Failing such appointment, the estate was to be held "for behoof of her whole lawful children" and the survivors, share and share alike. It was suggested, if not maintained, on behalf of the first and fourth parties to this case, that some right in the income of the estate was conferred (after the death of Mrs M'Murdo) on the fourth parties (her grandchildren) in the interest or income of the estate by the words "issue of the marriage." I do not doubt that in many cases the terms "issue of the marriage" would include grandchildren. But I do not think they do so here. The expression "issue of the marriage" occurs in the same clause, with the expressions "children of the said intended marriage," and "whole lawful children," and I think it impossible to read the whole clause without coming to the conclusion that its provisions were intended to apply, and only to apply, to the immediate issue of the marriage, that is, the children of Mr and Mrs M'Murdo.

Mrs M'Murdo having died, the only persons interested in the estate in question are Mr M'Murdo, who has right to the liferent, and the children of the marriage, who take the fee subject to their father's right of appointment. The children are all of full age and their rights are vested. In these circumstances Mr M'Murdo offers to renounce and discharge his liferent in order that his children may at once receive their shares of the estate as he has apportioned them; but the question has been raised whether Mr M'Murdo can validly discharge his liferent. I am of opinion that he can, and the case of *Pretty* v. *Newbigging*, 16 D. 667, seems a direct authority in favour of that view. I may also refer to the opinion of Lord Watson in the case of *Muirhead*, 17 R. (H.L.) 48, as applicable to the present case, where the constitution and continuance of the trust have apparently no other purpose or object (and none other was suggested at the bar) than the protection and security of the liferent right which Mr M'Murdo is ready to discharge.

I think, therefore, that the question put to us should be answered in the affirmative.

LORD MONCREIFF concurred.

The Court answered the question in the affirmative.

Counsel for the First and Fourth Parties —Burnet. Counsel for the Second and Third Parties—Guthrie. Agents—Murray, Beith, & Murray, W.S.

Saturday, January 30.

FIRST DIVISION.

BANKNOCK COAL COMPANY, LIMITED, PETITIONERS.

Company—Reduction of Capital—Capital "lost or unrepresented by available assets"—Companies Act 1867 (40 *and* 41 *Vict. cap.* 26), *secs.* 3 *and* 4.

A company limited by shares had power under its articles of association, by special resolution, to reduce its capital; and it had also power to accept surrenders of its shares. The capital of the company was by the memorandum of association declared to be £25,000. Funds belonging to the company having been misappropriated by one of the officials to the amount of £2300, two of the shareholders agreed to the cancelling of 230 ordinary paid-up shares belonging to them, provided that the capital of the company should be correspondingly reduced. The company, accordingly, by a special resolution agreed to reduce the capital to £22,700, by cancelling these shares. No payment was made by the company in consideration of the surrender of the shares.

The company presented a petition praying the Court to confirm the proposed reduction, and to dispense with the use of the words "and reduced" after the company's name. The petition was not opposed. The Court, after a remit for inquiry and report, *granted* the prayer of the petition.

The Banknock Coal Company, Limited, presented a petition craving the Court to pronounce an order confirming the reduction of the company's capital, as resolved on by a special resolution of the company, passed on 18th September, and confirmed on 9th October 1896; to approve of a minute to be registered (under section 15 of the Companies Act 1867) by the Registrar of Joint Stock Companies; and to dispense with the addition of the words "and reduced" to the company's name.

The Court on 28th November 1896 remitted to Mr C. B. Logan, W.S., to inquire and report as to the regularity of the proceedings, and the reasons for the proposed reduction of capital.

Mr Logan reported, *inter alia*, as follows —"The petitioners, the Banknock Coal Company, Limited, were incorporated on 5th July 1892, and registered as a company limited by shares under the Companies Acts 1862 to 1890, and their registered office is situated in Glasgow. The objects for which the company was formed were the leasing and working of the Banknock colliery and coalfield, in the county of Stirling, and for other objects ancillary thereto, all as set forth in the memorandum of association of the company, and referred to on page 2 of the petition.

"By the said memorandum the capital of the company was declared to be £25,000, divided into 2000 ordinary shares of £10 each, and 500 preference shares of £10 each. Of this capital 1602 ordinary shares have been issued, 1054 of which are fully paid-up, and on the remaining 548 the sum of £6 each has been paid; 492 preference shares have also been issued, and are fully paid up. The remaining 398 ordinary and 8 preference shares are still unissued. By its articles of association (No. 58), the company has power from time to time by special resolution to reduce its capital.

"It is explained in the petition that funds of the company, amounting to £2300 have been misappropriated by an official of the company, and in order to recoup the company against loss, two of the shareholders of the company have, by minutes of agreement, agreed to the cancellation of, in all, 230 ordinary paid-up shares of the company belonging to them, provided that the capital of the company is reduced from £25,000 to £22,700.

"Accordingly, at extraordinary general meetings of the shareholders held at Glasgow on the 18th of September and 9th of October, both in the year 1896, the following special resolution was passed and confirmed, viz.—'That the capital of the company be reduced from £25,000, divided into 2000 ordinary shares of £10 each, and 500 preference shares of £10 each, to £22,700, divided into 1770 ordinary shares of £10 each and 500 preference shares of £10 each; and that such reduction be effected—(*a*) by cancelling the 180 paid-up ordinary shares, numbered 821 to 1000 inclusive, as provided by the provisional agreement executed by and between Borthwick Watson residing at Ardfern, Falkirk, and Robert Galloway, residing at 6 Hermitage Gardens, Edinburgh, two of the directors acting on behalf of the company, of the first part, and William Murray, coalmaster, Glasgow, of the second part, dated 8th September 1896; (*b*) by cancelling the 50 paid-up ordinary shares, numbered 295 to 344 inclusive, as provided by the provisional agreement executed by and between the said Borthwick Watson and Robert Galloway, two of the directors acting on behalf of the company as aforesaid, of the first part, and David Halley, of West Newport, Fife, hacklemaker, of the second part, dated 7th and 8th September 1896.'

"By article 18 of its memorandum of association the company has power to accept surrenders of its shares. The surrender proposed in the present case is not in consideration of a payment in money or money's worth by the company, and it appears not to be *ultra vires*, and is a transaction which may be competently carried out without the sanction of the Court. The company, however, desires to treat the surrendered shares as permanently extinguished, and unless the capital