were to happen, the result would be that no debt at all would in fact become due to the petitioners by the company. Therefore if the petitioners were compelled to lodge an affidavit and claim, and to accept a present payment, they might very likely get either a great deal too little or a great deal too much.

In these circumstances, if the Companies Act 1886 had not been passed, I think the judgment of the House of Lords in *Lord Elphinstone* v. *Monkland Iron and Coal Company* (13 R. (H.L.) 98) would have been a clear authority in the petitioners' favour. That indeed was hardly disputed, but it was argued that such considerations as were given effect to in that case are excluded by the provisions of the 4th section of the Act of 1886.

That section provides that in the winding up of any company under the Companies Act 1862 to 1886, the general and special rules for voting and ranking for payment of dividends provided by sections 49 to 66 of the Bankruptcy (Scotland) Act 1856, shall, "so far as consistent with the tenor of the said recited Acts, apply to creditors of such companies voting in matters relating to the winding up and ranking for payment of dividends."

Now I agree that if that provision applies to this case, the petitioners must lodge an affidavit and claim, and the liquidator must put a value on their debt as at the date of the valuation. It is plain, however, that the provision is not to be applicable to every winding up under the Companies Acts, because the rules in regard to voting and ranking are only to apply "so far as consistent with the tenor of the Companies Acts," and to creditors "ranking for payment of dividends." That being so, it seems to be clear that one case to which the enactment would not apply would be where the shareholders of a solvent company, possessed of ample means to pay all its creditors in full, chose to discontinue business and to wind the company up. Such a winding up would be quite competent under the Companies Acts, but there would be no need to follow the complicated procedure of the incorporated sections of the Bankruptcy Act, because there would be no question of the payment of a dividend only, or of the ranking of creditors. The creditors would simply be paid in full; any surplus assets would be divided among the shareholders; and the company would then be dissolved.

Now this is not quite a case of the kind which I have figured, because if a present value were put upon the petitioners' claim it may be that the assets of the company would not be sufficient to pay in full such estimated amount, and also the debts due to other creditors. Any difficulty, however, which that circumstance might have raised seems to me to be removed by the consent which the petitioners give to the other creditors being paid in full. If that be done, I do not think that the shareholders will be really prejudiced by the adoption of the course proposed by the petitioners, because it seems to be very improbable that whatever course is adopted there will be any surplus for division among the shareholders. It is true that the result of allowing the petitioners' claim to stand over may be to postpone the formal dissolution of the company for some time, but that would not hurt the shareholders, because postponement of the formal dissolution cannot add in any way to the liabilities and losses which they have already incurred.

I am therefore of opinion that the question stated in the petition should be answered in the affirmative.

LORD JUSTICE-CLERK—I have formed a very decided opinion in accordance with the opinion of Lord Low, who has stated the grounds of his opinion so fully and clearly, that it is quite unnecessary to repeat them.

LORD STORMONTH DARLING concurred.

LORD ARDWALL was not present.

The Court answered the question in the affirmative.

Counsel for the Petitioners—The Dean of Faculty (Campbell, K.C.)—Constable. Agent—Thomas Liddle, S.S.C.

Counsel for the Respondents—Hunter, K.C.—Munro. Agents—Paterson & Salmon, Solicitors.

Saturday, July 20.

SECOND DIVISION.

DICKIE'S TRUSTEES *v.* RUTHERFORD'S TRUSTEES.

Succession—Trust-Disposition and Settlement—Revocation—Two General Settlements—Implied Revocation.

Terms of a general trust-disposition and settlement executed in 1897 which were held impliedly to revoke a prior general trust-disposition and settle- executed in 1860.

Succession—Trust-Disposition and Settlement—Direction to Give Effect to Any Writing which Truster might Leave—Prior Trust-Disposition and Settlement which had been Impliedly Revoked.

Two trust-dispositions and settlements were found together in the repositories of a deceased person. The later, executed in 1897, impliedly revoked the earlier, executed in 1860. By the later the truster directed his trustees to pay any legacies which he might leave by any writing under his hand, and to dispose of the residue of his estate in the way to be directed by any writing under his hand, and in default of such writing to pay over the residue in the manner thereafter directed.

Circumstances in which *held* that "by any writing under my hand" the truster meant only writings to be thereafter made by him, and that the revoked

settlement, which left certain legacies and disposed of the residue of his estate, was consequently not one of the writings referred to.

Succession—Trust-Disposition and Settlement—Bequest to "Next-of-Kin according to the Law of Moveable Succession in Scotland"—Meaning.

A truster by his trust-disposition and settlement directed his trustees "to dispone, convey, deliver, or pay over the whole of the residue of my means and estate, heritable and moveable, real and personal, to my next-of-kin according to the law of moveable succession in Scotland." The truster died unmarried in 1906, predeceased by his mother and father. He was survived by two sisters A and B, and predeceased by a brother C and two sisters D and F. C, D, and F all left children who survived the truster. *Held* that the residue fell to be divided in five equal portions among A, B, and the children of C, D, and F, *per stirpes.*

This was a special case brought for the determination of various questions arising out of the testamentary writings of Mr James Dickie, solicitor, and town clerk of Irvine, who died at Irvine on 23rd January 1906.

After his death there were found in his repositories two validly executed trust-dispositions and settlements, one dated 6th July 1860 and the other dated 31st December 1897. No other writings of a testamentary character were discovered.

By the trust-disposition and settlement of 6th July 1860 the testator conveyed to Alexander Gilmour, writer in Irvine, as his sole trustee and executor, the whole heritable and moveable means and effects, of whatever kind or description, then belonging or which might belong to him at his death. The trust purposes were, that after payment of debts the trustee should "pay the following legacies, viz., £30 to my brother George, £20 to my sister Mary, £10 to my sister Margaret, and £10 to my sister Jessie, . . . and I beg the said Alexander Gilmour will accept from my means ten guineas as a small token of friendship; and I direct the whole residue of my estate to be divided, in proportion to the sums herein above bequeathed to them respectively, among my brother and sisters above named."

By the said trust-disposition and settlement of 31st December 1897 the testator conveyed to certain trustees the whole means and estate, heritable and moveable, which should belong to him at his decease. The purposes of the trust were—First, for payment of his debts and funeral expenses and the expenses of executing the trust; Second, "for payment or delivery of such legacies, bequests, annuities, or other provisions as I may leave, bequeath, make, or provide by any writing under my hand, however informal the same may be, and though found in my repositories or in the custody of any other party undelivered at the time of my decease." The third purpose of the trust was in the following terms:—"In the third place, for payment, application, and delivery of the residue of my said means and estate, or the proceeds thereof, including the interest and income thereof, in the way or manner to be directed or appointed by any writing or writings under my hand, however informal the same may be, and though found in my repositories or in the custody of anyone to whom I may have entrusted the same undelivered at the time of my death; and I hereby declare that the writings, for the execution of which provision is made in the second and third purposes of this trust, may be in the form of deeds or of letters addressed by me to my trustees, or memoranda left by me for their instruction, and shall be good, valid, and effectual though executed without a date, or although defective in any legal formality; and my trustees shall comply with, carry out, and make effectual all such directions and instructions as shall be contained in any such deeds, letters, or writings in the same way as if the purposes thereof had been herein contained and expressed; and no one shall have right or power to challenge, quarrel, or impugn any such deeds, letters, or writings on account of any informality or legal defect, or on any other ground whatever, if the same shall be clearly expressive of my wish, will, and intention; and the same shall be held to be part and parcel hereof, and shall have the like force and effect in every respect as if the directions, instructions, or provisions thereof had been herein inserted and expressed, any law or practice to the contrary notwithstanding; and in default of my leaving any such written directions or instructions, then my trustees shall dispone, convey, deliver, or pay over the whole of the residue of my means and estate, heritable and moveable, real and personal, to my next-of-kin according to the law of moveable succession in Scotland."

The testator, who was born on 19th March 1833, was never married. His father died on 17th June 1860, aged 67, and his mother died on 2nd August 1853, aged 60. He was survived by two sisters, namely (*a*) Mrs Mary Dickie or Rutherford, who died on 6th November 1906, and whose testamentary trustees were the parties of the *second part*, and (*b*) Miss Agnes Orr Dickie, the party to the special case of the *third part.* He was predeceased by a brother, Mr George Dickie, who died on or about 24th March 1887. Mr George Dickie left four children, all alive at the date of the special case, who were group (*a*) of the parties of the *fifth part.* The testator was also predeceased by a sister, Mrs Margaret Dickie or Jamieson, who died on 9th June 1891. Group (*b*) of the parties of the fifth part were (1) such of the children of Mrs Jamieson as survived the testator, and (2) the children of a daughter of Mrs Jamieson, viz., Mrs Agnes Jamieson or Campbell, who predeceased the testator, having died on 12th January 1895. The testator was also predeceased by a sister, Mrs Jessie Dickie or Murray, who died on 31st May

1879. Group (*c*) of the parties of the fifth part were such of the children of Mrs Murray as survived the testator. The testator was survived by no brother and by no sisters other than Mrs Mary Dickie or Rutherford and Miss Agnes Orr Dickie. He was survived by no children of predeceasing brothers or sisters who were not among the parties of the fifth part. The only child of a predeceasing brother or sister who predeceased the testator, leaving issue who survived him, was Mrs Agnes Jamieson or Campbell. George Dickie, the eldest son of the deceased George Dickie, who was the only brother of the testator, was the party of the *fourth part* as the testator's heir in heritage. The parties of the *first part* were the testator's testamentary trustees.

The following statement of the questions of difficulty in connection with the testator's writings, and the contentions of parties upon them, is taken from the special case:—"Questions have arisen as to whether said trust-disposition and settlement of 6th July 1860 was revoked wholly or in part by the trust-disposition and settlement of 31st December 1897; assuming it to have been revoked, what is the true construction of the latter trust-disposition and settlement; whether, assuming the former trust-disposition and settlement not to have been revoked, or to have been only partly revoked, the latter trust-disposition and settlement came into effect; and what is the true construction of both settlements?

"The parties of the second part, as representing Mrs Rutherford, a sister of the testator, who survived him, maintain that said trust-disposition and settlement of 6th July 1860 has not been revoked, and that under it they, as representing Mrs Rutherford, are entitled to a legacy of £20 and to two-seventh parts of the residue. They further maintain that on a true construction of the trust-disposition and settlement of 31st December 1897 the remaining five-sevenths of residue fall to be equally divided between them, as representing Mrs Rutherford, and the third party, as claiming to be the testator's sole next-of-kin at the date of his death; or, alternatively, in the event of its being held that said residue, or any part thereof, has fallen into intestacy, that they are entitled to share therein along with the testator's heirs *in mobilibus ab intestato*.

"The party of the third part maintains that said trust-disposition and settlement of 6th July 1860 has been revoked wholly by the latter deed, or, in any case, can now receive effect only to the extent of said legacy of £20. She further maintains that the whole residue of the trust estate, or, in any event, five-seventh shares thereof, fall to be divided equally between her and the second parties; or, alternatively, in the event of its being held that said residue, or any part thereof, has fallen into intestacy, that they are entitled to share therein along with the testator's heirs *in mobilibus ab intestato*.

"The party of the fourth part maintains that said trust-disposition and settlement of 6th July 1860 has not been revoked, and is still effectual as to said legacy of £20 and two-seventh shares of residue; that in consequence the residue clause of the trust-disposition and settlement of 31st December 1897 cannot receive effect, that five-sevenths of the residue have fallen into intestacy, and that he, as heir, is entitled to five-sevenths of the heritage.

"The parties of the fifth part maintain that said trust-disposition and settlement of 6th July 1860 has been revoked, or, in any event, is effectual only as to said legacy of £20 and two-seventh shares of residue, and that on a sound construction of the trust-disposition and settlement of 31st December 1897 the whole estate, or such part thereof as may be held not to be effectually disposed of by said trust-disposition and settlement of 6th July 1860, falls to be divided according to the law of intestate moveable succession, and that they are entitled *per stirpes* to three-fifth parts thereof as representing the testator's predeceasing brothers and sisters. Alternatively, they maintain, on the ground stated by the fourth party, that five-sevenths of the residue of the estate has fallen into intestacy, and that three-sevenths of said residue, so far as moveable, fall to be divided among them—exclusive of the fourth party—*per stirpes* according to the law of intestate moveable succession."

The following questions of law were, *inter alia*, submitted to the Court:—"1. Has the trust-disposition and settlement of 6th July 1860 been impliedly revoked by the trust-disposition and settlement of 31st December 1897? Or, is it still effectual as to the legacy of £20 and two-seventh shares of residue destined to Mrs Mary Dickie or Rutherford, now represented by the second parties, or either and which of the said bequests? 2. In the event of the first alternative of the first question being answered in the affirmative, or of its being determined that the trust-disposition and settlement of 6th July 1860 is effectual only as to said legacy of £20, are the parties of the second and third part entitled on a sound construction of the trust-disposition and settlement of 31st December 1897, equally between them, to the whole or to the residue of the estate? Or, does the said whole estate or residue fall to be divided into five equal shares, and is each of the three stirpes forming the parties hereto of the fifth part entitled, as representing the testator's predeceasing brother and sisters, to one of these five shares?"

The second parties quoted the following authorities:—Upon revocation—*Stoddart* v. *Grant*, 1852, 1 Macq. 163; *Allan* v. *Glasgow*, 1846, 5 Bell's App. 379; upon "next-of-kin"—*Honeyman's Trustee* v. *Donaldson*, January 30, 1900, 2 F. 539, 37 S.L.R. 388; *Fulton's Trustee* v. *Fulton*, 1901, 8 S.L.T. 465; *Connell* v. *Grierson*, February 14, 1867, 5 Macph. 379; *Tait's Trustees* v. *Neill*, November 25, 1903, 6 F. 138, 41 S.L.R. 92; *Young's Trustees* v. *Janes*, December 10, 1880, 8 R. 242, 18 S.L.R. 135; *Gregory's Trustees* v. *Alison*, April 8, 1889, 16 R. (H.L.) 10, 26 S.L.R. 787; *Tronsons* v. *Tronsons*, November 21, 1884, 12 R. 155, 22 S.L.R. 125; *Gordon*

v. *Gordon's Trustees*, July 26, 1882, 9 R. (H.L.) 101, 19 S.L.R. 899; *Ralston* v. *Hamilton*, 1862, 4 Macq. 397, Lord Chelmsford at 418; the Intestate Moveable Succession (Scotland) Act 1855 (18 and 19 Vict. cap. 23).

The third parties cited—Upon revocation—*Bertram's Trustees* v. *Mathieson's Trustee*, March 10, 1888, 15 R. 572, 25 S.L.R. 385; upon "next-of-kin"—*Withy* v. *Mangles*, 1843, 10 C. and F. 215.

The fifth parties cited—*Webster* v. *Shiress*, October 25, 1878, 6 R. 102, 16 S.L.R. 45.

Lord Low—The first question to be answered in this case is whether the trust-disposition and settlement executed by the deceased Mr James Dickie in 1860 was revoked by a second trust-disposition and settlement which he executed in 1897.

The latter settlement contains no express revocation of the former, but I think it is very plain that revocation is implied. Both settlements commence with a statement that the truster's object is to settle his affairs and provide for the disposal of his means and estate after his death; in both he conveys in trust the whole means and estate belonging to him or which may belong to him at the time of his death, and the trustees under the two settlements are different persons; and in both settlements the trust purposes exhaust the estate. The two settlements, therefore, cannot stand together, and accordingly the earlier is superseded and revoked by the later.

It was argued, however, that the settlement of 1860, although it might be revoked as a universal settlement of the truster's means and estate, was to a certain extent effectual as being a writing under his hand of the kind referred to in the settlement of 1897. The question arises in this way. By the second purpose of the settlement of 1897 the truster directed his trustees to pay any legacies which he might leave by any writing under his hand, and by the third purpose to dispose of the residue of his estate in the way to be directed by any writing under his hand; and in default of such writing, to pay over the whole residue to his next-of-kin according to the law of moveable succession in Scotland. Now, by the settlement of 1860 the truster directed his trustee to pay a legacy of £30 to his brother George, of £20 to his sister Mary, and of £10 to each of two other sisters, and to divide the residue among these legatees in proportion to the sums bequeathed to them. All the legatees except Mary (Mrs Rutherford) predeceased the truster, and therefore even if the settlement had not been revoked the other legacies and bequests of residue would have lapsed. It was contended for the representatives of Mrs Rutherford (the second parties) that as the settlement of 1860 was a writing under the truster's hand by which a legacy and a share of the residue were left to her, the trustees under the settlement of 1897 were bound, in terms of the second and third purposes of that settlement, to give effect to those bequests.

I am of opinion that that contention is not well founded. I think that the language used by the truster in the settlement of 1897 to describe the writings under his hand to which the trustees shall give effect, makes it sufficiently plain that he referred to writings to be thereafter made by him, and not to writings which he had already made. Further, it seems to me to be impossible to accept the view that when in the settlement of 1897 the truster directed his trustees to divide the residue "in the way or manner to be directed" by any writing under his hand, he included in that category the former settlement, which when he wrote the words he was in the act of revoking. It is to be remembered that it was a mere accident that only one of the legatees under the settlement of 1860 survived the truster. The argument would have been the same if they had all survived, but in that event the result of giving effect to the argument would have been that the only testamentary writing of the testator which had any operative effect would have been a settlement which he had by clear implication revoked.

Except the settlement of 1860, the truster left no testamentary writing, nor any writing giving directions to his trustees; and accordingly the question is, Who are the parties entitled to the residue under the destination in the settlement of 1897 to my "next-of-kin according to the law of moveable succession in Scotland?"

The circumstance under which that question arises are these:—The truster, who died in 1906, was never married. His mother died in 1853, and his father in 1860. He was survived by two sisters, Mrs Rutherford and Miss Agnes Orr Dickie (the third party to this case), and he was predeceased by a brother, George, and by two sisters, Mrs Jamieson and Mrs Murray, all of whom left children who survived the truster. The question therefore is, whether, under the destination which I have quoted, the residue fell to be divided between Mrs Rutherford and Miss Dickie, as the only next-of-kin who survived the truster, or between them and the children of the predeceasing brother and sisters *per stirpes*.

Now it must be regarded as settled that if the destination had simply been to the truster's "next-of-kin," without any words qualifying that expression, the two sisters who survived the truster would have been entitled to the whole residue, to the exclusion of the children of the brother and sisters who predeceased him. Accordingly, it is necessary to consider what is the meaning and the effect of the words "according to the law of moveable succession in Scotland."

It was contended for the second and third parties that these words were merely explanatory of the term "next-of-kin," and that all that was meant was that the persons answering to that description should be ascertained according to the law of Scotland. If so, then the words served no practical purpose, but were mere surplusage, because when a domiciled Scotsman makes a testamentary settlement in Scotland, and according to the Scotch form, a

bequest to his next-of-kin necessarily falls to be construed according to the law of Scotland. It is no doubt possible that the truster used words which were entirely unnecessary, and which are altogether inofficious, but the presumption is that such words were intended to serve a definite and operative purpose.

It was further argued that the explanation of the words might be found in the fact that the estate consisted partly of heritable and partly of moveable property, the suggestion being that the truster desired to make it clear that the whole estate was to be dealt with as if it had been moveable, and that any claim by the heir in heritage was excluded. I am not impressed with that argument. The direction to the trustees is to "dispone, convey, deliver, or pay over the whole of the residue of my means and estate, heritable and moveable, real and personal, to my next-of-kin." Even if the direction had stopped there, I do not see how any question of the kind suggested could have arisen, because it is expressly directed that the whole residue, whether heritable or moveable, shall be made over to the next-of-kin, that is, to all the persons composing the class, without distinction between them. Further, the heir in heritage is necessarily excluded, because the heritage is to be made over to the next-of-kin; the next-of-kin are not heirs in heritage. The heir may be one of the next-of-kin so far as blood relationship is concerned, but he takes the heritage not as one of the next-of-kin but as heir-at-law, and even if he is one of the next-of-kin he takes no share in the moveable estate unless he collates. It is also worthy of observation that neither at the date of the settlement nor at his death was the truster's heir-at-law one of his next-of-kin, but was the son of his deceased brother George. I therefore do not think that any weight can be given to the argument founded upon the mixed nature of the estate.

In my opinion the words under construction are both explanatory of the sense in which the truster uses the expression "next-of-kin," and a direction to his trustees as to the manner in which they are to dispose of the residue—they are "to pay over" the residue "according to the law of moveable succession in Scotland.' Of course the words "the law of moveable succession" mean the law of succession in the case of intestacy, because the law only provides for the succession of a person deceased if he has not done so for himself.

Now prior to the passing of the Intestate Succession Act the expression "next-of-kin" was used to designate the class of blood relations entitled to the moveable succession of the intestate—in fact, the expressions "next-of-kin" and "heirs *in mobilibus*" were used as synonymous. Now the Intestate Succession Act gave for the first time certain rights to the father and the mother of an intestate dying without issue, but as regarded the next-of-kin the only change which was made was to admit representation among descendants, and in the collateral line among brothers and sisters and their descendants. Here the question is not complicated by the survival of the father or mother of the truster. He was only survived by two of his next-of-kin and by three stirpes, each representing a deceased next-of-kin, and that also was the position of matters when he made the settlement.

In such circumstances I see no difficulty in understanding what is meant by, or in carrying out, a direction to divide the residue among the next-of-kin according to the law of moveable succession. I think that it is plainly a direction to divide among the next-of-kin who were alive at the truster's death and the children (*per stirpes*) who, according to the law of moveable succession, represented and came in place of next-of-kin who had predeceased him. I may add that the case of *Tronson*, 12 R. 155, appears to me to be an authority for the view which I have expressed, because I do not think that there is any substantial difference between the destination in that case and the destination under construction.

I am therefore of opinion that the first branch of the first question should be answered in the affirmative, and the second branch in the negative; and that the first branch of the second question should be answered in the negative, and the second branch in the affirmative. If that be done, the remaining questions seem to be superseded.

The LORD JUSTICE-CLERK, LORD STORMONTH DARLING, and LORD ARDWALL concurred.

The Court pronounced this interlocutor—

"Answer the first alternative of the first question of law therein stated in the affirmative, and the second alternative of said question in the negative; answer the first alternative of the second question in the negative, and the second alternative of the said question in the affirmative: Find that the foregoing answers supersede the necessity to answer the remaining questions of law."

Counsel for the First and Third Parties—Kennedy, K.C.—Macmillan—J. H. Henderson. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Second Parties—The Dean of Faculty (Campbell, K.C.)—W. Thomson. Agent—G. R. Stewart, S.S.C.

Counsel for the Fourth Party—Grainger Stewart. Agents—Oliphant & Murray, W.S.

Counsel for the Fifth Parties—Cullen, K.C.—Chree. Agents—Mackay & Young, W.S.