On 16th November 1882 the Lord Ordinary (KINNEAR) reported the petition to the First Division.

"*Note.*—The Lord Ordinary would have been disposed to dismiss this petition as unnecessary, holding that in the administration of a permanent trust for charitable purposes trustees are entitled, without obtaining the authority of the Court, to feu out mortified lands—*Merchant Company of Edinburgh* v. *Heriot's Hospital*, Mor. 5750. But it is stated that although there is no reported case to that effect, similar petitions have been entertained, and that power to feu has been granted under the Trusts Act 1867; and as the point is one of general importance, affecting the administration of charitable trusts, the Lord Ordinary has thought it proper to report the petition."

At advising—

LORD PRESIDENT—I daresay that it was very right for these magistrates to present this petition for the purpose of satisfying themselves whether they are entitled as trustees under this charitable trust to grant feus of the lands mortified without the authority of the Court, and no doubt it will be satisfactory to them to have a judgment on the point. I have no doubt on the subject, and I think that the trustees of every charitable institution have power at common law to feu out the lands belonging to the institution. It was so decided in 1765 in the case of the *Merchant Company of Edinburgh*, and it has been the practice ever since. I am for refusing this petition as unnecessary.

LORD DEAS concurred.

LORD MURE—I concur, and will only say that I think it would have a pernicious effect to throw doubts on the power of a body of this kind to feu by granting the petition.

LORD SHAND—I am of the same opinion, and that being so, I have nothing to do with the restrictions to be inserted in the feu-rights granted to the respondent. That rests with the administrators of the trust; they will judge whether there should be any restrictions inserted. I only make this observation, that as the Court have found they have power to grant feus without special authority, that throws the responsibility on them as trustees.

The Court dismissed the petition as unnecessary.

Counsel for Petitioners—Orr. Agents—Boyd, Macdonald, & Jameson, W.S.

Counsel for Respondent—Hay. Agents—Rhind, Lindsay, & Wallace, W.S.

Saturday, December 9.

FIRST DIVISION.

LUMSDEN, PETITIONER.

Parent and Child—Guardianship and Custody.

In a petition by a father for custody of his son, a year old, who had been removed by the petitioner's father-in-law, the Court, pending intimation, *granted* interim interdict against the father-in-law parting with the child.

This was a petition presented by John Dunlop Lumsden, cooper, residing at Boddam, in the county of Aberdeen, for the custody of Andrew Buchan Lumsden, the only child of the marriage between him and Margaret Smart Buchan or Lumsden, daughter of Andrew Buchan, salmon-fisher, Boddam. The petitioner set forth that he was married on 5th November 1880, and that the child was born on or about 26th September 1881, and on 26th December 1881 his wife deserted him. He further set forth that on the same date Andrew Buchan and his wife removed the child from the petitioner's house in his absence, and took it to their own house at Boddam; that he had endeavoured to get back his child, but that Andrew Buchan refused to give him up; that he was apprehensive that when Andrew Buchan became aware of the presenting of this petition that he would hand over the said child to the petitioner's wife; that in this way a new and expensive application would be rendered necessary; and that for the prevention of this he was anxious that the said Andrew Buchan should be interdicted from parting with said child to the petitioner's wife or anyone else.

The Court ordered intimation to be made on Andrew Buchan and on the petitioner's wife, and granted interim interdict against Buchan as craved.

Counsel for Petitioner—D. J. Mackenzie. Agent—William Officer, S.S.C.

HOUSE OF LORDS.

Tuesday, December 5.

ORR EWING *v.* JOHN ORR EWING & CO. AND ORR EWING'S TRUSTEES.

(*Ante*, Feb. 7, 1882, vol. xix. p. 613.)

Succession—Payment—Interest—Instalment.

A contract of copartnery provided that in the event of the death of any of the partners the surviving and solvent partners who should continue the business should pay out to the representatives of the deceased the amount at his credit in the books of the firm, by ten biennial instalments, "with interest thereon at the rate of 5 per cent. per annum from the date of the balance." *Held* (*aff.* decision of Second Division—*diss.* Lord Watson) that at each payment interest must be paid upon the whole balance of the debt then remaining unpaid, and not upon the instalment.

This case is reported *ante*, Feb. 7, 1882, vol. xix. p. 613. The defenders John Orr Ewing & Co. appealed to the House of Lords.

At delivering judgment—

LORD BLACKBURN—My Lords, the solution of the question in dispute between the parties in this appeal depends entirely on what is the true construction of a few words—I might almost say

of one word—in the 16th paragraph of the deed of partnership of the firm of John Orr Ewing & Company, dated 15th and 16th January 1878. That partnership was to be for ten years from the 1st January 1878, but it was necessarily subject to be terminated sooner by the death or bankruptcy of any one of the partners; and it is thus provided by the 16th paragraph, of which I shall now read the material part—"In the event of the death, bankruptcy, or declared insolvency of any of the partners during the subsistence of the co-partnership, the surviving or solvent actual partners at the time shall be allowed the period of three months from the date of such death, bankruptcy, or insolvency to consider and determine whether they shall continue to carry on the business and pay out the share and interest of such deceasing bankrupt or insolvent partner, as the case may be, or whether the business shall be wound up, which option shall be declared at the end of the said period of three months, or sooner if the surviving and solvent partners shall find it suitable to do so, and during the interval the business shall be continued by the surviving and solvent partners. In the event of the surviving and solvent partners electing to continue the business, the amount at the credit of the deceasing or insolvent partner as at the last balance of the company's books, taken as at 31st December preceding such death or insolvency, when the books were balanced or ought to have been balanced, as hereinbefore provided, together with any sum subsequently paid to the firm by him, and in the case of the said John Christie the balance of salary, if any, due to him, shall, under deduction of any sums withdrawn by such deceasing or insolvent partner, be paid out to his representatives (except the representatives of the said John Orr Ewing) or creditors, as the case may be, by instalments of equal amount, at six, twelve, eighteen, twenty-four, thirty, and thirty-six months' date from the date of the surviving and solvent partners declaring their election, or at shorter periods if the solvent and remaining partners shall so determine, with interest thereon at the rate of 5 per cent. per annum from the date of the balance in the event of the death, but without interest in the event of the insolvency or bankruptcy; and for these instalments bills with sufficient security shall be granted: But provided always that in case of the death of the said John Orr Ewing, his interest in the company, ascertained as aforesaid, shall be paid out to his representatives by instalments of equal amount at six, twelve, eighteen, twenty-four, thirty, thirty-six, forty-two, forty-eight, fifty-four, and sixty months' date as aforesaid, with interest as aforesaid; and for these instalments bills of the company shall be granted, with the security of the works and lands in Dumbartonshire, being the property included in the company's books under the names of 'field account' and 'land account,' and also the property numbered 46 and 44 West George Street, Glasgow, and all other heritable property which may belong to the company. In the event of the death or bankruptcy of any of the partners before the 31st December 1878, being the date at which the first yearly balance is to be made, the amount appearing at the credit of such partner, with interest at 5 per cent. per annum from the date of such amount being placed to his credit, and with the addition in the case of the said John Christie of the balance of salary, if any, due to him, shall be paid out in manner before prescribed to his representatives or creditors, as the case may be, but under deduction always of such sums as he may have withdrawn from the concern."

The event that has happened is that John Orr Ewing, the principal member of the firm, and who had the chief interest in it, died on the 15th April 1878. The surviving partners on the 30th June 1878 declared their option to continue to carry on the business and pay out the share and interest of the deceasing partner. As the event happened before the 31st December 1878, the amount of the share and interest of the partner has to be ascertained in the manner provided for in the last words which I have read. And as it was John Orr Ewing who died, some further deductions have to be made, with which I need not trouble your Lordships. There is no dispute what is the principal sum which is to be paid out, nor that as it was John Orr Ewing who died, that principal sum is to be paid in ten instalments, in the same way in which the interest of any other partner deceasing or becoming insolvent was to be paid in six instalments; and the sole question raised is as to what is the true construction of the words "with interest thereon at the rate of 5 per cent. per annum from the date of the balance in the event of death, but without interest in the event of insolvency or bankruptcy." It is quite clear that in the event of insolvency the instalments were to consist of a sixth part of the amount to be paid out by the firm, and for each of those a bill is to be given making the amount payable at the respective dates. And it is equally clear that in the case of death the representatives of the deceasing partner are in addition to have interest on something. It does not appear to have occurred to the person preparing the deed that there would be any doubt as to how that interest was to be paid. It is a pity it did not occur to him that it might be a question whether it was to be included in the bills or was to be paid separately. If it had so occurred to him, probably he would have used words to show that it was to be included in the bills, which he has not done, and in so doing he could hardly have failed to make it clear on what that interest was to be paid, and so prevented the present difficulty. All parties have agreed that the bills should be drawn, not only for the equal share of the principal sum, but also for the interest which would be payable at the date when the bills became due, and the only question raised is what that interest is to be calculated upon, or, in other words, what does the word "thereon" as used in this passage refer to?

The Lord Ordinary framed his interlocutor on the construction that the interest at the rate of 5 per cent. per annum was to be "on each instalment" from the date of the balance. The majority of the Second Division recalled that interlocutor, and found that the interest was to be "on the balance of the said principal sum due or unpaid at the date when each such instalment became due," and the question is, which is right?

I cannot agree in what is said at the end of Lord Young's judgment, that the construction put on the deed by the Lord Ordinary and Lord Craighill is either whimsical or unjust, or that the Court should favour a subtle and ingenious con-

struction to avoid it. But I have come to the conclusion, on grounds substantially the same as are stated in the earlier part of his judgment, that the interlocutor appealed against is right.

I think there can be no controversy that in construing a deed the Court are to look at the whole instrument, and say what is the intention evidenced by the words used in such an instrument, and with reference to such a subject-matter, and that the Court is to take the words in their ordinary grammatical meaning. And I agree with the Lord Ordinary and Lord Craighill that it is a rule, not I think of law, but of the grammatical construction of the English language, that words of relation refer to the last antecedent. But I do not agree with them in thinking that what comes nearest to the words of relation is necessarily to be taken as the last antecedent. On the contrary, I think that the context and the subject-matter may show that something more remote in the collocation of words really is the antecedent.

I think that as soon as the option was exercised, that sum which stood in the books as the interest of the deceasing partner was changed from being the interest which that partner had in the assets of the firm, and became the price to be paid by the continuing firm for his interest, and I think that as long as any part of that price remained unpaid, the natural thing, and what we should *prima facie* expect, is that the interest which was to be paid was to be on that portion of the price of which the continuing partners had the use, and of the use of which the representatives of the deceased were deprived. It seems to me that this is enough to justify the Court in saying that "thereon" does not relate to "instalments," though that is the word which in the collocation of words is the nearest, but to the amount which was to be paid out, though further off in the collocation of words.

Some reference was made, both in the judgments below and the argument at your Lordships' bar, to other clauses in the deed, but I do not think any of them throw light on this. I do not think the point is capable of being elucidated by argument; the principle is I think what I have stated. On its application one mind will come to one conclusion, and another to a different one. In fact we know that of the four Judges below two came to one conclusion and two to the other. And I am afraid that in this House your Lordships also differ. I need hardly say that I think it by no means an easy question. But for the reasons here given I think the interlocutor appealed against is right. I therefore move that it be affirmed and the appeal dismissed with costs.

Lord Watson—My Lords, as I entirely concur with the legal principles which have been laid down by the noble and learned Lord who has just addressed you, I think it necessary that I should explain very briefly the reasons which induce me notwithstanding to differ from the conclusion at which he has arrived.

This is not a case in which words having a plain and obvious primary meaning fall to be construed according to a secondary and more forced construction, because the adoption of the primary meaning would lead to results in themselves harsh and inequitable, or contrary to the main purpose of the parties as gathered from the terms of the deed in which the clause occurs. It appears to me to be a case where the words in dispute are fairly capable of receiving two different constructions—indeed, I might almost say two natural constructions—but in endeavouring to arrive at the just construction in such a case I think it is always right to inquire, in the first place, which of the two constructions submitted by the parties respectively is the more natural one, and, in the second place, to consider whether that meaning is be ousted because of some probability to the contrary arising either from the terms of the deed itself or otherwise.

Now, my Lords, in dealing with the clause which is before the House for construction in this case I entirely assent to the view taken by my noble and learned friend, that very little, indeed no assistance is to be derived in construing it from expressions occurring in other parts of the deed with regard to the payment out of partners in certain other events by instalment bills. That is a circumstance which gives rise to two counter arguments, in my opinion of nearly equal plausibility, and therefore neither party can derive much aid from their use. But in the present case, taking the words as they stand—taking the words *per se*—I prefer the construction submitted on the part of the appellants to that submitted on the part of the respondent, for this reason—Assuming that the parties meant, as the appellants contend, to stipulate that Mr Orr Ewing's executors should receive payment out of his interest in the concern by ten instalment bills, each for a proportion of the principal sum, with interest upon the amount of that instalment to be included in each bill, then the parties, in order to give effect to that stipulation, have framed a consecutive unbroken sentence, which expresses with perfect fulness and precision all that they meant to bargain for; every provision requisite is expressed; nothing whatever is left to implication. But, on the other hand, if you adopt the construction submitted by the respondent, it is necessary to introduce into that sentence a very long parenthesis, and it is necessary to supply by inference a great deal that is required in order to bring out the full meaning of the parties.

Now, my Lords, as between such constructions, and irrespective of any considerations which may point to the one or the other of them arising from the probabilities of the case, I do not hesitate to adopt the former—that which fully expresses the mind of the parties without break, with connection, and without leaving anything to inference. That leads me to consider whether there are such probabilities existing in this case as ought to make me prefer the respondent's construction. If a probability existed, according to my apprehension I should not be disposed to insist upon a very imperious probability, because it appears to me that any reasonable probability, although not in degree very strong, would be sufficient in the circumstances of the present case to turn the scale in favour of the respondent.

My Lords, I find that Lord Young in delivering his opinion as one of the majority of the Second Division puts the matter thus:—"I do not say that the clause is incapable of the construction contended for by the defenders, but thinking it also capable of that maintained by the pursuer, which is certainly in my opinion more just and equitable, I prefer the latter as more

probably according to the meaning and intention of the parties." My Lords, I do not think that justice or equity enter into this matter. I do not think that there would be any case of injustice or inequity in giving effect to the pursuer's contention, and I take it that probably these words of Lord Young were meant to express no more than this, that it would not be just or equitable not to give effect to the probabilities of the case which were in favour of the respondent.

My Lords, I am not going to canvass those probabilities, but will only say that, looking to deed itself, which I rather think is the more legitimate source to which to look for the existence of any such probability, I cannot discover anything decisive one way or the other. No doubt many considerations may be suggested to show that in reason Mr John Orr Ewing's executors should have full interest upon his share, but as against that I put the very natural consideration, Why in a deed like this, which stipulates that interest shall be paid in other cases where parties are paid out by instalments, should harsher terms be imposed upon the firm simply because the paying out of so large a partner will involve a very heavy strain upon the firm? It is not a question whether Mr Orr Ewing, if the option had been given him, would have probably preferred taking a larger or a smaller sum. It does not appear to my mind to be the test of probability here. The question is, what would the parties probably have done in contracting with each other as fair and reasonable men. I can only say that I am not satisfied in my own mind; I have not been able to attain to the view that it would have been either unjust or unreasonable for them in settling their matters together beforehand to adopt either the one or the other of the constructions which have been submitted to the House. I do not think that the one can be said to have been at the time when this contract was framed more or less reasonable than the other, and consequently I do not think that it can be predicated that the one is more or less probable than the other; and it is, my Lords, because of my inability to arrive at the conviction that any such antecedent or *a priori* probability does exist in this case that I am unable to concur in the judgment which my noble and learned friend has just proposed.

Lord Bramwell—My Lords, this is a remarkable case. There is no provision in the agreement that the interest shall be a part of the bills, and yet the parties seem to have considered that it was intended that it should be so, and doubtless it was. There is also no direct provision that any interest shall be payable until the payment of the last instalment, but the words are that the instalments are to be paid with interest thereon, and the question is whether that means on the principal or on the instalments. It is equally left unprovided in terms whether that interest shall be paid from time to time, or whether it shall be payable at the last payment of the principal. But I think that it would be right to construe this stipulation as the parties have construed it, namely, that interest is not postponed until the last payment, but is payable from time to time as payments are made on account of the principal.

Well, now, that being so, and assuming that interest is to be paid from time to time as the instalments are paid, is the interest to be calculated on the instalments, and paid on the amount of the instalments, or upon the sum which is due at the time when the payment is made, or due up to that time? Now, I cannot help thinking, for my own part, that it is not a matter of justice or injustice, because the parties might make any agreement they thought fit. If we could suppose that in negotiating one party had stood out for the one form of payment, and the other had stood out for the other, and at last one of them had yielded, there would have been no injustice in making such a stipulation either one way or the other. But what does seem to me a reasonable way of looking at this thing, and a way in which we have a right to look at it, is this, inasmuch as the words are admittedly ambiguous we must look at what is the reasonable and probable thing. Now, the reasonable and probable thing to my mind is, that if you are to assume interest to be payable from time to time, it ought to be payable, not upon the amount of principal paid from time to time, but upon the amount due from time to time—that is to say, if anyone were to come to me to prepare a deed by which £1000 was to be lent, payable in three years, and the instructions merely said that it was to be payable in three years by three equal instalments at the end of the first, second, and third years, with interest at five per cent. payable from time to time, I should prepare a deed undoubtedly which would make the interest payable at first on £3000, when the second instalment was paid on £2000, and when the third instalment was paid on £1000. That seems to me to be the reasonable view, and that which one would understand from general instructions such as I have endeavoured to describe.

But I cannot help thinking that it may be put also thus—supposing that nothing had been said about instalments, and that the sum payable was not payable until the end of the three years, or, as in the case of Mr Ewing, until the end of the five years, but that a provision had been made that from time to time half-yearly payments of interest should be made, no doubt in that case it must be payable upon the entire principal. Why, then, because a provision is made that the principal shall be paid off from time to time, should the interest be supposed to be payable upon more favourable terms to the debtor than if there had been no such provision? Of course I must not be supposed to be treating the views of those who differ from me as unreasonable, but what seems to me to be the reasonable thing is that the sum due should be paid with interest, and that the interest payable should be calculated upon the sum due. And I am particularly corroborated, as it seems to me, in that idea by the fact that interest on this money was allowable; when I use the expression "allowable" I mean was payable by the firm to Mr Ewing from time to time upon the principal money while he was alive; and why when he died, and the money became a debt from the remaining partners of the firm to his representatives, the interest payable upon it should be of a less favourable character to his representatives than it was to him when he was alive, I am at a loss to see. It seems to me, therefore, that what I cannot help calling, with great respect to those who differ from me, the reasonable agreement for these

parties to make was that which the respondent contends was made here.

But a difficulty is raised upon the grammatical rule that the word "thereon" must be taken to refer to the last antecedent. Now that rule cannot be applied here, because the very last antecedent is "partners." Nobody can suppose that interest is payable upon the partners of course.

The next antecedent before that is "periods." It is just possible, I suppose, that interest might be payable upon a period.

Then there is another antecedent before that, namely "election," and there is another antecedent before that, which is partners, so that you do not come to the antecedent which the appellants are so anxious to rely upon—that is to say, "instalments"—until you have passed over four other antecedents; that being the case, if you may pass over four antecedents on account of the good sense of the thing, I cannot see why you may not pass over a fifth. I confess that I feel no difficulty upon that score. Further, I cannot help saying that if I had to prepare the deed, in speaking of the instalments, if I had meant that interest should be paid upon the sums paid by instalment, I should not have said that interest should be payable on the instalments, but on the amount so payable by each instalment; that would appear to me to be the more natural expression to use.

I think that that is really all that one need say upon the construction of the clause itself. I cannot quite agree with what has been said by my noble and learned friend opposite (Lord Watson) that you can get no assistance from the other clauses. I think that you can get a little, because it seems to me that in the other clauses where provision is made for the payment of money by instalments it is expressly said that the amount of the instalment shall be that upon which the interest shall be paid from time to time.

I think I may say that in every case it is so. It may be said, Well, then, why did the draftsman make a difference between this case and the others? In the first place, I think it is very likely that he did not think anything at all about it one way or the other, and we are speculating upon what was the meaning of the parties when the fact is that the subject was not present to their minds. But if one is to act upon the general rule, and attribute a meaning to them in the words which they have used, I think it is perfectly possible that the draftsman may have said in this particular case of a deceasing partner, his capital is bearing interest from time to time while he continues a partner, and therefore when he ceases to be a partner it ought to do the same. It is not so with the others.

It seems to me, therefore, that the judgment appealed from is right. It does not seem to me to be a case for a confident opinion. I should not set much value upon any confident opinion expressed by anybody whatever in this case. It is too obvious that intelligent people may take different views of the matter. I should like to say that although I have not referred particularly to the judgments given in the Scotch Courts, I think it will be seen that I have derived the arguments which I have used from those judgments. In my opinion the appeal ought to be dismissed.

Interlocutor appealed from affirmed and appeal dismissed with costs.

Counsel for Appellants—Davey, Q.C.—Webster, Q.C. Agents—Martin & Leslie—Murray, Beith, & Murray, W.S.

Counsel for Respondents — Solicitor-General Herschell, Q.C.—Solicitor-General Asher, Q.C. Agents—Grahames, Currey, & Spens—J. & A. Peddie & Ivory, W.S.

Tuesday, December 12.

(Before Lord Chancellor, Lords Blackburn, Watson, Bramwell, and Fitzgerald.)

OAKBANK OIL COMPANY (LIMITED) *v.* CRUM.

(*Ante*, Dec. 2, 1881, vol. xix. p. 174, 9 R. 198.)

Public Company—Articles of Association—Payment of Dividend where some Shares fully Paid-up, others not—Companies Acts 1862 *and* 1867 (25 *and* 26 *Vict. c.* 88, *and* 30 *and* 31 *Vict. c.* 131).

The articles of association of a limited company provided that "the directors may, with the sanction of the company in general meeting, declare a dividend to be paid to the members in proportion to their shares." The articles also provided that "capital" should mean "the capital for the time being of the company," and "shares" the "shares into which the capital is divided." The capital consisted of 60,000 shares of £1 each. Two-thirds of the shares were fully paid-up, and on the remaining third only 5s. per share had been paid. *Held* (*aff.* judgment of First Division) that under the terms of the articles of association dividends were to be paid in proportion to the nominal, and not in proportion to the paid-up capital held by each member.

This Special Case is reported *ante*, Dec. 2, 1881, vol. xix. p. 174, and 9 R. 198.

The first parties, the Oakbank Oil Company, appealed to the House of Lords.

The respondent's counsel were not called on.

At delivering judgment—

Lord Chancellor — My Lords, in this case your Lordships having heard the able and exhaustive arguments which have been addressed to the House by the learned counsel for the appellants, are, I believe, of opinion that it is not necessary to call upon the learned counsel for the respondent.

The question depends, I think, entirely upon the true construction of the contract contained in the memorandum and articles of association of this company. It is unnecessary to determine whether the *a priori* arguments on the one side or upon the other exactly balance each other, or whether in the absence of express terms in the contract requiring to be construed one *a priori* argument would preponderate over another. To me it seems that that consideration is the same on both sides. If we had to consider what was *a priori* a reasonable contract as to dividends in a company of this sort, it would appear to be an unreasonable proposition that if a man made