Tuesday, July 19.

FIRST DIVISION.

BAIRD'S TRUSTEES *v.* DUNCANSON AND OTHERS.

Succession — Trust-Disposition and Settlement—Authority to make Advances on Marriage — Interest on Unauthorised Payments.

A testator directed that the residue of his estate should be divided equally among his children upon the youngest attaining majority. He postponed vesting until the period of division, but authorised his trustees to make advances out of the residue to his daughters on marriage, these advances to be deducted from their respective shares of residue upon the division taking place.

The testator left four daughters, three of whom married before the period of division, and the trustees, besides making them advances on marriage, made each a yearly allowance after marriage.

Held that in division of the residue, interest at the average rate earned by the trust-estate must be charged upon the payments made to the married daughters after marriage, these payments being unauthorised, but that no interest was chargeable upon the advances made on marriage.

Robert Baird of Limerigg died on 26th November 1891, leaving a trust-disposition and settlement whereby he disponed his whole estate, heritable and moveable, to trustees for the purposes therein set forth. The third purpose was in these terms—"In the third place, I direct and appoint the said trustees to manage and preserve the residue and remainder of my estate, heritable and moveable, hereby conveyed for the use and behoof of the lawful children of my body until the division hereinafter appointed to take place; and until the youngest of my children shall have attained the age of twenty-one years complete, I appoint the said trustees to pay and apply the rents, interest, and annual profits of my said estate, or so much thereof as the said trustees may consider necessary, for and towards his, her, or their maintenance and education respectively, while, and so long as, in the opinion of the trustees, any of my children are unable to provide for themselves; but when, in the opinion of the trustees any of my children shall be able to provide for himself or herself, such child or children shall cease to participate in the annual income of my estate: Declaring that it shall be in the power of the said trustees at any time before the division of the residue of my estate, at their discretion to make advances to any of my sons for placing him or them out in any profession, business, or employment, or to my daughters on their marriage, for his, her, or their benefit or advancement in the world, notwithstanding that their share or shares in the residue shall not then have become vested, which advances shall be accounted as part of the share or shares of the residue of my estate accruing to the child or children to whom such advances shall be made, and shall be deducted from his, her, or their share or shares of the said residue upon the division after mentioned taking place; and at and upon my youngest surviving child attaining the age of twenty-one, . . . I direct and appoint the said trustees immediately to proceed to convert into money the whole residue of my estate, real and personal, and after payment of my whole debts and expenses and others foresaid, to pay, assign, and dispone the free residue to and in favour of my whole lawful children, share and share alike; . . . But specially providing that in case any of my lawful children shall have died leaving lawful issue before said division shall take place, such issue shall be entitled to the share or shares to which their deceased parent or parents would have been entitled if alive."

By the provisions of the deed the shares of residue did not vest in the children of the testator until his youngest child attained majority.

The truster was survived by four daughters, viz., Isabella, who married Dr Duncanson in 1875; Jessie, who married Mr Graham in 1884; Annabella, who married Mr Orr in 1884; and Elizabeth, born on 3rd May 1870, who was the truster's youngest daughter.

Prior to the marriage of the three eldest daughters the trustees paid them sums for maintenance; upon their marriage they made to each an advance of £1000, and thereafter they made each a yearly allowance of from £250 to £300. The trustees also paid the testator's youngest daughter sums for maintenance prior to her majority.

When the period of division arrived, on the testator's youngest daughter attaining majority, questions arose as to how the advances made to the married daughters on and after marriage were to be treated, and in order to have these questions determined this case was presented to the Court by (1) Mr Baird's testamentary trustees; (2) Mrs Duncanson and her husband; (3) the marriage-contract trustees of Mr and Mrs Graham and of Mr and Mrs Orr; and (4) Miss Elizabeth Baird.

The opinion of the Court was desired on the following questions, *inter alia*—"(1) In framing a scheme for the division and payment of the estate, do the payments made to each or any, and if so to which, of the married daughters on and after their respective marriages, fall to be deducted from or imputed as part of their respective shares of residue as payments already made to account, and does interest fall to be charged against each or any, and if so against which married daughter upon the said payments from the respective dates thereof? (4) If interest is chargeable, at what rate is it chargeable?"

It was stated in the case that the payments made to Mrs Graham and Mrs Orr

after marriage were made "for the purpose of their education and maintenance." It was also stated that "none of the husbands of the married daughters were in such circumstances as to be unable to maintain their wives in a manner befitting their station, or to require assistance from the trust-estate for this purpose."

The second parties contended that Mrs Duncanson was entitled to an equal one-fourth share of the trust-estate remaining in the trustees' hands at the date of division, and was not bound to repay to the trust-estate, or have imputed as part of her share of residue, the *cumulo* amount of the yearly allowance paid by the trustees to her since her marriage or previously, except in so far as these payments exceeded the *cumulo* amount of the payments made to each of the third and fourth parties. In any event, the second parties contended that they did not understand that said allowances were to be so imputed, and that the interest fell to be charged upon the payments made.

The third parties contended that the annual payments made to Mrs Graham and Mrs Orr after marriage were in continuation of the allowances made for their maintenance prior to marriage, and were not to be deducted from the shares payable to the third parties, and did not bear interest.

The fourth party contended that the annual payments to the married daughters after marriage were not such advances upon their marriage, or payments for maintenance as were authorised by the trust-deed, and that they must bear interest at the legal rate.

At advising—

LORD ADAM—[*After reviewing the facts of the case, and deciding that vesting was postponed until the period of division*]—As to the payments to Mrs Kirk Duncanson on and after marriage—these were made in virtue of a resolution of the trustees, by which they professed to exercise powers to that effect conferred on them by the truster.

By the power referred to, the trustees were authorised to make advances at their discretion to any of the truster's sons for placing him out in any business, profession, or employment, or to his daughters on their marriage, for his or her advancement in the world.

It was not disputed that the advance of £1000 to Mrs Duncanson was validly made in terms of the power, that having been made on her marriage; but it was maintained that the grant of an annual allowance was *ultra vires* of the trustees. It appears to me that the power conferred on the trustees was a power to make advances to a daughter on her marriage only, and not at any other time. I think that annual payments made after marriage cannot be considered as being advances made on marriage. I think, accordingly, that these payments cannot be supported as having been made in execution of the power.

As regards the payments of £1000 made to Mrs Graham and to Mrs Orr on marriage, no question is raised, but as regards the annual payments made to them after marriage they maintained that these were in a different position from those made to Mrs Kirk Duncanson, in respect that they were made in continuation of the allowance which had been made to them for their maintenance prior to marriage, and they endeavoured to support these payments by a reference to a power conferred on the trustees, by which they were authorised to pay out of the annual profits of the estate so much as they might consider necessary for the education and maintenance of a child, so long as in their opinion such child was unable to provide for itself.

It is no doubt stated in the case that payments were made "for the purpose of their education and maintenance." But it is also stated in the case that none of the daughters' husbands were in such circumstances as to be unable to maintain their wives in a manner befitting their station, or to require assistance from the trust-estate for this purpose. It cannot therefore be said that at the time these payments were made Mrs Graham and Mrs Orr were insufficiently provided for, and I accordingly think that none of the payments to Mrs Graham and Mrs Orr after marriage were validly made by the trustees under the powers of the trust.

I accordingly think that we should answer the first question to the effect that all the payments made to the married daughters on and after their respective marriages fall to be deducted from their respective shares of the residue.

As regards the question whether interest should be charged on these payments, and if so, at what rate?—I think that as regards the payments made after marriage the position of matters was this. These were unauthorised payments made by the trustees out of the trust funds. The primary claim therefore would be by the beneficiaries against the trustees to replace these funds. But the trustees having made the payments in perfect *bona fides* would, I think, only have been liable to replace them with such interest as would presumably have been received upon the money by the trust if it had not been so misapplied. The daughters to whom the payments were made would have been bound to relieve the trustees to that extent only, and I therefore think that only such interest should now be charged as the trust funds were earning at the time, which I suppose may be taken at 3½ per cent.

With reference to interest on the advances of £1000 each made to the three daughters on their marriages, the deed directs that such advances shall be deducted from the child's share of the residue, but it does not direct that any interest shall be charged thereon or deducted, and I do not think that it was the truster's intention that interest should be charged. I think, therefore that no interest falls to be charged in respect of these advances.

The second and third questions were withdrawn, and what I have now said dis-

poses of the first and fourth questions.

LORDS M'LAREN, KINNEAR, and the LORD PRESIDENT concurred.

The Court pronounced this interlocutor—

"In answer to the first question, Find and declare that in framing a scheme for the division and payment of the estate, the payments made to the married daughters on and after their respective marriages fall to be deducted from or imputed as part of their respective shares of residue as payments already paid to account, and that interest falls to be charged against them upon the said payments, in so far as made after marriage, from the respective dates thereof, but that no interest falls to be charged upon the payments of £1000 each to the married daughters on marriage: Find and declare further, in answer to the fourth question, that interest is chargeable at the rate of four per centum per annum: Authorise the expenses of all the parties to the case to be taken out of the trust funds," &c.

Counsel for the First Parties—Gillespie. Agents—A. P. Purves & Aitken, W.S.

Counsel for the Second Parties—Comrie Thomson—Cook. Agents—W. & J. Cook, W.S.

Counsel for the Third Parties—C. S. Dickson—Deas. Agents—A. P. Purves & Aitken, W.S.

Counsel for the Fourth Party—Guthrie—Ure. Agents—Simpson & Marwick, W.S.

Tuesday, July 19.

FIRST DIVISION.

W. MORRISON & COMPANY, LIMITED, PETITIONERS.

Company—Reduction of Capital—Confirmation of Resolution to Reduce—Replacing of Lost Capital—Incompetent Procedure—Companies Act 1862, *secs.* 9 *and* 19—*Companies Act* 1877, *secs.* 3 *and* 4.

The Court *refused* to confirm a special resolution of a joint stock company, which purported to reduce the capital of the company, but which really only reduced the amount paid up upon each share with the view of thereby replacing certain capital which had been lost.

Upon 14th May 1892 W. Morrison & Company, Limited, printers and publishers, Hawick, presented a petition to the First Division of the Court of Session under the Companies Act 1867, sections 9 and 19, and the Companies Act 1877, sections 3 and 4, praying the Court, after due intimation and advertisement, "to pronounce an order confirming the reduction of capital resolved on by special resolution of 23rd March 1892."

The petitioners set forth that "by the memorandum of association it was declared that the capital of the company was £2000 sterling, divided into 2000 shares of £1 each, 1000 of which we recalled 'founders' shares,' and the others 'ordinary shares.' All the shares into which the capital of the company was divided have been issued. The sum of £1 has been paid up on each share issued. Since its incorporation the company has carried on the business for which it was formed. It has been found necessary to reduce the capital of the company in consequence of the price paid by the company for the business of William Morrison & Company, printers and publishers, Hawick, having been at least £500 in excess of the real value of the concern, and of the original capital of the company having thus been lost to the extent of £500. With the object mentioned in the last paragraph, the company accordingly, of these dates, March 8th 1892, and March 23th 1892, passed and confirmed the following special resolution:—'That the following article be added to the articles of association—The company shall have power, by special resolution, to modify the conditions contained in its memorandum of association, so as to increase or reduce its nominal or paid-up capital, or to reduce the amount paid up in the nominal capital;' and of these dates, March 23rd 1892, and April 7th 1892, passed and confirmed the following special resolution—'Being satisfied that the price paid by the company for the business of William Morrison & Company, printers and publishers, Hawick, was at least £500 in excess of the real value of the concern, and that the original capital of the company has thus been lost to the extent of £500, it is hereby resolved to modify the conditions contained in the company's memorandum of association to the effect of reducing its paid-up capital from £2000 to £1500 as follows, viz.—1000 founders' shares of £1 each, fully paid up, to 1000 founders' shares of £1 each, with 15s. per share paid up; and 1000 ordinary shares of £1 each, fully paid up, to 1000 ordinary shares of £1 each, with 15s. per share paid up. And the said paid-up capital is hereby declared to be reduced accordingly.'"

Upon 1st June 1892 the Court remitted to Mr Charles B. Logan, W.S., to inquire and report as to the regularity of the proceedings, and the reasons for the proposed reduction.

Upon 14th July 1892 Mr Logan reported, *inter alia*, as follows—"The effect of the above resolution, [viz., the resolution to reduce, set forth *supra*,] would be that instead of the whole capital of £2000 being held to be fully paid up as at present, only £1500, or 15s. per share, would be deemed to be paid up, the remaining £500 of the paid-up capital being cancelled or written off as paid up, but revived as uncalled capital, with the sum of 5s. per share on the whole shares remaining uncalled. This would imply not only a reduction of the present capital, which is competent, but the creation, in an irregular manner,