with the ordinary course of the business in which the company is engaged.

Now, it distinctly appears that the directors and managers of this mutual association desired to insert as a term of their policies the condition that the ships insured should only be covered to the extent of four-fifths of their total value; and I cannot doubt that that was a legal and effectual condition to be inserted in the policies to be effected by the company in such a case, because it had the effect of leaving a portion of the vessel uninsured, and giving to the shipowner a stronger inducement to have his vessel in a seaworthy condition, and to be careful in his selection of the master and crew in order that he might be kept safe from loss. Now, if this policy had contained a clause providing as a condition of the insurance that the ship should be to the extent of one-fifth uninsured, I hardly conceive that any question could have been raised as to the validity of that condition; and if the pursuer had in that case insured the vessel to its full value, it would have been impossible for him to recover. But then it is said that because we do not have the condition in express words, but only in the shape of rules in the articles of association, we are entitled to inquire whether this particular article was so adopted by the association of underwriters as to make it an article of association—a term of the constitution of the company itself. If the company had proposed to insure the pursuer's vessel to an extent exceeding four-fifths of its value, the question which I have proposed would have been tabled for consideration. The question then would have been, whether the contract was legal, or whether the managers of the company had not exceeded their powers in granting a policy under conditions which were forbidden by the articles of association. In such a question it would have been right to consider whether that article should not have been passed. But no one has said, nor can it be said, that it was illegal or unconstitutional of this association to grant policies containing the conditions in question, and therefore it appears to me that there is no materiality at all in the inquiry whether the resolution so passed was part of the articles of association of the company. Of course, if the meaning of the contract contained in this policy, as averred, was not that this particular article 67 was embodied, but that the pursuer insured on this condition that he was to be bound by any articles which the company from time to time might pass, then the question as to the validity of the article would arise. But no sensible person ever would insure on such terms, or terms which would put it in the power of the company to cut down his insurance by passing a *post facto* resolution. Therefore I take it that everyone who insures in terms of articles means to insure in terms of what are represented and purport to be the articles existing at the time. And those articles are referred to not as articles but as conditions of the policy, and for that purpose only are to be treated as part of the policy.

It appears to me that the pursuer cannot recover if he agreed that he should keep his vessel to the extent of one-fifth uninsured. I therefore am of opinion that the interlocutor of the Lord Ordinary is right, and should be affirmed.

The LORD PRESIDENT concurred.

The Court adhered.

Counsel for the Pursuer—Sol.-Gen. Asher, Q.C. — Watt. Agent — Robert Denholm, S.S.C.

Counsel for the Defenders—C. S. Dickson —Salvesen. Agents — Beveridge, Sutherland, & Smith, S.S.C.

Tuesday, February 21.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

GRANT *v.* MORREN AND ANOTHER (GRANT'S EXECUTORS).

Succession—Testament—Words Importing a Bequest of Heritage—Titles to Land Consolidation Act 1868 (31 *and* 32 *Vict. cap.* 101), *sec.* 20.

A testator died in 1890 without issue, leaving a testament executed in that year, in which he nominated his wife and another "to be my joint executors and administrators, with full power to them to intromit with my whole estate and executry of every description, . . . and generally to do everything in the premises competent to an executor." Then, after certain legacies, there came this clause—"And whatever residue there may be of my said means and estate falling under this testament, I ordain the same to be paid to my wife Elizabeth Grant, for her own absolute property, whom I hereby appoint to be my residuary legatee."

The estate comprised heritage and moveables, but the latter scarcely covered the debts, expenses, and legacies. The heir-at-law sued for a declarator that he was entitled to the heritable estate.

Held (Lord Adam *diss.*) that the deed did not import an intention on the part of the testator to bequeath his heritable estate to his widow, and that the heritage, not being carried by the testament, fell to the heir-at-law.

Observations on section 20 of the Titles to Lands Consolidation Act 1868 in regard to the words *sufficient* under it to carry heritage.

William Grant, 27 Nelson Street, Huntly, died without issue, but survived by his widow, on 6th September 1890, leaving the following settlement, dated 10th March 1890—"I, . . . do hereby make and appoint Elizabeth Grant, my wife, and James Smith Grant Morren, slater, to be my

joint executors and administrators, with full power to them to intromit with my whole estate and executry of every description, to give up inventories thereof, to confirm the same, and generally to do everything in the premises competent to an executor: Declaring always that the said Elizabeth Grant and James Smith Grant Morren shall be accountable to the residuary legatee hereinafter named for their actings in virtue hereof, after payment of all my lawful debts, deathbed and funeral charges, the necessary expenses to be laid out in confirming and receiving my said estate and executry, and the legacies hereinafter to be paid:" Provision was made for legacies amounting to £168: "And whatever residue there may be of my said means and estate falling under this testament, I ordain the same to be paid to my wife Elizabeth Grant, for her own absolute property, whom I hereby appoint to be my residuary legatee: And I consent to the registration hereof for preservation.—In witness whereof, &c. (Signed) WILLIAM GRANT." Then follow the names and designations of the testamentary witnesses.

The whole estate of the deceased was as follows:—

1. Heritable property, consisting of cottages and garden ground in Nelson Street, Huntly, valued at		£250	0 0
2. Personal property—			
Amount of deposit-receipt with Union Bank of Scotland, Limited	£190	0	0
Loan to David Murray, farmer, Kenmore	40	0	0
Debt due to deceased by do. .	20	0	0
Furniture, valued at . . .	10	0	0
	£260	0	0
From which deduct debts due by the deceased and funeral expenses	98	0	0
Balance,	£162	0	0

The balance of the personal estate was scarcely sufficient to meet the legacies under the testament.

James Grant, farmer, Drumbulg, Gartly, the only brother and heir-at-law of the deceased William Grant, brought this action of declarator, &c., against Mrs Elizabeth Grant, widow of the said William Grant (who died during the currency of the action), and James Smith Grant Morren, as executors and administrators appointed by the said testament, *inter alia*, to have it found that the pursuer, as heir-at-law of his brother, or alternatively, of his father, had the only good and undoubted right and title to the heritable subjects above described, and that the defender was bound to remove therefrom, and to count and reckon for his intromissions with the rents.

The defender stated that (Ans. 3) "the settlement was prepared by the Rev. Adam Semple of Huntly on the instructions of the deceased, and with the object and intention of leaving all that the deceased possessed to his widow, and in particular the said heritable property, which the deceased intended should continue to be a home and residence for his widow. This intention he expressed to the said Rev. A. Semple and others at the time. . . . Mrs Grant had no means of subsistence other than what was left to her under her husband's testament. (Ans. 4) Mrs Grant occupied part of the subjects till her death on 15th February 1892."

The pursuer pleaded—"(1) The right to the said subjects and others being vested in the pursuer as heir-at-law of the deceased James Grant and William Grant, he is entitled to decree in terms of the first, second, and third conclusions of the summons."

The defender pleaded—"(2) The right to the said subjects and others being vested in the defender as executor and trustee of the deceased William Grant, decree of absolvitor should be pronounced, with expenses."

On 29th June 1892 the Lord Ordinary (STORMONTH DARLING) gave decree in terms of the first declaratory conclusion of the summons.

"*Opinion.*—The question here is, whether a small heritable property in the town of Huntly was carried by the last will and testament of the late William Grant dated 10th March 1890? If not, the pursuer is entitled to it as his only brother and heir-at-law.

"Grant died on 6th September 1890, leaving a widow but no family. The widow has died since this action was raised.

[*After quoting the essential portions of the will*]—"The testator left some moveable estate, but the parties admit that it was no more than sufficient to meet debts and legacies. If one were at liberty to speculate from that circumstance as to his probable intentions, there would be strong reason for supposing that he meant to leave his heritable property to his wife. But the construction to be put on the will must depend on its own terms.

"Mr Campbell, for the defender, while necessarily admitting that the will was taken from a style adapted to moveable estate, argued that it contained some significant departures from that style, indicating an intention to convey something more. He founded, I think, on three such departures, but I have compared the document with the first style of a testament in the Juridical Styles, vol. ii., p. 565, and I find that there is only one variation (though no doubt an important one) in the operative part of the deed. It is that in giving power to the executors to intromit the will says, 'with my whole estate and executry of every description,' while the style-book says 'with my whole moveable estate and executry of every description.' There is nothing else in the deed which can possibly be founded on as indicating an intention to convey heritage. The question therefore comes to be, is that enough? I am of opinion that it is not.

"I fully grant that the word 'estate' is comprehensive enough to cover heritage. But it is open to construction from other parts of the deed, and if these show that it is used in a limited sense, it must be read in that limited sense. Now, the features

in this deed which point to a limited construction are these. The word occurs in a nomination of executors, with instructions as to the estate to which right is given by that nomination—that is, executry estate. All the other directions to the executors (as to giving up inventories and the like) are appropriate only to executry estate. There is no direction to sell or realise, but only an implied direction to incur expense 'in confirming and receiving my said estate and executry.' Lastly, the residue is described as 'whatever residue there may be of my said means and estate falling under this testament' (which seems to imply that the testator had other estate not falling under the testament), and it is to be 'paid' to the residuary legatee. These seem to me stronger considerations in favour of reading 'estate' as 'moveable estate' than those which led the majority of the First Division in *Urquhart* v. *Dewar*, 6 R. 1026, to decide that the will did not carry heritage. *Campbell* v. *Campbell*, 15 R. 103, was another case where a nomination of executrix, coupled with a bequest of 'my whole means and estate to her as executrix foresaid,' was held not to carry heritage; and I think that the case of *Macleod's Trustee* v. *M'Luckie*, 10 R. 1056, in which heritage was held to be conveyed by a nomination of 'sole executor and trustee,' coupled with a direction to 'my trustee to sell the remainder of my property, wherever situated,' and to divide it amongst the beneficiaries, is instructive by way of comparison.

"It ought, I think, to be borne in mind that the 20th section of the Titles Acts, which made it possible to convey heritage by words which, if used with regard to moveables, would be effectual to carry moveables, was not intended to substitute conjecture for reasonable certainty derived from the language of the will itself, but in every case requires, as the postulate of its application, that there shall be words used 'with reference to' the lands said to be conveyed. The words need not be technical, but I think it is not too much to ask that they shall be fairly unambiguous. I cannot find such words in this will. The language, viewed as a whole, seems to me appropriate to moveables, and to moveables alone. I cannot believe that if the testator, assisted as he was by educated though non-professional advice, had really wished to convey his heritable estate, he would have left his meaning to lurk under a single vague phrase when it would have been so easy to make it plain."

The defender reclaimed and argued—Section 20 of the Titles Act 1868 was satisfied if the will as a whole showed that the granter intended to pass his whole estate. "My whole estate and executry" was a general and exhaustive phrase, 'executry' being suitable to moveables, and 'estate' applying in its primary force to land rather than to moveables, *per* Lord Mure in applying *Urquhart* v. *Dewar*, June 13, 1879, 6 R. 1026. In that case there was a nomination of an executor only, and it was held that there was no gift of estate other than executry estate; but here the nomination was of "executors and administrators," which suggested that the testator meant to add something to the word "executor," as in *Macleod's Trustees* v. *M'Luckie*, 10 R. 1056. "Administrator" had no technical meaning in Scots law such as it had in English law. There was no limiting power on the word "intromit;" it was equally applicable to heritage and to moveables. The words of direction "I ordain the same to be paid" were not sufficient to cut down the primary meaning of the other expressions in the will. There was admittedly a deficiency in the personal estate after payment of the funeral expenses, debts, and legacies; and that suggested that the deceased intended his widow to have the heritage.

The pursuer argued—There was no word used in the will that came near an inclusion of heritage except the word "estate." The cases went to show that the construction of that term was to be gathered from the context in which it occurred in the instrument, and if that was not sufficient the intention of the testator was to be considered; both these tests were in favour of the pursuer's contention here. Authorities cited—*Pitcairn* v. *Pitcairn*, February 25, 1870, 8 Macph. 604; *Edmund* v. *Edmund*, January 30, 1873, 11 Macph. 348; *Ford's Trustees* v. *Ford*, July 18, 1884, 11 R. 1129; *Campbell* v. *Campbell*, November 30, 1887, 15 R. 103.

At advising—

LORD PRESIDENT—I agree with the Lord Ordinary.

The 20th section of the Act of 1868 enables anyone to dispose of heritage by testament, if words of bequest are used, as the statute expresses it, "with reference to such lands." Now, the decisions seem to show that it is not necessary that words should be used either naming the lands intended to be disposed of or even descriptive of heritage as distinguished from moveables. Again, it is nothing against the efficacy of the instrument to dispose of heritage that it should be in the form and expression of a testament, for that is contemplated by the statute. But what is necessary is that, whatever words are founded on as disposing of heritage, it shall be clear that those words refer to heritage, and when neutral or equivocal words are used the intention will be determined by the context. The present case is, so far as the structure of the instrument goes, that of a pure testament. It begins with an appointment of two persons to be joint executors and administrators, then follows what, structurally, are clauses ancillary to this appointment, giving powers, and those are summed up by the words "and generally to do everything in the premises competent to an executor." Now, one of the powers thus summed up is "power to intromit with my whole estate and executry of every description," and the question is whether the word estate is there used with reference to heritage. I cannot think that it is. The words used are quite appropriate to an estate of moveables, the word "intromit" is at least not

highly appropriate to heritage, and the juxtaposition in which the word "estate" occurs seems to me to determine its effect as not referring to heritage. Again, in the only other part of the will where the word "estate" occurs, the residue of the "estate" is to be "paid." The only other word in the whole will which helps the defender, viz., "administrators," seems to have any importance which it might otherwise possess extracted from it by the limiting words about powers "competent to an executor," on which I have already commented. The conclusion I come to is that this will contains nothing to show that it refers to lands.

LORD ADAM—The question in this case is whether both the heritable and moveable estate left by William Grant were carried by his will, or the moveable estate only.

William Grant had no children, but he left a widow. That she was a *persona predilecta* is clear, because he nominates her as an executor and sole residuary legatee.

The heritable estate consists of two or three cottages, in one of which William Grant and his wife lived.

The moveable estate, I understand, is just about sufficient to pay the debts, legacies, and expenses. The widow died during the currency of this action, but the result of the pursuer's claim, if successful, is that the widow would have been left penniless, and turned out of the house in which she had lived—a hard case no doubt, and one, it may be conjectured, which the testator could not have intended. But as the Lord Ordinary says we have nothing to do with conjectures, our duty being to gather the intentions of the testator from the terms in which he has expressed his will, and not otherwise. At the same time, it is legitimate, in construing his will to take into consideration the actual state of his affairs, which was presumably known to himself, and to which the directions of his will were intended to apply.

Now, the testator begins by appointing Elizabeth Grant, his wife, and James Smith Grant Morren "to be my joint executors and administrators, with full power to them to intromit with my whole estate and executry of every description."

This appears to me to be the most important clause in the will, because it is the clause which sets forth the subject-matter on which the will is to operate—and that is described as being "my whole estate and executry of every description." It would be difficult to find more comprehensive words. That the word "estate" compretends heritable as well as moveable estate cannot I think be disputed. It appears to me, therefore, that in construing this deed it must receive that meaning and effect, unless it can be clearly shown from the context that it was intended to apply to moveable estate only.

But if we are to read the will as applying to moveable estate only, as the pursuer contends, then no effect would be given to the word "estate" at all, because in that view the deed would read that power was given to his executors and administrators to intromit with his whole moveable estate and with his whole executry—which is but repeating the same thing twice over. The ordinary rule of construction—that we are to give meaning and effect, if possible, to every word used—would rather lead to the conclusion that the testator was using the word as applicable to heritage alone, and that the true construction of the phrase "my whole estate and executry," is just my whole heritable and moveable estate.

No doubt it may be shown from the context that the word "estate" was used in the limited sense of being applicable to moveable estate alone. But we are here met with the important fact that the testator has appointed Mrs Grant and Mr Morren not executors only but also administrators. I do not think that they are appointed administrators merely *qua* executors. I think, as the Lord President said in the case of *Macleod's Trustees* v. *M'Luckie*, where the nomination was as sole executor and trustee, that the presumption is that they were appointed for other duties as administrators than those laid upon them as executors. But administrators are just trustees, and herein lies the distinction between this case and the cases of *Urquhart* v. *Campbell*, referred to by the Lord Ordinary. In these cases the executors were executors only. They had no power or title to administer except as executors, and it followed that the estate which they were appointed to administer was presumably executry estate only.

But it is said that the only powers of administration specified in the deed are those applicable to administration as executors—for example, powers are given to them to give up inventories, to confirm the same, and to do everything competent to an executor, while none are given applicable to the administration of heritable estate, such as a power of sale—and reference is made by the Lord Ordinary by way of contrast to the case of *Macleod's Trustees*.

That such considerations may have great weight in some cases is not to be disputed, but it is a question of circumstances, and I do not think that they have much weight in this case, for this reason, that the widow was the sole residuary legatee; and assuming the heritable estate to fall within the trust, the only act of administration contemplated by the testator was that his administrator should hand it over to her.

With regard to the moveable estate of course it was different. That estate had to be realised and the debts and legacies paid out of it, and the relative powers—directions—are therefore set out in the deed. It may be observed that these directions are addressed to them as executors—but as regards the residue the direction is general. The testator simply directs the same to be paid over to his wife as her absolute property.

No doubt the direction is to "pay" over the residue—a word which is applicable to moveable estate rather than to heritable. But presumably the testator contemplated

that the residue would be a mixed estate, partly heritable and partly moveable, and I do not think that the use of this word is of much materiality.

The circumstances, accordingly, founded on by the pursuer, as indicating an intention that this will was to apply to moveable estate only, appear to me to be insufficient to overcome the fact that the testator has nominated executors and administrators, and in effect conveyed to them his whole estate and executry, which in my opinion includes his heritable estate, for administration. I therefore differ from the Lord Ordinary, and I think that the error into which his Lordship has fallen is that he has omitted to notice that Mrs Grant and Mr Morren were appointed administrators as well as executors, and has failed to take that fact into consideration.

LORD M'LAREN—In all cases like the present it should be kept in view that the object of the 20th section of the Titles Act was to prevent the intentions of testators being defeated by our rule which prevented a proprietor from transmitting heritage otherwise than by words of *de præsenti* conveyance. After much dispute it had been settled that heritable property could only be disposed of in two ways, either by using the word "dispone," or by granting a procuratory for resigning the lands for new infeftment. The new legislation on this matter introduced by the Titles Act of 1868 was to the effect that where a testator made a will giving and granting his estate, that should take effect according to the ordinary meaning of the words. A will giving and granting estate in general terms would be subject to the provisions of the 20th section; it would be a case of using, with regard to heritage, words which would in any case be sufficient to pass moveables, and it would take effect on both.

The settlement in this case is not a will in the ordinary form; it is a testament proper—that peculiar form under which a testator, by naming an executor, disposes of his estate. The effect of such a testament as constituting a trust in favour of the next-of-kin is a purely statutory effect, depending on a statute of the Scottish Parliament which made it a trust to the extent of two-thirds of the estate, and in the Moveable Succession Act, which constitutes it a trust to the full extent. It is not to be supposed that in framing a will in this form the testator had heritage in view. If the maker of a testament introduces the words "heritable estate" or equivalent words, I should give effect to them; but if he speaks of "estate" only, I should take it that he refers only to such estate as can be passed by a proper testament. I therefore agree with your Lordship in the chair.

LORD KINNEAR—It is very difficult in this case to know what the testator meant, and I think he had no clear idea in his own mind. I concur with your Lordship in the chair and with Lord M'Laren. I desire to add that I do not think our judgment decides anything else than that the will, taking its whole effect, carries moveables only. It would not rule other cases unless the settlement were in exactly the same terms.

The Court affirmed the interlocutor of the Lord Ordinary, with expenses.

Counsel for Defender and Reclaimer—Cullen. Agents—J. & A. F. Adam, W.S.

Counsel for Pursuer and Respondent—Kemp. Agents—Dove & Lockhart, S.S.C.

Wednesday, February 22.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

NORTH BRITISH RAILWAY COMPANY *v.* R. & J. GARROWAY.

Process—Diligence and Recovery of Documents from Parties not in the Action—Limitation of Specification—Railway.

A firm of chemical manufacturers being sued by a railway company for a balance alleged to be due for the carriage of goods, averred that the company had, in breach of a traffic arrangement between the parties, given preferential rates to rival traders, and charged higher rates than were exacted by competing railway routes. They asked a diligence to enable them to recover or examine the business books of the competing companies, and invoices, receipts, &c., of certain rival traders. The companies compeared by minute, and stated objections to producing in terms of the specification lodged by the defenders. *Held* that the party asking a diligence must limit his specification to what is strictly necessary, and that havers are not bound in the first instance to show that special prejudice will be occasioned to them by the recoveries.

Form in which a restricted specification was allowed by the Lord Ordinary.

By agreement, dated 14th and 21st October 1880, the North British Railway Company leased for fifteen years a piece of ground adjoining the Camlachie Station to Messrs R. & J. Garroway, chemical manufacturers, Camlachie, Glasgow, for the purpose of a goods' siding, and stipulated that "the whole of Messrs Garroway's railway traffic to and from their works shall be conveyed by the routes of the company, at the rates in force from time to time, to and from Camlachie Station, and not higher than the rates in force by any competing railway route." By another agreement between the same parties, dated 28th January and 6th February 1886, the lease of the siding was extended for thirty years from Martinmas 1885, and the following traffic arrangement was entered into—"(Fourth). The whole of the said Messrs R. & J. Garroway's railway traffic to and from