sons instituted beneficiaries. But the gift is not so expressed; it is an independent gift to all the testator's grandchidren of the liferent use of the residue of his estate as it should arise; and in my opinion it follows that on the death of one of the children the heritable and moveable estate enjoyed by him or her would pass to the grandchildren collectively. The testator no doubt adds the words *per stirpes;* but these words only regulate the mode of enjoyment of the estate by the grandchildren *inter se.* For example, if one of the surviving children should leave two or more children and the other remain unmarried, the daughter's children would take one-half of the vacant share among them, and Mr Adair would take the other half.

Collecting these results, it follows, in my opinion, that we should answer the first question in the affirmative. It is then unnecessary to answer the second question. The third question will be answered in the negative, the fourth question (as amended) also in the negative. I do not think we can give any answer to the fifth question, because we do not at present know how the fee may be affected by the Entail Amendment Act 1868. In answer to the sixth question (as amended) and the seventh question, we may find that on the death of each of the liferenters the share liferented falls to be held by the first party as trustee in terms of the will for behoof of the fourth party, and for any other grandchildren of the trustee who may come into existence *per stirpes* in liferent, but subject as regards *nascituri* to such claim as may be competent to them under the provisions of the Entail Amendment Act 1868.

The LORD PRESIDENT and LORD ADAM concurred.

LORD KINNEAR not having been present at the hearing gave no opinion.

The Court answered the questions in the case in accordance with LORD M'LAREN'S opinion.

Counsel for the First Party — W. J. Robertson. Agents—Nisbet & Mathieson, S.S.C.

Counsel for the Second Party — C. D. Murray. Agents — Campbell & Smith, S.S.C.

Counsel for the Third Party — Taylor Cameron. Agents—Nisbet & Mathieson, S.S.C.

Counsel for the Fourth Party—Fleming. Agents—Guild & Guild, W.S.

Thursday, July 4.

SECOND DIVISION.

STILLIE'S TESTAMENTARY TRUSTEES *v.* STILLIE'S MARRIAGE-CONTRACT TRUSTEES.

Husband and Wife—Marriage-Contract—Annuity Provided to Wife by Marriage-Contract—Larger Alimentary Annuity Provided by Husband in Will to be in Satisfaction of Marriage-Contract Annuity—Power of Wife to Discharge Marriage-Contract Annuity—Denuding—Succession—Trust.

By antenuptial contract of marriage, to which the husband and wife alone were parties, the husband bound himself to provide for his widow an annuity of £100 during all the days and years of her life, but in the event of the widow entering into a second marriage it was provided that the annuity should be restricted to £50, and that this restricted annuity should be alimentary and not affectable by her debts or deeds or the debts or deeds of her husband. By his trust-disposition and settlement the husband directed his trustees to pay his widow an annuity of £360, restrictable in the event of a second marriage to £120, and this annuity, both original and restricted, was declared to be purely alimentary, and to be in place and in full satisfaction of the provision conferred on the wife by the marriage-contract.

The husband died survived by his wife and leaving no issue. After his death the funds in the hands of his testamentary trustees were insufficient to afford payment to the widow of the annuity of £360, and the funds contributed by him to the marriage trust and in the hands of the marriage-contract trustees were more than sufficient to meet the annuity of £100.

Held that the marriage-contract trustees were bound, with consent of the widow, to hand over the funds in their hands to the testamentary trustees, so that payment of the larger annuity might be made to the widow.

Elliott's Trustees v. *Elliott,* July 13, 1894, 21 R. 975, *distinguished.*

By antenuptial contract of marriage dated 30th June 1857 between Thomas Logan Stillie and Ann Bell, Mr Stillie bound and obliged himself and his heirs, executors, and successors "to content and pay to the said Ann Bell, his promised spouse, in case she survives him a free yearly jointure or an annuity of £100 sterling during all the days and years of her life she shall survive the said Thomas Logan Stillie, restrictable in the event after mentioned, payable half-yearly at two terms in the year, Whitsunday and Martinmas, by equal portions, in advance, commencing the first term's payment at the first term of Whitsunday or Martinmas next ensuing after the said Thomas Logan Stillie's death for the half-

year succeeding: . . . Provided always as it is hereby expressly provided and declared, that in the event of the said Ann Bell surviving the said Thomas Logan Stillie and entering into a second marriage, then the said jointure or annuity shall be, and the same hereby is limited and restricted to a jointure or annuity of £50, payable at two terms in the year, Whitsunday and Martinmas, by equal portions, in advance, commencing the first term's payment thereof at the first of these terms which shall happen after such second marriage for the half-year succeeding, and so on thereafter: Declaring that the said restricted jointure or annuity after such second marriage shall be purely alimentary to the said Ann Bell, and shall not be alienable or assignable by her or affectable by her debts and deeds or attachable by the diligence of her creditors, and shall be exclusive of the *jus mariti* and right of administration of any second or future husband she may marry, and not affectable by the debts or deeds of such husband or attachable by the diligence of his creditors in any manner of way." . . . Mr Stillie also bound himself and his foresaids to pay to his wife in the event of her survivance £50 for mournings, and £12 per month for aliment from the date of his decease till the first term's payment of the annuity became due. He also assigned to his wife in the event of her survivance the whole household furniture and plenishing, and wines and liquors in private use at the time of his death. These provisions were accepted by Mrs Stillie as in full of her legal rights. There were also certain provisions in favour of the children, if there should be children, of the intended marriage. In security of the foresaid provisions to his wife and children Mr Stillie assigned certain moveable estate to the marriage-contract trustees.

There were no children born of the marriage.

On 5th June 1883 Mr Stillie died, survived by his widow, and leaving a trust-disposition and settlement dated 26th March 1864, by which he conveyed his whole estate, heritable and moveable, to trustees for the trust purposes therein mentioned. By this deed he directed his trustees, in the third place, in the event of his wife surviving him, to deliver over to her the whole household furniture and plenishing and wines and liquors for private use at the time of his decease; "as also to make payment to her during all the days of her lifetime after my decease (but restrictable in the event after mentioned) of a free yearly jointure or annuity of £360 sterling, exempted from all duties, taxes, and deductions whatever, payable at two terms in the year, Whitsunday and Martinmas, by equal portions, in advance, beginning the first term's payment thereof at the first of these terms which shall happen after my decease for the half-year succeeding said term; . . . as also to make payment to my said wife of such a sum as, calculated at the rate of £360 per annum, will correspond to the period from the day of my decease until the first termly payment of said annuity becomes due in name of interim aliment, and also to pay to her the sum of £70 for mournings, payable the said interim aliment and sum for mournings at the expiry of one month after the date of my decease, . . . and also to relieve her of all house-rent, taxes, and servants' wages up to the first term of Whitsunday or Martinmas after my decease; but declaring always, as it is hereby expressly provided and declared, that if she shall enter into a second marriage the said annuity of £360 shall be, and the same is hereby restricted to an annuity of £120 from and after such second marriage, payable the said restricted annuity at the terms, in the manner, and with interest, as before expressed in regard to the said annuity of £360, commencing the first term's payment of the said restricted annuity at the first term of Whitsunday or Martinmas that shall happen after such second marriage." . . .

The truster, in the fourth place, directed his trustees to hold the residue of his estate for his children and their issue; and, in the fifth place, he directed his trustees, in the event of his leaving no children (which event happened), after implementing and fulfilling or providing for the due implement and fulfilment of the previous purposes of the trust—1st, to pay certain legacies, and 2nd and 3rd, to pay the income and capital of the residue, if any, as therein directed. The truster further specially provided and declared that the foresaid annuity, original and restricted, before provided to his wife should be purely alimentary to her, and not alienable or assignable by her or affectable by her debts or deeds, or attachable by the diligence and execution of her creditors, and that the restricted annuity should be exclusive of the *jus mariti* and right of administration of any husband she might marry, and not affectable by his debts or deeds. He further provided and declared that the provisions to his wife should be in full satisfaction of her legal rights, "and in particular shall be in lieu and place of and shall be accepted as in full satisfaction to her of the whole provisions conferred on her by me by the contract of marriage entered into between her and me dated 30th June 1857."

At the date of Mr Stillie's death the funds placed by Mr Stillie in the hands of the marriage-contract trustees in security of the provisions in the marriage-contract amounted to about £3848. The testamentary trustees gave up an inventory of his other estate amounting to £2571, 11s. 3d., exclusive of the value of the household furniture and plenishing and others which fell to Mrs Stillie. The income of the whole estate held by the marriage-contract trustees and the testamentary trustees was not sufficient to provide Mrs Stillie with the annuity of £360 conferred on her by the trust-disposition and settlement. After Mr Stillie's death the annuity of £360 was paid in full, the income of the funds held by the two sets of trustees being primarily applied towards meeting the annuity, and any

deficiency being provided out of the capital of the funds held by the testamentary trustees. At December 1899 the funds held by the testamentary trustees had owing to this encroachment on capital become reduced to £119, 11s. 8d., while the funds placed by Mr Stillie in the hands of the marriage-contract trustees owing to appreciation of the investments amounted to about £4014. In these circumstances questions arose as to the future administration of the trusts, and for their settlement a special case was presented for the opinion and judgment of the Court.

The parties to the special case were (1) the testamentary trustees, (2) the marriage-contract trustees, (3) Mrs Stillie, and (4) the legatees under the trust-disposition and settlement other than Mrs Stillie.

The first question was—Are the second parties bound to hand over to the first parties the whole or any part of the marriage-contract funds? There were other questions of law, but they were all withdrawn from the consideration of the Court except one (the third), the decision upon which it is not considered necessary to report.

Argued for the first and third parties—The third party having accepted the provisions in Mr Stillie's trust-deed in her favour, the second parties were bound to hand over to the first parties the whole of the funds in their hands. There being no children of the marriage, the only persons interested in the marriage-contract were Mr and Mrs Stillie. Mr Stillie had consented in his will to the discharge of the provisions in the marriage-contract trust, and Mrs Stillie had also done so by accepting the provisions in the trust-disposition and settlement. The provisions in the testamentary settlement were more favourable to the second party than those in the marriage contract—the annuity being larger, and also being declared alimentary. The marriage having come to an end, and there being no children, the second party was entitled to elect to take her provisions under the will and thus carry out the express wishes of her husband. The case was clearly distinguishable from that of *Elliott's Trustees* v. *Elliott*, July 13, 1894, 21 R. 975. In the present case the annuity under the will was declared to be strictly alimentary, so that the widow's interests, which were the chief concern of her husband as shown by his settlement, could not be jeopardised by her acts or deeds. The marriage-contract was between husband and wife only, while in *Elliott's* case the father of the wife was a party to the contract. The husband here had also in his testamentary settlement specially provided that the provision in that deed was to take the place of the marriage-contract provision, while in *Elliott's* case no mention was made of the marriage-contract in the husband's will.

Argued for the second and fourth parties—During the lifetime of the third party the second parties were bound to retain in their hands the whole of the marriage-contract trust funds. This was rendered necessary because of the provision of an annuity of £50 to Mrs Stillie in the event of her second marriage being declared in the marriage-contract to be alimentary. It was not within the power of the husband, even with the consent of his wife, to revoke an alimentary liferent provided by an antenuptial marriage-contract—*Elliott's Trustees, supra.*

At advising—

LORD TRAYNER—The parties have withdrawn from our consideration all the questions appended to this special case except the first and third.

I am of opinion that the first question should be answered in the affirmative. The state of the facts is this. By his contract of marriage the late Mr Stillie bound himself to provide for his widow an annuity of £100 during all the days and years of her life. That annuity is not declared alimentary, and could therefore have been disposed of by Mrs Stillie as she pleased. There was no restriction whatever placed upon her disposal of it. But the contract provided that in the event of Mrs Stillie entering into a second marriage, the annuity should be restricted to £50, and that restricted annuity was declared to be purely alimentary and not affectable by her debts or deeds, or the debts and deeds of her husband. By his trust-settlement Mr Stillie directed his trustees to pay his widow an annuity of £360, restrictable in the event of a second marriage to £120, but this annuity, whether restricted or not, is declared to be purely alimentary.

The funds in the hands of the testamentary trustees are insufficient to afford payment to the widow of the annuity of £360, and the funds in the hands of the marriage contract trustees are more than sufficient to meet the annuity of £100. In these circumstances the testamentary trustees desire the marriage-contract trustees to hand over the funds in their hands, to the end that payment of the larger annuity may be made to the widow, and the widow consents to this being done. If this is done the widow surrenders an annuity of £100 which she could sell or renounce for one of a larger amount, of which she cannot dispose, and of which by her own deeds she cannot be deprived. The widow gains an advantage by the change both in the amount of the annuity and in its protected character, and her advantage or benefit was the matter which both by the marriage-contract and trust-settlement the parties thereto respectively had most in view. The only difficulty which the marriage-contract trustees suggest is, that in the event of Mrs Stillie entering into a second marriage they may be called on to pay the restricted alimentary annuity provided in that case to Mrs Stillie. The probability of any such event is remote, as we are informed that Mrs Stillie (who has been a widow for more than eighteen years) is now about sixty-seven years of age. But dealing with matters as they stand, Mrs Stillie is willing to surrender her right (as she competently may) to the annuity of £100 provided to her by the marriage-contract, and to accept instead the

alimentary annuity provided by the trust-settlement. The consent of Mr Stillie to this arrangement may be inferred from what he has done by his settlement, in which it is provided that the annuity there given is to be accepted by Mrs Stillie in full of all her claims under the marriage-contract. In the circumstances, I think she may now elect to take the latter provision. No claim under the marriage-contract would thereafter be competent to her, especially seeing that her election is made after the marriage had come to an end.

[*His Lordship then dealt with the third question*].

LORD YOUNG concurred.

LORD MONCREIFF—It seems to me that the case of *Elliott's Trustees*, 21 R. 975, can be distinguished on the facts. In that case, under the antenuptial contract of marriage (to which the wife's father was a party), she was secured by a trust in an alimentary liferent in the event of her surviving her husband. The husband, who predeceased, left a will by which he bequeathed his whole property absolutely to his wife. He did not in his will make any reference to the marriage-contract.

After her husband's death, Mrs Elliott called on the trustees under the marriage-contract to denude of the trust estate, and to pay it over to her absolutely. The effect of this, had it been done, would have been to render ineffectual the provisions in the marriage-contract for the protection of the wife against the diligence of creditors.

The majority of the Court held that on a sound construction of the husband's will he did not intend to discharge the alimentary liferent in his widow's favour; and I gather further from the opinions of the majority that they were also of opinion that, even if he had expressed an intention to that effect, it was not within his power with the consent of his wife to revoke the alimentary liferent.

If the facts in the present case were identical I should feel bound by that decision; but they seem to me to be essentially different. Under the marriage-contract the second party, the widow, is provided out of her husband's funds in an annuity of £100, to be restricted to an alimentary annuity of £50 on second marriage. The only other persons named in the contract are the children of the marriage; but as there were no children of the marriage the trustees on the widow's death would hold for the husband's representatives.

Now, under the husband's will he bequeathed an annuity of £360 to his wife, restrictable to £120 in the event of a second marriage; but, unlike the case of *Elliott's Trustees*, he declared that the annuity should be purely alimentary and not alienable or assignable or open to the diligence of creditors. Further—and this is another difference—he declared that the provisions in favour of his wife should "be accepted as in full satisfaction to her of the whole provisions conferred on her by me by the contract of marriage entered into by her and me, dated 30th June 1857," thus indicating that he intended to substitute the testamentary provisions for those in the marriage-contract. It will thus be seen that while on the one hand Mr Stillie gave his wife a largely increased annuity he did not free her from the restrictions. In point of fact he made the conditions more stringent, as the £100 annuity under the marriage-contract payable during viduity is not alimentary.

Now, what has happened is this. In order to make up the widow's annuity to £360 the testamentary trustees have practically used up all the trust funds in their hands. On the other hand, the marriage-contract trustees have funds amounting to about £4014. They maintain that they are bound to retain these funds for the purposes of the marriage-contract, that is, to pay to the widow an annuity of £100, reducible to £50, and any surplus income, keeping the capital intact. It is plain that if this is done the widow's total provisions will fall far short of the annuity of £360; and thus the will of the testator will be defeated, while under the marriage-contract there are no third parties for whom the trustees are bound to hold except indeed the husband's representatives, that is, his trustees, the first parties, who hold for the beneficiaries under the will, of whom the widow is the most favoured. The only way in which effect can be given to both deeds is for the marriage-contract trustees to hand over the funds in their hands to the testamentary trustees, who have power, which the marriage-contract trustees have not, to apply the capital to make up the annuity to £360. As this will not involve the abandonment of the restrictions in the marriage-contract, and on the contrary will make the widow's annuity during viduity alimentary, I fail to see what right or interest the second parties have to resist the demand made upon them by the first parties.

The LORD JUSTICE-CLERK concurred in the opinion of LORD TRAYNER.

The Court answered the first question of law in the affirmative.

Counsel for the First Parties——Cowan. Agents—Adam & Sang, W.S.

Counsel for the Second and Fourth Parties — Craigie. Agents — Campbell & Smith, S.S.C.

Counsel for the Third Party — Deas. Agents — Traquair, Dickson, & M'Laren, W.S.