your Lordship has expressed. I regard it as properly intended to meet the case of some question arising while the contract is current, and to compel any question of that sort to be brought to a point and be determined incidentally so as not to interfere with the continuous execution of the contract as a whole. I do not think that it was intended to cover what comes at the end of the contract—the winding up of the relations between the contracting parties and a final settlement. There is no question that the rejection of either the whole machinery contracted for, or of such a large and important part of it as is here in question, raises in effect the matter of final payment. It certainly supports this view, that if Mr Clyde's clients had desired arbitration, instead of resisting it, their tactics would have been simple. They would have demanded a final certificate notwithstanding the rejection, and even though on their own reading of clause 18 they were too late to insist directly on taking the question of rejection to arbitration, and on a final certificate of payment being refused would have gone to arbitration, because, as I read section 5, its proviso as regards arbitration in the case of a disputed certificate for payment, whether interim or final, is not affected by the final clause of section 18.

I therefore agree that the Lord Ordinary has come to a correct conclusion as represented in the interlocutor he has pronounced.

LORD MACKENZIE—The agreement turns upon the construction to be put upon the arbitration clause in the contract. It is very wide in its terms, and there is not room for doubt that the dispute as to whether there was a right to reject the turbine supplied falls within the leading words of the clause. The contention is that there has not been compliance with the proviso. This, according to the defenders, entitles them to absolvitor *de plano*, the pursuers contending, on the other hand, that the clause cannot now be appealed to and that they are entitled to a proof.

Neither of these contentions is in my opinion sound. The proviso is badly expressed. I cannot construe it as meaning that when a dispute has arisen notice must be given within seven days by the party wishing arbitration. The clause does not say so. Nor can I construe it as meaning that if one of the parties takes a step which he is entitled to under the contract, *e.g.*, as here, if he rejects the work under 4 (*a*), then it is to be held there is a conventional acquiescence unless within seven days thereafter the other party disputes his right to do so. This is what the defenders' first contention came to, the result being that the engineer becomes final. A dispute cannot arise between two parties unless there is disagreement. When the engineer of the Powell-Duffryn Company rejected the work, Howden & Company might have either agreed or disagreed with his view. If they agreed there was no dispute. Until they disagreed there neither was, nor could it be deemed that there was, a dispute or difference. It is therefore impossible, in my view, to say that because the defenders did not write within seven days after the 12th of August 1909, on which date a dispute had not arisen, giving the pursuers notice that a dispute had then arisen, therefore recourse cannot now be had to arbitration. There was no dispute until the pursuers wrote on 25th August 1909 saying they could not accept the defenders' right to reject, and by writing the letter they necessarily gave notice of the existence of the dispute within seven days after it arose. The proviso does not seem capable of any very intelligible meaning, but there is not, in my opinion, any reason for construing it so as to render the leading words of the clause nugatory.

The result is that I think the defenders' alternative argument in support of the conclusion reached by the Lord Ordinary should prevail.

The Court adhered.

Counsel for Pursuers (Reclaimers)—Clyde, K.C.—Macmillan. Agents—J. & J. Ross, W.S.

Counsel for Defenders (Respondents)—Morison, K.C.—Crurie Steuart. Agents—Mackay & Young, W.S.

Wednesday, March 20.

SECOND DIVISION.

DRYBROUGH'S TRUSTEES *v.* DRYBROUGH & OTHERS.

Succession—Liferent and Fee—Annuity—Annuitant Born after Date of Deed—Right to Fee—"Held in Liferent"—Entail Amendment (Scotland) Act 1848 (11 *and* 12 *Vict. cap.* 36), *secs.* 47 *and* 48—*Entail Amendment (Scotland) Act* 1868 (31 *and* 32 *Vict. cap.* 84), *sec.* 17.

Held that a share in an annuity, in security of which certain heritable property had been disponed to trustees by an antenuptial bond, was not estate "held in liferent" in the sense of the Entail Amendment (Scotland) Acts 1848 and 1868, so as to entitle an annuitant born after the date of the deed to payment of the fee.

Succession—Accretion—Annuity—Lapsed Share of Annuity—Conditio si sine liberis.

By an antenuptial bond of annuity D bound himself to make payment to trustees of an annuity of £200, disponing certain heritable estate in security, and provided that the trustees should hold the annuity for behoof of his intended wife "and the child or children of our said intended marriage, and the survivors and survivor of them, as an alimentary provision for them." He indicated in later clauses of the bond that the issue of a child were to take their parent's share. D and his wife were survived by three sons. In

a competition between the last surviving son and the issue of a predeceasing son (who had been held entitled to their father's share) as to the share of the third son who had died without leaving issue, *held* (*diss.* Lord Dundas) that the surviving son alone had right to the lapsed share of the annuity.

The Entail Amendment (Scotland) Act 1848 (11 and 12 Vict. cap. 36), section 47, enacts—"Where any land or estate in Scotland shall, by virtue of any . . . deed of trust whatsoever dated on or after the first day of August 1848, be in the lawful possession, either directly or through any trustees for his behoof, of a party of full age born after the date of such . . . deed of trust, . . . such party shall be deemed and taken to be the fee-simple proprietor of such land or estate." . . .

By section 48 of the same Act a similar provision is enacted with reference to land or estate "held in liferent by a party of full age born after the date of" the deed in virtue of which the estate is held.

The Entail Amendment (Scotland) Act 1868 (31 and 32 Vict. cap. 84), sec. 17, enacts —. . . "Where any moveable or personal estate in Scotland shall, by virtue of any deed dated after the passing of this Act (and the date of any testamentary or *mortis causa* deed shall be taken to be the date of the death of the grantor . . .), be held in liferent by or for behoof of a party of full age born after the date of such deed, such moveable or personal estate shall belong absolutely to such party, and where such estate stands invested in the name of any trustees, such trustees shall be bound to deliver, make over, or convey such estate to such party." . . .

A Special Case was presented for the opinion and judgment of the Court by (1) Andrew Drybrough, Edinburgh, trustee under an antenuptial bond of annuity granted by Andrew Drybrough, merchant, Leith, *first party;* (2) Hope Park, S.S.C., Edinburgh, trustee and executor of Andrew Drybrough junior, *second party;* (3) William Charles Drybrough, Manchester, and his pupil children, *third parties;* (4) P. C. Gould, Evansville, U.S.A., executor of the late Robert Drybrough, U.S.A., *fourth party;* (5) John Robert Drybrough, Chicago, U.S.A., *fifth party;* and (6) Ralph M. Drybrough and Frederick W. Drybrough, Evansville, U.S.A., *sixth parties.*

Andrew Drybrough, merchant, Leith, in contemplation of his marriage with Miss Catherine Clark, granted a bond of annuity dated 3rd and recorded 18th June 1862, whereby he bound himself to pay an annuity of £200 a year to trustees and conveyed certain estate in security of the annuity.

The trust purposes were, *inter alia,* as follows—"(*First*) That the said trustees shall in all time coming during the subsistence of the trust hereby created hold the said annuity in trust for behoof of my said intended wife and the child or children that may be born of our said intended marriage, and the survivors and survivor of them, as an alimentary provision for them . . .: (*Second*) During the subsistence of the said intended marriage between me and the said Miss Catharine Clark, the said trustees shall pay over to her, for behoof of herself and the said child or children, the foresaid annuity, and her receipt for the same shall be a complete discharge therefor: (*Third*) In the event of the said Miss Catharine Clark surviving me, then my said trustees shall pay over the said annuity to her while she remains my widow, for behoof of herself and such of our children as shall continue to live in family with her and shall not have been forisfamiliated or otherwise provided for, she, however, having the absolute power of disposal of the said annuity without being answerable to any of her children thereanent: (*Fourth*) In case the said Miss Catharine Clark shall after my death marry a second husband, it is hereby provided and declared that the annuity hereby created in her favour shall be restricted to the sum of £100 per annum, payable at the terms and with interest and penalty if incurred as aforesaid, and in the event of there being a child or children of our said intended marriage, or the issue of such child or children alive at the time, the remaining half of the said annuity shall be paid over or applied by my said trustees to or for behoof of the said child or children, and that in such manner as to my said trustees shall seem most judicious, but in the event of there being no child or children of said intended marriage or the issue of such child or children, the foresaid subjects hereby conveyed in security as aforesaid shall to the extent of £100 be freed and disburdened of the said sum of £100, and my said trustees shall be bound, as by acceptation hereof they bind and oblige themselves, upon that event to execute and deliver a discharge and renunciation to the effect foresaid . . .: (*Fifth*) In case I shall be the survivor of the said intended spouses, there being a child or children of the said intended marriage born and surviving at the time or the issue of such child or children, the said trustees shall pay over the said annuity of £200 to me during my life for the use and behoof of such child or children, or survivors or survivor of them, as shall continue to live in family with me and shall not then have been forisfamiliated: (*Sixth*) In case a child or children shall be born of the said intended marriage and shall survive us or leave issue, the said trustees shall, after the death of the longest liver of me and the said Miss Catharine Clark, pay over the said annuity during the non-redemption thereof equally amongst the said children if there be more than one, and if there be only one such child, and that such one child shall be in right of the foresaid subjects hereby conveyed in security, the said annuity shall upon the decease of the longest liver of me and my intended spouse cease and determine, and the foresaid subjects shall belong to such one child freed and disburdened of the said whole annuity, and such one child shall be entitled to demand a discharge

at his own expense from said trustees of said annuity: And in the event of there being more than one child of the said intended marriage alive at the death of the longest liver of me and the said Miss Catharine Clark, or there being only one child then alive, in the event of the person in right of the said subjects hereby conveyed being another than the said one child, then and in either of these events the said annuity of £200 shall continue and be paid over by the said trustees equally among such children, if there be more than one, and wholly to the said one child if there be but one: And it is hereby provided and declared that notwithstanding the terms hereof the right of any child or children of said intended marriage in said annuity shall be held only to begin and take effect from the death of the said Miss Catharine Clark."

Andrew Drybrough senior and the said Miss Catharine Clark were married on 4th June 1862. There were born of the marriage three children, viz., Andrew, Robert, and William Charles.

Andrew Drybrough senior died on 14th February 1883. He left a trust-disposition and settlement, which provided, *inter alia* —"(*Seventh*) I hereby declare my desire and intention to be that my three children, or the survivors of them (the issue of any of them predeceasing taking the parent's share), shall participate equally in the benefit of the whole residue of the estate and effects left by me at the time of my death . . .: (*Eighth*) In case my eldest son shall desire to, and it appear proper to my trustees that he should take over and possess [a brewery belonging to the testator] for himself, I hereby direct and empower my trustees, on the concurrence, but only on the concurrence, of these two events, . . . to make over and convey the same to my eldest son at a valuation, but in case and before the said brewery is conveyed to him, he shall be bound to, and my trustees shall be entitled to require of him that he shall, account for and pay over to my trustees the two-thirds of the value of the brewery to them for behoof of my two other children, in case my three children survive me, so that the seventh purpose of these presents may be carried into effect, or the one-half of said value, if only two of my said children survive me, and that for behoof of such other children or child, it being declared that in such equal division shall be included the capital of the said two annuities conferred on my wife as aforesaid, and that in arranging with my eldest son in regard to the said brewery my trustees shall be bound to obtain a discharge of the said two bonds of annuity . . ."

Andrew Drybrough was survived by his widow (who under the provisions of the bond received payment of the annuity until her death) and three sons Andrew (junior), Robert, and William Charles. Under an arrangement between the widow and her sons (she having claimed her legal rights) it was arranged that the subjects disponed in security of the annuity should be represented by a sum of £6000, which was then paid over to the trustees acting under the bond of annuity on the footing that they were to hold and invest the same for the purpose and subject to the conditions of the bond of annuity, and thereafter on these being completely satisfied, for the three sons in fee. Mrs Drybrough died on 22nd August 1907. Robert died on 21st December 1908, leaving three children, John Robert, Ralph Melville, and Frederick William.

Questions having arisen as to the rights of the beneficiaries and the duties of the trustees under the aforesaid deeds, a Special Case was submitted to the Second Division (boxed 16th July 1909). In the said Special Case the Court decided that the trustees under the foresaid bond of annuity were bound to hold the trust fund until at least the death of the longest liver of the granter's sons, and that the children of the said deceased Robert Drybrough were entitled equally among them to receive payment of one-third of the annuity of £200. Andrew Drybrough junior died on 19th October 1910, survived by a widow but no issue.

Certain further questions thereupon arose, and this Special Case was presented for their determination.

The following *questions of law* were, *inter alia*, submitted—"1. Does said annuity, from and after the death of the said deceased Andrew Drybrough junior, and during the survivance of the said William Charles Drybrough, fall to be paid over as follows—(*a*) one-half thereof to the said William Charles Drybrough, and one-half thereof to the children of the said deceased Robert Drybrough, or (*b*) two-thirds thereof to the said William Charles Drybrough, and one-third thereof to the children of the said deceased Robert Drybrough? 2. Is the said John Robert Drybrough entitled in virtue of the said Entail Amendment Acts to receive payment from the first parties as and from 24th February 1911 (date of majority) of a proportion of the capital of the trust fund corresponding to one-third of the share of said annuity falling to the children of the said deceased Robert Drybrough?"

Argued for the fifth and sixth parties—On Andrew's death his share fell by accretion equally *per stirpes* to the children of his deceased brother and to his surviving brother. The language of the bond of annuity showed very clearly that it was the intention of the granter that the issue of predeceasing children should get all that would have come to their parent by survivance. The general rule, no doubt, was that the children of a legatee were only to take what was in their parent at the time of his death, and were not entitled to shares that would have accresced to him had he survived—*Young* v. *Robertson*, February 11, 1862, 4 Macq. 337 (Lord Chanc. Westbury at 340); *Henderson* v. *Hendersons*, January 9, 1890, 17 R. 293, 27 S.L.R. 247. It was, however, the view of the Court that this rule should not be extended—*Burnett* v.

Burnett's Trustees, July 18, 1894, 21 R. 1040 (Lord Kyllachy at 1042, and Lord M'Laren at 1044), 31 S.L.R. 810. It had hitherto only been applied to bequests of capital, and should not therefore be extended to a share of an annuity. Accretion had been held to operate in circumstances like the present—*Neville* v. *Shepherd*, December 21, 1895, 23 R. 351, 33 S.L.R. 248. (On question 2) The annuity was "estate" in the sense of section 47, and a liferent in the sense of section 48 of the Entail Amendment (Scotland) Act 1848 (11 and 12 Vict. c. 36) and section 17 of the Entail Amendment (Scotland) Act 1868 (31 and 32 Vict. c. 84). The annuitants here were to be regarded as liferenters. The shares of the annuity were liferents of a definite portion of the annual proceeds of the sum held in trust. The granter of the bond desired to give an equal alimentary annuity to all his descendants. Notwithstanding all conditions, alimentary or otherwise, the annuitant had, under the above-mentioned sections of the Entail Acts, a right to payment—*Macculloch* v. *Macculloch's Trustees*, November 24, 1903, 6 F. (H.L.) 3, 41 S.L.R. 88; *Shiell's Trustees* v. *Shiell's Trustees*, May 26, 1906, 8 F. 848, 43 S.L.R. 623; *Baxter* v. *Baxter*, 1909 S.C. 1027, 46 S.L.R. 743; *Baker* v. *Baker*, 1858, 6 H.L.Ca. 616; M'Laren, Wills and Succession (3rd ed.), p. 304.

Argued for the third parties (on question 1)—It was well settled that the children of a legatee were not entitled to participate in a lapsed or accrued share, but were only entitled to the parent's original share—*Young* v. *Robertson* (*sup. cit.*); *M'Nish, &c.* v. *Donald's Trustees*, October 25, 1879, 7 R. 96, 17 S.L.R. 25. The rule was equally applicable whether the *conditio* was expressed or implied—*Henderson* v. *Hendersons* (*sup. cit.*), Lord President, at 17 R. 296; *Cumming's Trustees* v. *White*, March 2, 1893, 20 R. 454, Lord Trayner at 460, 30 S.L.R. 459. The rule applied invariably unless there was distinct indication of intention that a different rule was to be followed—*Neville* v. *Shepherd* (*sup. cit.*) was undoubtedly difficult to reconcile with the course of decision, but it was there held on the terms of a particular deed that the testator intended that the issue of a predeceasing legatee were to take accrescing shares. There was no expression of intention in the bond now under consideration that the grandchildren were to get accrescing shares. It was no doubt true that the reported cases in which the above-mentioned rule had been applied were cases of capital, but there was no distinction whatever in principle between capital and income—see also *Fergus and Others*, July 13, 1872, 10 Macph. 968, Lord Justice-Clerk, at 970; *Wilson's Trustees* v. *Wilson's Trustees*, November 16, 1894, 22 R. 62, 32 S.L.R. 54; *Paxton's Trustees* v. *Cowie*, July 16, 1886, 13 R. 1191, 23 S.L.R. 830.

Argued for the second and fourth parties—The Entail Acts had no application to the annuities here. Section 47 of the Entail Amendment (Scotland) Act 1848 (11 and 12 Vict. c. 36) dealt with estate on which infeftment could be taken, and sec. 48 of that Act and sec. 17 of the Entail Amendment (Scotland) Act 1868 (31 and 32 Vict. c. 84) dealt with liferents only. Infeftment could not be taken on this annuity, nor was it a liferent interest, which was a totally different thing from an annuity. A liferenter was only entitled to the fruits of the subject liferented, whereas an annuity was due from capital if the fruits of the estate out of which it was to be paid fell short—*Kinmond's Trustees* v. *Kinmond*, February 5, 1873, 11 Macph. 381, Lord President at 383, 10 S.L.R. 244; Bell's Prin. 1037.

At advising—

LORD SALVESEN—The parties to this Special Case are the trustees of the late Andrew Drybrough, the executors of two of his sons who are now dead, a third son who still survives, and the children of one of the deceasing sons; and it raises questions as to a capital sum of £6000 held by the trustees and the annual income which they are receiving from the securities in which it has been invested. The leading deeds on which the rights of parties depend are (first) an antenuptial bond of annuity executed by the late Andrew Drybrough in 1862, and (second) his trust-disposition and settlement, which came into operation on 14th February 1883, when Andrew Drybrough senior died. By the antenuptial bond of annuity Mr Drybrough bound himself to make payment to certain trustees whom he nominated of an annuity of £200 sterling, and in security of the personal obligation he disponed certain heritable subjects. The first purpose of the trust thereby constituted was that the trustees should during the subsistence of the trust hold the annuity for behoof of his intended wife "and the child or children that may be born of our said intended marriage, and the survivors and survivor of them, as an alimentary provision for them." Mrs Drybrough survived her husband, and during her survivance she was entitled to receive and actually did receive payment of the annuity. She died on 22nd August 1907. There were three children born of the marriage, namely, Andrew, Robert, and William, and all of them survived their mother. Andrew died on 19th October 1910 survived by a widow but no issue, leaving a will by which he appointed Mr Hope Park to be his sole executor. Robert died on 21st December 1908 leaving three children, one of whom has now attained majority. William still survives and has two children.

By his trust-disposition Andrew Drybrough, after providing an additional annuity for his widow, provided as follows:—"(Seventh) I hereby declare my desire and intention to be that my three children or the survivors of them (the issue of any of them predeceasing taking the parent's share) shall participate equally in the benefit of the whole residue of the estate and effects left by me at the time of my death," and on the death of his widow

he directed his trustees to take such measures as might be necessary for carrying this his desire into effect. In the following purpose there was a declaration referable to this bequest to the effect "that in such equal division shall be included the capital of the said two annuities conferred on my wife as aforesaid," one of these annuities being the alimentary annuity of £200 already referred to. Under a subsequent arrangement between the widow and her sons (the widow having claimed her legal rights) it was arranged that the subjects disponed in security of the annuity were to be represented by a sum of £6000 which was then paid over to the trustees acting under the bond of annuity on the footing that they were to hold and invest the same for the purpose and subject to the conditions of the bond of annuity, and thereafter, on these being completely satisfied, for the three sons in fee. An additional sum of £1500 was provided by the widow in case the sum of £6000 should not be sufficient to provide the alimentary annuity of £200.

Under a previous special case it was decided that the first parties were bound to hold the trust funds until at least the death of the longest liver of Andrew and William Drybrough, Robert having by this time predeceased but leaving issue. It was also decided that Robert's issue were entitled to one-third of the alimentary annuity as coming in place of their father.

The annuity accordingly continued to be paid in three equal parts, but the eldest son Andrew has now died without issue, and the first question in the case is as to what the trustees are to do with his share of the annuity. It is claimed by the surviving son William, who, if his claim is sustained, will be entitled to two-thirds of the alimentary annuity. On the other hand, the issue of Robert maintain that they are entitled to an equal share with William, in which case one half of the annuity would be payable to them and one half to William, the surviving son of the testator.

It is settled by a series of cases, of which that of *Henderson*, 17 R. 293, is typical, that "where by express provision . . . children of a predeceasing legatee take their parent's share, that share is merely the original share provided to the parent and does not cover any part of a legacy, which by virtue of another clause in the deed would have accrued on the failure of the person first instituted to it, to the parent, if he or she had survived." This is a rule of construction merely, and must, of course, yield to the intention of the testator whether actually expressed or only clearly implied. We were referred on behalf of Robert's issue to the case of *Neville*, 23 R. 351, in which it was held that the issue were entitled to succeed to the half of the residue which would have fallen to their mother had she survived the term of payment, although, if their claim had depended merely on the *conditio si sine liberis*, they would only have been entitled to the sixth share originally destined to their mother. This result was arrived at, however, on a construction of the particular trust deed, which the Court read as plainly implying that the issue of a predeceasing legatee were to take the parent's share whether original or by accretion, and it does not conflict in any way with the prior authorities. The question here is, therefore, whether we can find in the antenuptial bond of annuity any provision from which a similar intention can be inferred.

I have studied the complicated clauses of this bond with some care, but I am unable to find any expression of intention on the part of the testator that his grandchildren were to take any benefit except from the share originally destined to their parent. The main purpose of the trust was to secure an alimentary allowance for his children and the survivors and survivor of them; and while by later clauses it is made reasonably clear that the issue of a child were to take their parent's place as regards his share (as indeed the Court have already decided), I see no ground for inferring that these grandchildren were to have the same rights as a surviving child of the testator in shares that lapsed by the predecease of other children. It is true that in this particular case we are dealing with the share of an annuity and not with a share of capital as in all the previous cases; but I am unable to see that this makes any difference in the application of the general principle to which I have already referred. I am therefore for answering the first branch of the first question of law in the negative and the second in the affirmative.

The second question is raised because of a claim made on behalf of the eldest son of the deceased Robert Drybrough to a proportion of the trust fund corresponding to one-third of a share of said annuity falling to him as one of the children of Robert Drybrough. This claim is made in virtue of the Entail Amendment Acts, and especially sections 47 and 48 of the Act of 1848, and section 17 of the Act of 1868. In my opinion these sections have no application. The right of the issue of Robert Drybrough is not a right in a liferent interest but to a share of an annuity. Now a liferent interest and an annuity are two totally different things. A proper liferenter is entitled to the income of the subject liferented and to no more; an annuitant is entitled to have the capital on which the annuity is secured encroached upon if the income is insufficient to meet it; and on the other hand he is not entitled to receive any surplus income if the income is more than sufficient to meet the annuity. The Entail Amendment Acts, I think, clearly do not apply to a right of this nature. I propose, therefore, that we should answer the second question in the negative. [*His Lordship then dealt with questions with which this report is not concerned.*]

LORD DUNDAS—I do not think there is any great room for doubt as to the manner in which we ought to answer the questions put to us in this Special Case, except the

first. I shall therefore postpone consideration of that question until I have dealt with the other and simpler matters.

Question 2 must, in my opinion, be answered in the negative, upon the plain ground that the Entail Acts referred to have no application in the circumstances. It seems to me that Robert Drybrough's right to share in the annuity can by no reasonable stretch of language be described as a liferent interest. The point is, in my judgment, so clear that I think it is unnecessary to refer to the various cases cited to us where the sections of the Entail Acts have been construed or commented on. The characteristic differences between a liferent and an annuity are perhaps nowhere more pointedly explained than by Lord President Inglis in *Kinmond's Trs.* (1873, 11 Macph. 381). [*His Lordship then dealt with questions with which this report is not concerned.*]

I now revert to the first question. At the close of the discussion I had formed an impression, which subsequent study of the case has ripened into a distinct opinion, that we ought to answer head (*a*) in the affirmative, and head (*b*) in the negative. The question must depend, primarily at least, upon the intention of Mr Drybrough as it may be ascertained from the language of the bond of annuity. . . . I am of opinion as matter of construction that Mr Drybrough's intention must be held to have been that the annuity was to be paid during its currency (after the death of his wife, who survived him) for behoof of the "children" of the marriage, including in that term the children of deceasing children, equally among them *per stirpes*. [*His Lordship then referred to the views expressed by the Court in the previous special case as to the construction to be put upon the terms of this particular deed, and continued*]—Apart, however, from our previous judgment, my opinion as to the proper construction of this bond, in relation to the state of facts now existing, is that which I have indicated. It seems to me a probable and feasible idea that the annuity should be intended to be applied for behoof of the children and grandchildren *per stirpes*—the *stirpes* receiving benefits throughout in equal proportions; and, as matter of construction, I think the bond is to be read as expressing that idea, though its language is far from perfect.

If this view is well founded, there seems to me to be an end of the matter. None of the decided cases can afford much, or indeed any, aid to us in arriving at the true meaning and intention of this infelicitously expressed deed; and the principles or, as I should rather call them, rules which have been laid down in certain well-known cases do not, in my judgment, come here into play at all. It is, no doubt, settled that where by express provision, or by the operation of the *conditio*, children of a predeceasing legatee take their parent's share, that share is limited to the original share provided to the parent, and does not extend to or include any share which would have accrued to the parent if he or she had survived. But if my construction of this particular deed is correct, there is no room or occasion for the application of this rule. There is not anywhere, so far as I see, a direction that grandchildren are to take their parent's share; they are, as I read the document, entitled to participate in the annuity among the "children" of the granter, as a *stirps*, equally with other subsisting *stirpes*, their surviving uncles, or (as matters now stand) their surviving uncle. . . . For the reasons stated, I am for answering the first question in the manner I have indicated. I should like to add that the principle or rule of law to which I have alluded is one which will not, I apprehend, be readily extended by the Court; and I am not, as at present advised, clear whether or how far it would be held applicable in the case of an annuity, especially an alimentary annuity such as we have here. It has never yet, so far as I am aware, been so extended, and I desire to reserve my opinion upon this point until a case comes before us which raises the matter for decision. I am sorry to find that, as regards question 1, I stand in a minority among your Lordships. But my regret is lessened when I reflect that the matter, as I view it, involves no question of general application or interest, though, of course, its decision may be of importance to the parties concerned.

LORD GUTHRIE—I agree with what I understand is the opinion of all your Lordships in regard to questions 2 to 5. As to the first query, whether half of the proportion of the annuity payable to the deceased Andrew Drybrough, the testator's eldest son, accresced to the issue of the deceased Robert Drybrough, the testator's second son, I agree with the opinion of Lord Salvesen. I think that accretion did not operate in favour of Robert's children, who are in my opinion entitled only to Robert's original share of the annuity.

This question was not directly before the Court in the last special case dealing with this estate, and the reasoning of the learned Judges, as it appears to me, is directly applicable only to the question of the right of Robert's children to their father's share. Reading Lord Ardwall's opinion as a whole, it seems to me that in the sentence "there is, I think, throughout the deed sufficient indication that the granter intended that there should be equality of provision among the children and the issue of predeceasing children *per stirpes*," his Lordship had only in view an original and not an accresced share. On a question of that kind the Court will be easy to satisfy, whereas if grandchildren are to take an accresced share this can only be done where there is express statement or necessary inference.

The question in the last special case turned, as I think, on the sound construction of the sixth clause; the question in the present case seems to me to turn on the sound construction of the first clause. That clause runs as follows:—"That the said trustees shall, in all time coming,

during the subsistence of the trust hereby created, hold the said annuity in trust for behoof of my said intended wife and the child or children that may be born of our said intended marriage, and the survivors and survivor of them, as an alimentary provision for them, exclusive of all rights competent to me therein, whether of *jus mariti*, administration, or otherwise, all which as regards the said annuity are hereby renounced, or, if necessary, assigned to the said trustees or their foresaids: Declaring the said annuity not to be liable for my debts or deeds nor to the diligence of my creditors." This clause was referred to but does not seem to me to have been founded on as a ground of judgment in the opinions delivered in the previous special case on the question there raised for decision as to predeceasers' original shares. Clauses two and three were not dealt with at all. The clauses which were founded on were clauses four, five, and six. So far as issue of children are concerned, these six clauses stand thus. In the first three clauses there is no express reference to issue; in the last three issue are expressly mentioned. In the latter clauses, on which the Court proceeded, the only question was whether issue being expressly mentioned in the preamble of each of these clauses, the word must not be read in in the later and executorial part of each clause, and the Court had no difficulty, on obvious grounds, in coming to the conclusion that issue of children were intended in each case to come in their father's place. When the first three clauses are considered the contrast is striking. As already mentioned, there is no mention in any of them of issue of predeceasing children. The subject-matter of clauses two and three is not applicable in my opinion to grandchildren. Clause two operates during the subsistence of the marriage, and provides that the trustees shall pay the annuity to the truster's wife "for behoof of herself and the said child or children." It seems clear that the truster did not contemplate his wife supporting his grandchildren. Then according to clause three, which operates after the dissolution of the marriage, the trustees are to pay the annuity to the widow "for behoof of herself and such of our children as shall continue to live in family with her and shall not have been forisfamiliated or otherwise provided for." The reference to children "who shall continue to live in family with her" and to the forisfamiliation of children seems to exclude grandchildren. Clause one remains for consideration. Are the words "or their issue" to be read in after the words "child or children." I say no (first) because where the truster meant issue of children to come in he indicated his intention by mentioning issue in each clause where a provision was made in their favour, although the expression was not always repeated, as it should have been, in other parts of the clause; (second) because this clause, the first in the deed, occurs immediately before other two clauses, from the operation of which issue of predeceasing children are excluded; and (third) because if I am right in thinking that the second clause does not cover the case of issue of predeceasers, that clause explains the scope of the first clause, inasmuch as the "child or children" in the first clause are expressly stated to be the same as the child or children in the second clause, by the use in that clause of the expression "the said child or children," that is to say, the child or children covered by the first clause; and (fourth) because if child or children in the first clause covers grandchildren, I do not see how the operation of the clause can be limited to them.

The LORD JUSTICE-CLERK concurred with Lord Salvesen.

The Court answered head (*a*) of the first question in the negative and head (*b*) in the affirmative, and the second question in the negative.

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