judgment on the merits of the case in favour of the pursuer, for he therein assumed that she was entitled to what she claimed, only subject to questions of accounting. On the whole, therefore, I think it is the clearest case possible for holding that the finding of expenses in favour of the pursuer was a necessary consequence of the proceedings which had already taken place.

The Court adhered, and refused the reclaiming note.

Agent for the Reclaimer—D. J. Macbrair, S.S.C.
Agents for the Respondents—D. Crawford & J. Y. Guthrie, S.S.C.

Saturday, March 18.

DOWIE *v.* DOWIE OR BARCLAY.

Process—Reduction—Decree of Confirmation—Executor—Next of Kin—18 *Vict. c.* 23, § 1. Where a niece had been decerned executrix "*qua* one of the next of kin" to her uncle, there being no competition or opposition to her service; and where another uncle, brother to the deceased, afterwards sought to reduce the decree on the ground that the defender had obtained confirmation under an erroneous description, the Moveable Succession Act, 18 Vict., c. 23, § 1, only entitling her to succeed or be confirmed as "a descendant of a predeceasing next of kin"—it was *held*, affirming the judgment of Lord Jerviswoode, that she had been rightly decerned executrix, there being no competition; and that, though the description in the decree of confirmation was not quite accurate, it was not sufficient to render the confirmation null, nor a ground upon which it could be reduced.

Agent for the Pursuer—James Barton, S.S.C.
Agent for the Defender—Alex. Gordon, S.S.C.

Friday, March 17.

SECOND DIVISION.

MRS HELEN BRINE OR GORDON, PETITIONER.

Register — Warrant to Transmit — Recorded Deed. Warrant granted by the Court to transmit a contract of marriage, registered in the Sheriff-court Books, to Edinburgh by registered post-letter, for the purpose of having an additional stamp impressed at the Inland Revenue Office.

Mrs Gordon presented a petition to the Court, setting forth that an antenuptial marriage contract had been entered into in 1852, between her and her late husband, Alexander Gordon of Newton, Aberdeenshire, which was recorded in the Sheriff-court Books of Aberdeenshire at Aberdeen, on 4th April 1856; that the executors of her late husband were entitled to a return of a portion of the inventory duty, paid on her husband's personal estate, but that the Board of Inland Revenue refused to repay the same, in respect that their marriage contract was insufficiently stamped; and that she had an interest in the said marriage contract, which contained various provisions in her favour, including an annuity of £400, and sundry provisions respecting her own fortune. The petition prayed for service on the Sheriff, Sheriff-Substitute, and Sheriff-Clerk of Aberdeen, and for warrant to the Sheriff-Clerk or his Depute at Aberdeen "to transmit the said principal contract of marriage by registered post-letter, to the Clerk of Court in this petition, that he may present the same at the office of Inland Revenue in Edinburgh, and obtain it duly and sufficiently stamped, and thereafter retransmit the said contract of marriage, also by registered post-letter, to the said Sheriff-Clerk or his Depute at Aberdeen," or to do otherwise &c.

Service was ordered, and answers appointed to be lodged within three days, in consequence of the Session being near a close, and intimation in the minute book was dispensed with.

On the calling of the case in the Summar Roll, no appearance having been made for the Sheriffs or Sheriff-Clerk, the prayer of the petition was granted.

Agent for Petitioner—John Auld, W.S.

Saturday, March 18.

SPECIAL CASE—EWEN MENTEITH TOD AND GENERAL TOD'S TRUSTEES.

Trust—Clause—Powers of Trustees—Annuity—Alimentary. Terms of a settlement which were *held* not to import an imperative direction to trustees to invest a fund in an alimentary annuity for a son of the truster; and *observed*, that even if they did, as the truster's intention of securing an alimentary annuity could not be made effectual by following the directions of the deed, the trustees were entitled to pay over the capital of the fund to the son, as the sole party interested in the same.

General Suetonius Tod died in September 1861, survived by a widow and two sons. Mrs Tod died in April 1866. In 1859 General Tod executed a trust-settlement of his whole estate. After certain provisions in favour of his widow, the trust-deed proceeded:—"*Fourth*, I direct and appoint my said trustees to divide the residue of my said means and estate among my two sons, Suetonius Macdonald Tod and Ewen Menteith Tod, equally between them or the survivor of them, in manner following, viz.:—Should my said trustees consider it prudent and proper to advance to each of my said sons, for the purpose of setting them up in business, or of advancing their prospects in life, such a sum as shall not exceed the one-half of the share of the free residue of my said means and estate, to which each of them might be entitled in the event of my death, and the other half or balance of the said free residue shall be invested when my said trustees shall consider it proper and prudent to do so, in the purchase of two separate annuities for each of my said sons, or the survivor of them, declaring that, as said annuities are intended by me solely for their respective aliment and personal support, the same shall not be assignable, arrestable, or affectable, for the debts or deeds, legal or voluntary, of the said Suetonius Macdonald Tod or Ewen Menteith Tod." General Tod left no heritable estate. The value of his moveable estate was about £12,000, one-half of which the trustees paid over to the two sons absolutely in equal portions, and the other half stood invested in the name of the trustees, who paid the interest to the sons. Mr Ewen Tod, who was now about thirty-two years of age, was desirous of entering into business, and accordingly requested payment of the remaining capital of his share of

the trust-estate. The trustees were doubtful whether they were not bound by the trust-deed to invest at least one-half of each son's share in an alimentary annuity. A Special Case was consequently laid before the Court, in which it was stated that the trustees were satisfied that payment of his whole share would be of great advantage to Mr Ewen Tod, but that, in consequence of the manner in which the fourth purpose of the trust-deed was expressed, they were advised that it was doubtful whether they were entitled to make such payment.

The questions submitted to the Court were—

'1. Whether the trustees are bound to convey to Mr Ewen Menteith Tod the remaining capital of his share of his father's trust-estate?

"2. Whether (supposing the first question answered in the negative) the trustees are entitled and in safety, if they consider it prudent and proper, to make payment to Mr Ewen Menteith Tod of the said remaining capital?"

GILLESPIE, for General Tod's trustees, argued, that the direction of the truster to invest at least one-half of each son's share in an alimentary annuity, was imperative.

LEES, for Mr Tod, argued—No one except Mr Tod has any interest in the manner in which his share is dealt with. If he died, his children would be entitled to the uninvested funds; and the terms of the deed are not sufficient to protect the produce of the funds from being arrested by his creditors. He could sell the annuity, and so defeat the purpose of the trust; and in the principles of English Law and the analogy of the Cluny Entail case, he is therefore entitled to have the trustees restrained from implementing directions which he can defeat. As there is no destination over, no one could have any interest to challenge a conveyance of the capital by the trustees, if he gave them a formal discharge. A trust can always be terminated where fiar and liferenter concur, and are the only parties interested. Even if the trustees are not bound to convey, it is a matter for their discretion. They may never think it necessary to purchase an annuity, nor would they do so with propriety if the annuitant were ill of a mortal sickness. The terms of the trust-deed do not entitle them to retain the annuity in their own charge. Trustees are only justified in keeping up a trust where it is for the protection of some person's interest. Authorities—*Nisbet* v. *Tod*, 15 Jan. 1848; *Wood* v. *Begbie*, 7 June 1850; *Gordon* v. *Gordon*, 2 March 1866; *Stokes* v. *Cheek*, 2 July 1860, 29 L. J. (Ch. R.) 922; *Browne*, 29 July 1859, 27 Beavan's Rep. 324.

At advising—

The LORD JUSTICE CLERK—The question in this case is in regard to the bequest of residue, whether the trustees under the settlement of General Tod are entitled to hand over Mr Ewen Tod's share in money, or are bound to invest it in an annuity. The trustees substantially say, that as far as they have any discretion in the matter, they do not consider that it would be for the advantage of Mr Ewen Tod to risk his share in an annuity. I am of opinion, in the first place, that there is no distinct injunction on the trustees to purchase an annuity, and secondly, if there was, it is an injunction which could be defeated, and in fact by following out the words of the deed, the trustees would not accomplish the object of the truster. I am inclined to rest my opinion on the first point. The direction is to divide the residue between his sons, no doubt qualified by the words "in manner following." But there is no time fixed for making the investment. If the trustees came to the conclusion that at no time it would be prudent to purchase an annuity, I think there is nothing in the words to prevent their acting on that conclusion. I think that Mr Ewen Tod could have tested on his share, provided it had not been previously sunk in an annuity. If the trustees thought it desirable to purchase an annuity, they were entitled to do so. But it would have been necessary to create a second trust. Merely declaring an annuity not assignable would not have the desired effect. I am therefore of opinion that the second question is to be answered in the affirmative.

LORD BENHOLME—I concur. As an additional ground in support of your Lordship's opinion, I may adduce the principle laid down in the case of *Burnet* v. *Craigie*, 17 June 1837, 15 S. 1157, where it was held that a mother and son, who concentrated in themselves the whole interests in a certain property, were entitled to deal with it as they pleased. Mr Ewen Tod here concentrates the whole interest in one half of the residue, and therefore it appears to me that, as the fund is appropriated to his advantage, he is entitled to a large share in determining the form which the fund is to take. In the case of *Burnet* v. *Craigie*, the Court disregarded the contingency of the son dying, and the mother having another heir. The contingent interests in such a case are held to be merged in the existing interests. The trustees in this case have acted wisely in geting the extent of their powers ascertained.

LORD NEAVES—It is quite plain that the beneficial interest in the residue belongs to General Tod's two sons. Perhaps the words of actual bequest are not so explicit as they would otherwise have been from the fact that they were the truster's next of kin. The trustees have a certain discretion, but I am not prepared to say that they would have been entitled to purchase an annuity in all cases. If one of the sons had a wife and family, and was dying, it would not have been proper for the trustees to benefit an insurance office, by purchasing an annuity for him. I concur.

LORD COWAN absent.

The Court answered the second question in the affirmative, and in the circumstances found it unnecessary to decide the first.

Agents for Mr Tod—Gillespie & Paterson, W.S
Agents for General Tod's Trustees—Dalgleish & Bell, W.S.

Friday, March 18.

SPECIAL CASE—FLEEMING *v.* BAIRD.

Lease—Minerals—Sterility—Break. The minerals in certain lands were let under a lease which entitled the lessees to work the minerals for two years on trial, and thereafter, if they decided upon proceeding with the workings, the rent for the minerals was specified, and the lease was to endure for thirty years, with breaks in favour of the tenant every five years. The trial period was extended till four years, and thereafter the tenants possessed the lands and continued working the minerals until a period after the date of the first break in their favour, when they renunciated the lease on the ground that the minerals were not workable to profit.—*Held* that, notwithstanding the failure