377, where there was a gift of heritage, and the wife was made executrix and universal legatrix—*Boston* v. *Horseburgh*, February 13, 1781, M. 8099. There was nothing in this deed to prevent the application of the general rule. Indeed, a consideration of the particular words used was favourable to its application. The settlement was pactional, as was shown by the use of the word "agreed." The power to revoke was confined to the period of the spouses' joint lives. The wife was not entitled to revoke after her husband's death. That provision could only be intended to prevent her defeating the rights of the husband's heirs.

LORD TRAYNER—I cannot say that I have found this case altogether unattended with difficulty. The general rule is that where a testator bequeaths estate to a person named "and his heirs, executors, and successors" the legacy does not lapse by the predecease of the legatee, but is taken by his heirs. That rule is however not without exception, as was instanced in the case of *Findlay* v. *Mackenzie*. I think that case is more applicable to the present than the case of *Halliburton*, and accordingly I think the views adopted in *Findlay* v. *Mackenzie* should be followed here, and the first question answered in the affirmative.

LORD YOUNG concurred.

LORD MONCREIFF—Having regard to the scheme of the mutual disposition and settlement executed by Mr and Mrs Baillie, and the terms in which it is expressed, I am of opinion that on Mrs Baillie surviving her husband she became absolute proprietor of the property settled upon her by her husband as well as of her own means and estate; and that the settlement made by her in the deed on her husband, "his heirs, executors, and assignees whomsoever," was evacuated to all intents and purposes.

It is true that in the absence of contrary intention, when a legacy is destined to a legatee, and "his heirs, executors, and assignees," these words import a conditional institution of the heirs, executors, and assignees in the event of the predecease of the legatee. But in the present case I am satisfied the whole gift was intended to be contingent on the husband's survivance.

The case of *Findlay* v. *Mackenzie*, July 9, 1875, 2 R. 909, is an authority directly in point. The case cited for the third parties on the other hand—*Halliburton* June 26, 1884, 11 R. 979—is distinguishable, because in that case the bequest was not "made conditional upon the survivance of the institute."

I therefore think that the first question should be answered in the affirmative, and the second in the negative.

The LORD JUSTICE-CLERK concurred.

The Court answered the first question in the affirmative.

Counsel for the First and Second Parties—C. K. Mackenzie—M'Lennan. Agents—Mackenzie & Black, W.S.

Counsel for the Third Parties—Campbell, Q.C.—Chree. Agents—Macpherson & Mackay, S.S.C.

Friday, June 16.

FIRST DIVISION.

[Lord Pearson, Ordinary.

MILN *v.* ARIZONA COPPER COMPANY, LIMITED.

Company—Preference Shares—Cumulative Dividend—Payment out of Profits of Each Year.

The articles of association of a company contained this clause—"The holders of preferred shares shall be entitled to receive out of the profits of each year a cumulative preferential dividend for such year at the rate of 10 per cent. per annum on the amount for the time being paid upon the preferred shares held by them respectively, and the surplus profits in each year shall belong, one-half to the holders of the preferred shares, and the other half to the holders of the deferred shares."

Held that the preference shareholders were entitled to a cumulative dividend of 10 per cent., so as to have the deficiency in one year paid out of the profits of a subsequent year.

The Arizona Copper Company, Limited, was originally incorporated on 11th August 1882 for the purpose of acquiring and working certain copper mines in Arizona, U.S.A.

In 1884 a new company was incorporated which took over the property and undertaking of the old company, with all its rights and liabilities.

By article 7 of the articles of association of the new company (which was in the same terms as the corresponding article in the old company) it was provided—"Subject to the provisions of the said agreement the holders of preferred shares shall be entitled to receive out of the profits of each year a cumulative preferential dividend for such year at the rate of 10 per centum per annum on the amount for the time being paid up on the preferred shares held by them respectively, and the surplus profits in each year shall belong, one-half to the holders of the preferred shares, and the other half to the holders of the deferred shares."

An action was raised by Alexander Miln, Baltic Street, Dundee, and Mr John Gill, S.S.C., Edinburgh, against the Arizona Copper Company, concluding, *inter alia*, for declarator—"*Seventh*, that under and in terms of the articles of association and constitution of the said company, the holders of the preferred shares thereof are not entitled to receive out of the profits of the current year or any future year a cumulative preferential dividend for any former year, but are entitled to receive out of the profits of each year a preferential dividend at the rate of 10 per centum per annum on the amount for the time being paid up on the preferred shares held by them respectively, and that one-half of the surplus profits in each year beyond the said preferential dividend on the preferred shares belong to the holders of the preferred

shares, and the other half to the holders of the deferred shares."

The pursuers, who were holders of 75 and of 400 deferred shares in the company respectively, averred—"The directors have represented that the preferred shares are entitled to a cumulative dividend of 10 per cent. per annum from the commencement of the company, and that the arrears of such dividend amount to £700,000 or thereby, and they have also represented that the deferred shares were of little or no value, and that they could not be expected to participate in any dividend for thirty years to come. The profits of the company for the first half of the past year have been declared by the board to be over £75,000, and the profits for the whole year ending 30th September 1898 may be expected to be at least double that amount. It takes only £63,306 to pay a dividend of 10 per cent. on the preferred shares for the year. So that, according to the pursuers' contention, there will be a large surplus for division between the preferred and the deferred shares at the next annual meeting of the company in February 1899."

The defenders pleaded that on a sound construction of the articles the pursuers were not entitled to decree.

The Lord Ordinary (PEARSON) on 18th March 1899 pronounced an interlocutor, by which, *inter alia*, he assoilzied the defenders from the seventh conclusion of the summons, and allowed the parties a proof before answer of their averments in support of certain other conclusions.

Opinion.—[*After dealing with the other conclusions his Lordship proceeded*]—"The seventh conclusion, to which I now turn, raises a question of considerable importance and interest. It goes pretty deeply into the other parts of the case, but it admits of being decided separately, and was placed by both parties in front of the argument. It is, whether the preferential dividend upon the preferred shares is cumulative, within the ordinary meaning of that term, or whether (to use the words of the conclusion) the holders of these shares are 'entitled to receive out of the profits of each year a preferential dividend at the rate of 10 per cent. per annum,' the surplus profits beyond that going, one-half to them and one-half to the deferred shareholders.

"This depends primarily on the terms of the articles of association. By the 7th article it is provided that, subject to the provisions of a certain agreement, the holders of preferred shares 'shall be entitled to receive out of the profits of each year a cumulative preferential dividend for such year at the rate of 10 per cent. per annum on the amount for the time being paid upon the preferred shares held by them respectively, and the surplus profits in each year shall belong one-half to the holders of the preferred shares and the other half to the holders of the deferred shares.' Article 149 provides that if the company should be wound up, the surplus assets should be applied in the first place in repaying to the holders of the preferred shares the amount paid up thereon, the residue being divided equally between the holders of the preferred and the deferred shares, one half to each, subject as therein mentioned. As to interim payments of dividend, it was provided by the articles of the original company that the directors might 'at any time in every year pay such sums on account of dividend on the paid-up capital of the company, as they may think fit.' This was not carried down into the articles of the reconstructed company, but in 1895 an article was added (article 123A), which provides that the board may from time to time pay to the members, on account of the next dividend on the preferred or deferred shares, such interim dividend as in their judgment the position of the company justifies.

"What then is the right of the preferred shareholders under the 7th article of association? Are they entitled to have the shortcoming of one year made up out of the profits of subsequent years? The original prospectus of the company on which subscriptions were obtained, is, in its description both of the preferred shares, and of the terms on which the vendors had agreed to accept deferred shares, conclusive as to the intention of the promoters that the dividend on the preferred shares should be truly a cumulative preferential dividend in the ordinary sense. But the decision of the question must depend on the true construction of the articles. The 7th article containing as it does the prominent and distinctive term 'cumulative,' seems at first sight to be free from doubt, but on a closer examination it proves to be a model of ambiguity. It is as if the draughtsman had had before him a typical non-cumulative clause and a typical cumulative one, and had combined them.

"Where a preferential dividend is intended to be non-cumulative, it is sometimes so expressed in the articles by adding the words 'without any right in case of deficiency to resort to subsequent profits.' But, as Mr Palmer significantly puts it (1 Company Precedents 653-4), another form is sometimes preferred, as not expressly calling attention to the contingency of the profits being deficient, namely, that the holders of preference shares shall be entitled to be paid out of the profits of each year a preferential dividend for such year at the rate of 10 per cent. per annum.

"It is obvious that as soon as a particular year is alluded to, the argument that the preferential dividend is non-cumulative is greatly strengthened. Even where the holders were declared entitled to their preference dividend 'out of the net profits of each year,' this was held sufficient to exclude a claim for cumulative dividend in the case of *Staples* (Law Rep. 1896, 2 Ch. 303). That case seems to me to go a considerable length, for after all the expression 'the net profits of each year' might be regarded as merely descriptive of the only possible fund out of which any dividend, whether cumulative or non-cumulative, could be paid. But where (as here) the holders are to receive the dividend not only 'out of the profits of each year,' but 'for

such year,' then even if the dividend be declared preferential, it is not cumulative. The rule, in short, seems to be this, that where no particular year is alluded to, a preferential dividend is held to be cumulative (*Henry*, 1857, 1 De Gex & Jones, 606; *Webb*, 1875, L.R. 20, Equity 556); but that even a description of the preferential dividend as payable out of the net profits of each year will make it non-cumulative (*Staples, cit.*)

"This rule, however, was settled in a series of cases, in none of which was the word 'cumulative' used—the question in all being whether a dividend admittedly preferential was also cumulative. Here it is expressly described as a 'cumulative preferential dividend,' There can, therefore, be no question that the preference dividend is to be a cumulative one. The question is, how is that to be reconciled with the distinct references to a particular year; and if they cannot be reconciled, which is to prevail?

"The pursuers maintain that the word 'cumulative' is here to be read in a special and narrow sense, meaning 'cumulative within the year,' and not as between one year and another. They point to the fact that by the original articles the directors might 'at any time in every year pay such sums on account of dividend on the paid-up capital of the company as they may think fit;' and that although this was omitted from the articles of the reconstituted company in 1884 and so remained for eleven years, it was restored in 1895 by the addition of article 123A, which empowered the board from time to time to pay to the members on account of the next dividend on the preferred or deferred shares, such interim dividend as in their judgment the position of the company should justify. If, then, the board were to pay the preference shareholders an interim dividend at the rate of say only 8 per cent. per annum for the first quarter or half year, the word 'cumulative' would entitle them to have that shortcoming made up within the year, if the profits should admit of it. The expression is thus equivalent to a declaration that they are to be entitled to a *cumulo* or aggregate preferential dividend of 10 per cent. within each year, whatever may have been the rates of interim payments, but not to a cumulative dividend as between one year and another. In my opinion, so to read the word is to read all meaning out of it; for I think the same result would necessarily have followed if the word had been omitted. Moreover, it is to read the word in a sense not merely narrower than, but different from, its accepted meaning, which I take to be cumulative as between one dividend period and another; and the dividend period is unquestionably a period of twelve months, whether interim payments are made or not.

"If it be said that this construction renders meaningless the expressions in the article which refer to a particular year, I do not think so. The expression 'out of the profits of each year' points out the source and the only source from which a dividend is to be paid in each year, whether the dividend is to be preferential or not, and whether it is cumulative or not. The expression 'for such year' presents more difficulty, but when a concrete case is put, the language seems appropriate enough. If in 1897 the profits admitted only of a 5 per cent. dividend to the preference shareholders, while in 1898 they admitted of a 15 per cent. dividend to them, I see no impropriety or inaccuracy in describing the latter as 'the dividend for 1898.'

"I therefore think that the pursuers are not entitled to the declaration which they ask for in the seventh conclusion of the summons, and I assoilzie the defenders from that conclusion."

The pursuers reclaimed, and argued—The clause must be construed as a whole, and it contained words of reference to a particular year which negatived the respondent's view. The word "cumulative" did not in reality add anything to the clause, for "preferential" would be quite enough by itself to imply a cumulative dividend as between one year and another, if it were not for the words which confined it to each particular year—Buckley on the Companies Acts, 353. The essential characteristic of a non-cumulative clause was that the dividend should, as here, be paid out of the profits of each particular year—Palmer's Company Precedents, i., p. 359 and 482; *Staples* v. *Eastman's Photo. Company*, L.R. [1896], 2 Ch. 303. Accordingly the true meaning of the clause was that the preference shareholders were entitled to a *cumulo* or aggregate preferential dividend of 10 per cent. within each year, whatever may have been the rates of interim payments, but not to a cumulative dividend as between one year and another.

Argued for respondents—It was not impossible to have a non-cumulative preference dividend unless the word "non-cumulative" was used. The reclaimers' argument was based on the fact that the clause designated the source from which the dividend was to be paid and that period, but it was quite unnecessary that these should be designated, and they in no way detracted from the clear intention of the clause. The case was ruled by *Henry* v. *Great Northern Railway Company*, 1857, 1 De G. and J. 606; *Webb* v. *Earle*, 1875, L.R., 20 Eq. 556. The case of *Staples* did not apply, because there the word "cumulative" was not used.

Lord M'Laren—This case comes before us under somewhat altered conditions from those under which it was heard and disposed of by the Lord Ordinary, because the argument before us was confined to three of the conclusions of the summons; but when the case was argued in the Outer House the whole summons was before the Lord Ordinary, including personal conclusions against the directors, which of course could only be successfully maintained upon a basis of fact. It is right to say also that these personal conclusions were to some extent involved with the conclusions against the company, especially

in that part of the case which related to the constitution of the third company—the company as constituted the year before last. In these circumstances it is not surprising that the Lord Ordinary, after disposing of the one point, which in his judgment admitted of being treated as a separable point, should have sent the case to proof upon the other branches of the case. Indeed, it is difficult to see how the learned judge could have dealt with the case in any other way than he did, with those personal conclusions standing unrecalled. But since the case came into the Inner House a minute has been signed by counsel withdrawing two of the conclusions, including the personal conclusion against the directors; and we have been informed by counsel on both sides, after consideration of the case in its present aspect, that they do not desire proof, and they do not see the necessity for proof for the purpose of disposing of the remaining points in the case. Accordingly, while there is no express renunciation of probation, it was proposed to argue the case before us as one that did not need proof, and in those circumstances it was suggested by your Lordship in the chair and agreed to that the case should go back to the Outer House in order that the parties might have the benefit of the Lord Ordinary's opinion, except upon the question whether the clause relating to dividends gave a cumulative as well as a preferential right to dividends in favour of the preferred shareholders. Now, without reading the clause, which has been so much discussed, I would say that we come to the consideration of a dividend clause in this form with the law clearly laid down that a preferential dividend, in the absence of expressions limiting the preference to a particular year, means a dividend having a preference over the whole income of the company during the whole period of its existence, or during as many years as may be necessary to satisfy the claim of dividend. That, according to the decisions in *Henry* v. *The Great Northern Railway Company*, and *Webb* v. *Earle*, is *prima facie* the meaning of a preferential right to dividend in favour of a particular class of shareholders, and if a preference limited to the particular year is intended, then it must be made clear by express words that such a preference and no more is intended. One thing only is clear to my mind in the clause under consideration, that whatever right is intended to be given under the name of a 10 per cent. dividend is to be a cumulative right, and that does at first sight appear to present an insurmountable difficulty to the construction that was put upon the clause by the reclaimers. After giving my best consideration to the argument of their counsel, I have been unable to satisfy myself that any other meaning than the ordinary meaning can be given to the clause consistently with the use which is here made of the word "cumulative" as descriptive of the nature of the right to be conferred. The clause is certainly not a model of clearness, but I think the ambiguity that has been the subject of so much discussion becomes less marked when we consider that a clause of this kind is always framed in the anticipation of a prosperous and successful venture, and that when this clause was framed everyone doubtless believed that in ordinary years there would be an income producing more than 10 per cent. on the preferred stock. Then the clause was framed with reference to this as the normal state of things, that there should be a sum available for division exceeding 10 per cent. on the preference stock, and it is clearly expressed that within the year a preferential dividend at that rate is to be paid, and that the balance is to be divided in manner there pointed out. But in case there might be a shortcoming in any year, the word "cumulative" is put in as descriptive of the nature of the right intended to be conferred on the preference shareholders. Such being my view of the meaning of the clause, and while I think there are some expressions in it that in the absence of the word "cumulative" would tend to a contrary construction, I cannot say that the suggested construction is at all displaced by the decision in the case of *Staples*. *Staples* is no doubt a very high authority, but the substance of it is this, that it points out a form of words which may be safely used where it is intended to limit the preferential right given to a certain class of shareholders to an annual preference—a preference for each year over the profits of that year, but I have no reason to suppose from the passages that were read to us that the learned judges who decided that case would have been prepared to apply the same rule of construction to a clause in which the dividend was declared not only to be preferential but to be cumulative; and on that ground I concur in the construction and in all the observations made by the Lord Ordinary on this part of the case. The result would be, if your Lordships are of the same opinion, that we shall affirm the Lord Ordinary's judgment on the question of the seventh conclusion of the summons, and remit *quoad ultra*.

The Lord President, Lord Adam, and Lord Kinnear concurred.

The Court adhered to the Lord Ordinary's interlocutor in so far as it assoilzied the defenders from the seventh conclusion of the summons.

Counsel for the Pursuers — Sol.-Gen. Dickson, Q.C.—Findlay. Agents — Gill & Pringle, W.S.

Counsel for the Defenders—Ure, Q.C.—Clyde—Graham Stewart. Agents—Davidson & Syme, W.S.