deed narrating expressly the great kindness and attention he had received from her, and his desire to benefit her accordingly. There is nothing to indicate that, in appointing her his residuary legatee, he desired to keep back from her anything which he had not specially appropriated to some other relation. The nephew having died many months before his death, there is no good reason for supposing that he did not desire that the property which by that event fell into the residue of his estate, because no longer destined to any particular person, should not be disposed of as the rest of the estate not specially disposed of was intended to be, by his appointment of the second party as his residuary legatee. And as that appointment was made in general terms, and the testator made no alteration upon it, and as it admits of being construed to refer to heritable as well as moveable estate under the existing law, there seems to be no good ground for holding that he died intestate as regards this property. On the contrary, I think that it must be held that under her appointment as residuary legatee the second party takes this property, which at the time of the testator's death stood in the position of not being specially disposed of by the will.

If this view be sound, then it must also follow that the moveables connected with the property of Newton Hall are in the same position. I think that the first alternative of the first question and the first alternative of the second question should be answered in the affirmative.

LORD TRAYNER—I think the language of the residuary clause in the will before us is habile to convey heritage to the residuary legatee named, and that it does convey heritage to her, if the whole tenor and contents of the will are sufficient to instruct that the testator intended thereby to deal with heritage as well as moveables. I think he did so intend. The will was a universal settlement; it disposed of the testator's whole estate. He had destined the property of Newton Hall to his nephew, who was his heir-at-law, but that nephew predeceased the testator, as the testator knew. In these circumstances had the testator intended to convey Newton Hall to the third party, he would probably have done so by a codicil. He must have known that the third party could not take the property under the will as it stood, in which the third party is not even named. But the probability is that nothing was added to the will, and no new provision made concerning the property in question, because the testator regarded the lapsed legacy as falling back into the residue, which had already been conferred on the second party. The special favour with which the testator regarded his niece (the second party) strengthens this view. The testator having made no new provision with regard to the property of Newton Hall, must have intended it to go either to his residuary legatee or to be treated as intestate succession. The latter view is opposed to all the probabilities of the case, and is indeed negatived, I think, by the fact that the testator had originally disposed of his whole estate by the will before us, and intended his property to descend according to his directions, and not according to the disposition of the law.

LORD YOUNG concurred.

LORD RUTHERFURD CLARK was absent.

The Court answered the first alternatives of the first and second questions in the affirmative.

Counsel for the First and Third Parties—Macfarlane. Agents—Henderson & Clark, W.S.

Counsel for the Second Party—H. Johnston—Neish. Agents—Henderson & Clark, W.S.

Thursday, November 21.

SECOND DIVISION.

KENNEDY'S TRUSTEES *v.* SHARPE.

Insurance—Life—Trust Policy for Children—Married Women's Policies of Assurance (Scotland) Act 1880 (43 *and* 44 *Vict. c.* 26), *sec.* 2—*Widower.*

By section 2 of the Married Women's Policies of Assurance (Scotland) Act 1880, it is provided that a policy of assurance effected by any married man on his own life, and expressed to be for the benefit of his children, shall be deemed a trust for the benefit of his children, and shall vest in him and his legal representatives in trust, or in any trustee nominated in the policy or appointed by separate writing duly intimated to the assurance office.

Held (1) that the expression "married man" included a widower; and (2) that the trust vested in the executors of the assured, and not in his testamentary trustees, the latter not having been specially appointed to deal with the policy.

By section 2 of the Married Women's Policies of Assurance (Scotland) Act 1880 (43 and 44 Vict. cap. 26) it is enacted — "A policy of assurance, if effected by any married man on his own life, and expressed upon the face of it to be for the benefit of his wife, or of his children, or of his wife and children, shall, together with all benefit thereof, be deemed a trust for the benefit of his wife for her separate use, or for the benefit of his children, or for the benefit of his wife and children, and such policy, immediately on its being so effected, shall vest in him and his legal representatives in trust for the purpose or purposes so expressed, or in any trustee nominated in the policy, or appointed by separate writing duly intimated to the assurance office, but in trust always as aforesaid, and shall not otherwise be subject to his control or form

part of his estate, or be liable to the diligence of his creditors, or be revocable as a donation, or reducible on any ground of excess or insolvency."

On 21st June 1889 Mrs Amy Day or Kennedy, wife of John Kennedy, manager of the Baintbari Tea Estate, Western Duars, District Jalpaiguri, India, died, survived by her husband and three children of the marriage—John Hogarth Kennedy, born 19th September 1879, Catherine Anne Kennedy, born 1st October 1881, and George Alexander Kennedy, born 21st November 1886.

On 10th October 1889 John Kennedy insured his life with the Scottish Imperial Insurance Company for the sum of £1000. The policy bore to be effected for the benefit of any child or children of the assured who might survive him, and by the terms of the policy the company undertook to pay the sum in question "to any duly appointed trustee or trustees, failing whom, to the executor or executors of the assured, all in trust for the benefit of any surviving child or children, failing whom, then to the assured, his heirs, executors, or assignees."

On 14th January 1893 John Kennedy married again, his second wife being Mrs Catherine Easter Macdonald or Kennedy. No children were born of this marriage.

On 14th April 1893 John Kennedy died, leaving a last will and testament dated 13th April 1893, whereby he, *inter alia*, appointed William Goss of Ballabari, Dr William Brown of Rungamati, and his wife Mrs Catherine Easter Macdonald or Kennedy as joint trustees thereunder, and directed all his belongings to be equally divided between his wife and three children.

Mr Kennedy was survived by his second wife, and by the three children of his first wife. Mrs Catherine Easter Macdonald or Kennedy was subsequently married to James Jardine Sharpe, engineer, Edinburgh.

William Goss and William Brown proved the will of Mr Kennedy in India, and probate was issued in their favour as his executors, dated 19th November 1894.

The trustees and executors applied to the Insurance Company for payment of the amount due under the policy, and the sum due, amounting to £968, 2s., was, on 23rd August 1895, paid over to the executors, who gave a discharge therefor. Mr Kennedy left almost no other estate.

In these circumstances various questions arose as to the administration and disposal of the funds. Mr and Mrs Sharpe contended that as Mr Kennedy, at the date when he effected the policy of assurance, was unmarried, the policy was ineffectual to constitute a trust for behoof of the children in terms of the Married Women's Policies of Assurance (Scotland) Act 1880; that the sum secured under the said policy was accordingly part of the deceased's estate at his death, and that they were entitled to payment of one-third thereof in virtue of the widow's *jus relictæ*. The children of Mr Kennedy, on the other hand, maintained that the sum recovered under the said policy of assurance fell to them as sole beneficiaries under the trust which was constituted for their behoof by the policy, and accordingly that that sum did not form part of the estate of the deceased at his death, and did not fall under his will, and that Mrs Sharpe was not entitled to any part of it.

If a valid trust had been constituted under the policy of assurance, a further question arose as to the persons entitled to administer and distribute the fund. The trustees under the will contended that by their appointment as such they had been also appointed trustees under the policy of assurance. The executors, in whose favour probate had been issued, maintained that they were entitled to administer the fund, the testator having made no appointment of trustees appropriate to the policy.

For the decision of these questions a special case was presented to the Court by (1) the trustees, (2) the executors, (3) Mr and Mrs Sharpe, and (4) the children of Mr Kennedy by his first wife.

The questions at law were—"1. Did the policy of assurance in question constitute an effectual trust under the Married Women's Policies of Assurance (Scotland) Act 1880, of the sum thereby secured, for behoof of the fourth parties solely? or 2. Did the proceeds of the policy form part of the estate of the assured at the date of his death? 3. In the event of the first question being answered in the affirmative, do the proceeds of the policy fall to be administered and distributed by the first parties as trustees duly appointed in terms of the policy? or 4. Do they fall to be administered and distributed by the second parties as the executors of the assured?"

LORD YOUNG — The question here is whether this policy of assurance constituted an effectual trust under the Act of 1880. I am of opinion that it did, and that the proceeds of the policy must go to the children of the deceased by the first marriage. These proceeds fall to be administered and distributed by the executors of the deceased, he not having nominated trustees to deal with the policy.

LORD TRAYNER—I entirely agree. I have no doubts about the case.

The LORD JUSTICE-CLERK concurred.

LORD RUTHERFURD CLARK was absent.

The Court answered the first question in the affirmative, the second in the negative, the third in the negative, and the fourth in the affirmative.

Counsel for the First and Third Parties—Constable. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Second and Fourth Parties—Sandeman. Agent—James Ayton, S.S.C.