feasible, but if it is, it will not be hindered by the order for compulsory winding up. The first ground I have referred to is one to which the Court will always attach considerable weight. But it appears to me that the interest of the creditors is more likely to be preserved than injured by the granting of the compulsory order. In saying this I allude principally to the fact that the company have executed a conveyance in favour of one of their creditors affecting materially the value of the assets available for the general body of creditors. Now, the right to challenge that conveyance (having regard to the date on which this petition was presented) will be preserved if the order now asked is granted, whereas it is at least questionable whether that right of challenge would be preserved if the company was wound-up voluntarily under resolution to that effect now or hereafter passed by the company.

LORD MONCREIFF and the LORD JUSTICE-CLERK concurred.

LORD YOUNG was absent.

The Court granted the prayer of the petition.

Counsel for Petitioners—Jameson, Q.C.—Horne. Agents—Drummond & Reid, S.S.C.

Counsel for Respondents, The Holmes Oil Company, Limited—Younger.

Counsel for Respondents, John Wood, Limited, and Others—Salvesen, Q.C.—Clyde.

Saturday, October 20.

FIRST DIVISION.

[Lord Pearson, Ordinary.

HENDERSON'S TRUSTEES *v.* HENDERSON.

Trust—Administration—Recovery of Estate—Antenuptial Marriage-Contract—Security for Provisions—Assignation of Share in Testamentary Estate—Substituted Assignation of Policies—Sum Equal to Amount of Provision Paid over to Trustees.

By antenuptial contract a husband bound himself to pay an annuity of £250 to his wife if she survived him, and after his death to pay the sum of £3000 to the children of the marriage. In security of these provisions he assigned to the marriage-contract trustees the balance of his share in the succession of his father, so far as then unpaid, directing them to pay to him the life interest thereof, and also to return to him any residue of the principal which should remain over after "these purposes are provided for." In 1862 a sum of £961 fell to be paid to account of this share, which was by inadvertence paid to the truster instead of to the trustees, and was invested by him in his business. In an action brought by the marriage-contract trustees against the husband in 1897 after the death of the wife for payment of this sum of £961, the defender averred that the trustees had received an assignation in security of two paid-up policies of assurance on his life amounting together to £515, and also a policy for 2000 dollars, that in security of payment of the premiums on this last policy they had the interest of over £5500 of funds belonging to the defender's late wife and liferented by him, and of £2850 paid to the trustees in cash out of the testamentary estate of his father in terms of the assignation in the marriage-contract; and that in consequence of this the trustees had agreed not to insist on payment of the sum now sued for. He further maintained that the pursuers had now no interest to have the fund contributed by him in security of the marriage-contract provision kept up beyond the sum of £3000, and that they held funds and securities provided by him to a greater amount.

Held that the defence was irrelevant, on the ground (1) that the obligation to assign contained in the marriage-contract had not been validly discharged and could not be satisfied by the assignation of the policies, and (2) that as the husband's obligation in the marriage-contract was to assign the share of the testamentary estate in security of payment of the sum of £3000 after his death, he and his representatives being only entitled to repayment of the residue remaining after the purposes of the trust had been fulfilled, and further as it did not follow that by retaining investments of the present value of £3000 the trustees would have £3000 available when the provisions came to be payable, the husband's obligation would not be sufficiently implemented by payment to the trustees of the sum of £3000 and no more.

By antenuptial contract of marriage entered into between Mr Alexander Henderson and Mrs Agnes Elder Robertson or Henderson, Mr Henderson made certain provisions for his wife and children, in terms of which he bound himself and his successors to make payment to his wife, if she survived him, of £250 per annum, and to make payment to the child or children of the marriage who should be alive at his death, if there should be two or more children, of the sum of £3000, payable at the term of 15th May or 11th November which should first happen after his death in the case of children then major or married and to others at the first term after their respective majorities or marriages.

In security of these provisions Mr Alexander Henderson assigned, disponed, and conveyed to the trustees under the marriage-contract, "and to the acceptors or acceptor, survivors or survivor of them, and to such persons as they shall afterwards assume into the trust in virtue of the powers hereinafter conferred on them, the majority alive and accepting being a quorum, All

and Whole the balance of his share of the succession of his said father unpaid at this date, which he is entitled to take and draw by the will of his said father, subject to the provisions of said will, in order that they may lay out the same on good securities, heritable or moveable, Government funds, debentures, or purchases of stocks taken to themselves as trustees foresaid, and may make payment of the interest thereof to the said Alexander Henderson during his life, and that after his death they may apply the said balance and the proceeds thereof for payment of the annuity and other provisions hereinbefore contained, in favour of the said Agnes Elder Robertson in the first place and preferably, and for the education and aliment of the said children, and for payment of the provisions to them as hereinbefore specified, and that if any residue thereof shall remain after these purposes are provided for, that they may make payment of the said residue to the said Alexander Henderson and his heirs and assignees whatsoever."

In 1862 a sum of £961, 9s. 9d. fell to be paid to Mr Henderson as to account of the balance of his share in the succession of his father, and in that year this sum was paid to Mr Henderson directly by his father's testamentary trustees, and was invested by him in his business in Canada. In 1881 a further sum of £2756, 4s. 7d. became payable to him, and this sum, in accordance with the assignation in the marriage-contract was paid over to the marriage-contract trustees.

Mrs Henderson predeceased her husband. There were more than two children of the marriage still surviving.

In 1897 the marriage-contract trustees raised an action against Mr Henderson, concluding for payment of the above-mentioned sum of £961, 9s. 9d., with interest thereon at the rate of 5 per cent. from August 13th 1862.

The pursuers averred that the sum in question had been paid to the defender without their knowledge or acquiescence, that in security for its repayment the defender had assigned to them policies of assurance on his life, representing £515, that he had further assured his life in the pursuers' names for $2000, and that on receiving payment of the sum sued for they were willing to assign to him these policies.

They further averred—"Through diminution in the value of, or loss incurred in the investments of the said sum of £2756, 4s. 7d., which diminution and loss was incurred within the powers of the trust-deed under which the pursuers act, or at all events on investments made with the consent and concurrence of the said Alexander Henderson, the whole sum of £961, 9s. 9d., with a large part of the interest thereon, is required to make up the full sum of £3000, payable to the children of the marriage on Mr Henderson's death."

The defender averred that the sum in question "on discharge signed by the defender on 13th August 1862 was by mutual inadvertence paid over to him by the testamentary trustees of his father."

He further averred—"(Stat. 3) The defender Mr Henderson failing to observe the mistake which he had made in receiving payment of this sum, invested it in his business in Montreal; and when, some years later, the mistake was discovered, in order to avoid the heavy loss which realisation and repayment of the sum would have entailed to him, he was authorised by the testamentary trustees to retain the sum, and in or about the year 1874 assigned to them in security two policies of assurance on his life, namely, a policy for £100 with the United Deposit Assurance Company (now the Scottish Union and National Fire and Life Assurance Company) the premiums on which had all been previously paid up in one sum, and a policy for £415 with the Scottish Provident Institution, the premiums on which Mr Henderson undertook to pay and empowered his marriage-contract trustees to pay out of his liferent from the marriage-contract funds. These premiums have since been paid up in full by the pursuers with the defender's funds. The present surrender value of these two paid-up policies is £379, 14s. These assignations were duly intimated to the insurance companies. (Stat. 5) Early in the same year 1881 a new arrangement was made between the various parties. The marriage-contract trustees received from the testamentary trustees of Mr Thomas Henderson an assignation of the two policies of assurance previously assigned to them as narrated in article 3, and in consideration thereof, it is believed, they jointly and severally bound themselves to indemnify the testamentary trustees against any claim which might be made against them by any of the beneficiaries under the marriage-contract trust in respect of the aforesaid payment in error should Mr Alexander Henderson's trust-estate eventually prove insufficient to meet the whole purposes of the trust. (Stat. 6) About the same time the defender assigned to his marriage-contract trustees, in additional security, a new policy on his life, which he took out in their names, for the sum of 2000 dols. (about £400) with the Canada Life Assurance Company. The receipt of this policy and assignation thereof was duly acknowledged by the pursuer Mr John Henry Robertson, who thereafter paid the premiums as they fell due out of the defender's liferent of his trust-estate. In consequence of these steps it was agreed that the sum received through inadvertent error by the defender nineteen years previously (being the principal sum sued for) should not be repaid, and during the sixteen years that have elapsed since then repayment has never been mentioned till, without any prior application to the defender personally, this action was raised."

The defender also stated that he had handed over to the pursuers in 1881 a sum of £94, 6s. 2d., being his share of the balance of liferent payable from his father's estate.

He averred further—"(Stat. 7) Ever since May 1881 the fulfilment of the defender's obligations under his marriage-contract has thus been amply secured by the

funds held by his trustees for this purpose, namely, by the two sums of £2756, 4s. 7d. and £94, 6s. 2d. paid to them as described in article 4, coupled with the paid-up policy for £100, and the policies for £415 (since paid-up) and 2000 dols. respectively, the premiums on which they are empowered to make a first charge on the liferent of the defender's funds in their hands, as narrated in articles 5 and 6. The pursuers also hold over £5500 of the funds of the defender's late wife, and pay him the interest thereof in liferent. The pursuers thus hold in security of the defender's obligation as to the £3000, £2850, 10s. 9d. in cash, £515 in paid-up policies of insurance, the present surrender value of which is £379, 14s., and a policy for 2000 dollars, besides bonuses, while in security of payment of the premiums on this last policy they have the interest of over £8000. If, therefore, the defender were to pay over the sum sued for to the pursuers, their first duty would, in terms of the provisions of the marriage-contract, be to pay it back to him, and, in any event, as he is liferented in the interest of the marriage-contract funds, any interest paid by him is due to him."

The defender offered on record to consign the sum of £149, 9s. 3d., being the difference between the sum which he stated had been already received by the pursuers irrespective of the policies of assurance, and £3000, being the provision in favour of his children.

He pleaded—"(2) The pursuers are barred by taciturnity and *mora*, and by acquiescence, from insisting in the present action. (3) The pursuers have no interest to have the fund contributed by the defender in security of his obligations under his marriage-contract kept up beyond the sum of £3000, and as they hold funds and securities of the defender's to a greater amount, the present action should be dismissed, with expenses. (5) In respect of the agreement come to by parties in 1881, and of the actings of parties then and since, the present action is incompetent."

The Lord Ordinary (PEARSON) on 2nd December 1898 pronounced the following interlocutor—"Repels the defences, decerns and ordains the defender to make payment to the pursuers of the sum of £961, 9s. 9d., as concluded for, with interest thereon at the rate of five per cent. per annum from the date of this decree, but without interest prior thereto: Finds the pursuers entitled to expenses," &c.

Opinion.—"The pursuers are the trustees under the antenuptial contract of marriage of the defender Mr Henderson.

"By that contract, dated in 1885, the defender assigned to trustees, in security of certain provisions to his wife and children, the balance of his share in the succession of his father, and this assignation was duly intimated to his father's trustees.

"In 1862 a sum of £961, 9s. 9d. fell to be paid to account of the share so assigned; and in 1881 a further sum of £2756, 4s. 7d. The latter sum was duly paid to the marriage-contract trustees. But the former sum was by inadvertence paid to and received by the defender himself, who says that he invested it in his business in Canada.

"The trustees now sue for payment of this sum of £961, with interest, as being part of the trust funds assigned to them, which *prima facie* it is.

"The defence raises certain questions which make it necessary to attend more particularly to the provisions of the marriage-contract. It there appears that the provisions in security of which the above-mentioned assignation was granted, were mainly (1) an annuity of £250 to his wife if she survived him; and (2) a provision to the children of the marriage who should be alive at his death (the issue of a predeceasing child taking the parent's share) of £1500 if one child, and £3000 if two or more. The wife is dead, and there are at present more than two children of the marriage.

"The trust fund so assigned in security was to be laid out by the trustees as there directed in their own names as trustees, the interest to be paid to the husband during his life, and on his death the funds were to be applied in payment of the said provisions; and if any residue remained after these purposes were provided for it was to be paid to the defender and his heirs and assignees.

"The defender maintains, in the first place, that the purposes so far as extant, are already amply provided for by the trust funds in hand, and that if the trustees recovered the money their first duty would be to pay it back to him, in terms of the marriage-contract.

"I cannot read the contract as imposing any such duty. It may be that where a sum assigned in security of provisions turns out to be out of all proportion larger than the provisions to be secured, the Court will set free a part for distribution. The explanations given do not suggest that this is a case of that class; and in one possible view of the case it cannot be said that the children's provision is even covered by the securities held by the trustees.

"If a provision has vested, no doubt all concerned, being *sui juris*, can combine for immediate distribution, except in the case of alimentary trusts.

"But in the present case it is at least not certain that the fee of the provision has vested; and even if it had the children are not here.

"But secondly, the defender alleges that certain arrangements were made relative to the fund in question which, followed by the actings of parties, exclude the present claim by the trustees. He avers that he invested the sum in his business; and that on the discovery being made some years after that the money had been paid to him by mistake, his father's trustees, who had paid it, authorised him to retain it, on his assigning to them in security two policies of assurance on his life, the one for £100 and the other for £415, the premiums on which are now fully paid. This assignation was, it is explained, in security of his liability to repay the £961 to his father's trustees when called on.

"Then in 1881 it is said a new arrangement was made between the various parties. Mr Henderson's marriage trustees bound themselves to indemnify the testamentary trustees of his father for the payment so made in error on obtaining from the latter an assignation of the two policies of assurance. About the same time the defender assigned to his marriage trustees in additional security a new policy on his life for 2000 dollars (about £400), the premiums being defrayed out of the defender's income. The averment is, that in consequence of these steps it was agreed that the sum received in error by the defender in 1862 should not be repaid, and that during the sixteen years which have since elapsed repayment has never been mentioned.

"It does not appear to me that this is a relevant answer to the trustees' claim.

"At the highest the averments do not amount to an allegation that the original assignation contained in the marriage-contract has received effect, or that the implied obligation to assign has been expressly discharged. The theory of the defender's case seems to be that the policies of assurance have been accepted by the trustees, not as security for implement of the defender's obligation to make good the £961, but as security for the provision to children, which is quite a different thing.

"I do not think the defender's averments amount to more than this—that on the error being discovered, after he had put the money into his business, his father's trustees, and afterwards his marriage trustees, refrained from pressing him for repayment on getting the policies in security for such repayment.

"It would require much more pointed averments to support the case now suggested, namely, that the original obligation has merged in the security arrangement, that it has been extinguished, and the security arrangement accepted in lieu of it.

"In my opinion, therefore, the defences are irrelevant so far as directed against repayment of the capital sum. With regard to the claim for interest, I think this may be held to be extinguished by the provision that the income of the trust funds is payable to the defender. No special case is made for restitution of profits on the ground that the money has been at risk, and has earned more than the normal rate. I do not think the trustees should be better off on receiving payment than if they had received it in 1862 and put it in a safe investment.

"As to expenses, I think on the whole that they must follow the result."

The defender reclaimed, and argued—The obligation was primarily the defender's and not that of the trustees. If he fulfilled the obligation in some other way, the whole of the assigned estate must be restored to him. Accordingly, as soon as the purposes were provided for, *i.e.*, by adequate security being lodged in the hands of the trustees, the excess must be returned to him. The two questions in the case were—(1) How much were the pursuers entitled to receive? (2) How much had they received? (1) The pursuers had no interest to have the amount contributed by the defender in security of his obligation kept beyond the sum of £3000, which was the amount to which the obligation was now restricted. Where money had to be paid over at some future date, trustees were not entitled to retain any residue to provide against possible depreciation—*More Gordon* v. *Gordon's Trustees*, November 6, 1868, 41 S.J. 43. There might be a discretion where there was an annuity to be paid, but that was not the case here. The defender had tendered what would make up £3000 in cash exclusive of the policies. (2) The pursuers had in money or money's worth no less than £3717, 14s. 4d. Part of the estate had been handed over in the form of policies of insurance, and this course had been taken at the instigation of the pursuers themselves. Accordingly, they could not now turn round and demand instant payment of cash. No suggestion was made by them on record that these policies were not investments which the trustees ought to hold. In point of fact they came within the terms of the clause of investment as being "good securities." Moreover, they were also justified as being "debentures"—*Phillips* v. *Eastwood*, 1835; Lloyd and Goold Chanc. Rep., Ir., 270 at 292. Accordingly, with the policies the pursuers had an ample margin, but if they were entitled to adequate security for £3000 and no more, they had it apart altogether from the policies.

Counsel for the respondents were not called upon.

LORD PRESIDENT—It appears to me that the judgment of the Lord Ordinary is clearly right. By antenuptial marriage-contract, dated 3rd October 1855, the defender bound himself to pay certain provisions to his widow and children, and in security of these provisions he assigned to the trustees under the marriage-contract "all and whole the balance of his share of the succession of his said father unpaid at this date . . . in order that they may lay out the same in good securities, heritable or moveable, Government funds, debentures, or purchases of stocks, taken to themselves as trustees foresaid, and may make payment of the interest thereof to the" defender during his life, and that after his death they may apply the said balance and the proceeds thereof for payment of the provisions already mentioned.

This is a perfectly unequivocal conveyance, and it does not appear that anyone ever had the least doubt as to its meaning, not even the defender, for on page 6 of the record he says:—"This sum on discharge signed by the defender on 13th August 1862, was by mutual inadvertence paid over to him by the testamentary trustees of his father." So that he admits, and indeed alleges, that the payment to him was a mutual error—one of the kinds of error against which redress is most readily given.

This then is an admission that in August 1862 this sum should have been paid to the

trustees, and it has not been paid, and the trustees demand that it shall be paid now. *Prima facie* it is very difficult to make any answer to this demand. There has been no discharge, if indeed there are any persons in a position to grant a discharge. The obligation is in favour of the children, who are not parties to the case. They have given no discharge, and there is nothing which would disentitle them from claiming the money from the trustees. It seems to me that if the money was not paid, and the defender died without sufficient estate to pay it, the trustees would have no answer to a claim by the children, on account of their failure to get in what is admitted to be part of the trust-estate, which by mutual error was not got in in 1862.

The defence is that the conveyance was for certain purposes, of which the only one not now satisfied (the defender's wife having died) is making good the provision of £3000 to his issue (or their issue) alive at his death. It is quite true that the defender's wife is dead, and that consequently the provision made for her has lapsed, but the obligation in favour of the children is not yet satisfied, and there are not trust funds to satisfy it. Even assuming the policies to be good, the taking of such policies in lieu of the shares of his father's estate assigned by the defender is not trust administration.

But the policies may not be good. And it seems to me no answer to this claim that the trustees have even paid-up policies of insurance, for the companies may be unable to pay when the time comes.

But the defender further says that his sole remaining obligation is to provide £3000, and if he provides this amount no more can be asked of him. Stated so broadly, I cannot assent to this proposition. It is true that there is now only an obligation to provide £3000 to the children; but it does not follow that by retaining what appears to be £3000 in value of present investments, the sum of £3000 will be forthcoming when the money falls to be paid. Even the best investments fluctuate. If the defender was in a position to show the sum he is called on to pay was greatly in excess of the obligation to be secured, the Court might consider whether the amount of security might be modified, but that would be in a proceeding very different from this. Such a question could only arise properly after the money had been paid over to the trustees. The defender's first duty is to hand over to the trustees the sum which ought to have been, but by mutual inadvertence was not, placed in their hands thirty-eight years ago.

I therefore think that the interlocutor reclaimed against should be affirmed, with additional expenses, subject to the declaration that the defender shall not be bound to pay the interest at 5 per cent. found due by the Lord Ordinary from the date of his interlocutor to this date.

LORD ADAM—I am of the same opinion. It appears to me that if this trust had been administered in terms of the trust-deed the result would have been that at this moment the marriage-contract trustees would have been in possession of the whole trust-estate left by Mr Henderson's father, and their duty would have been to have kept that trust-estate invested for payment of certain provisions set forth in the marriage-contract, and after all these provisions were satisfied, then, and then only, could they hand over any residue that might be left to Mr Henderson or his heirs, as the case might be. That would have been the normal condition of matters if they had acted in terms of the deed. But what happened was this, that Mr Thomas Henderson's testamentary trustees paid over the sum of £961 to Mr Henderson, the defender, which sum should have been paid to the marriage-contract trustees. That was an error that was committed in the administration of the estate. Now, after the lapse of a great number of years the marriage-contract trustees say — "You, Mr Henderson, should never have been in possession of this portion of your father's estate, which in truth was assigned to us by your marriage-contract, and you must repay that to us, and as trustees it is our duty to recover that portion of Mr Henderson's estate which is already in your possession." There is no question about that. It came into his possession by what is set forth on record as a mutual inadvertence. It was a mistake altogether that Mr Henderson had this £961, and the clear duty of the trustees is to recover that £961 from Mr Henderson in order that they may hold it in terms of the provisions of their own trust. I think that is the case, and I do not understand that Mr Henderson's counsel disputed that altogether.

Now, Mr Lees contended that all that the marriage-contract trustees had right to require is that they should have the sum of £3000, neither more or less, placed in their hands by Mr Henderson, and that, if that is done, they have no further claim on him to repay the portion which is still in his possession, because after the obligation was fulfilled to pay £3000 to the children out of the residue of the estate, the thing is at an end, and he says it is idle to ask Mr Henderson to give back the whole sum because it may—not that it must, but that it may—come back to him in the shape of residue. Now, I think that is entirely a mistake on the part of Mr Henderson. The obligation is not, and the trustees are not directed, to set aside out of the trust-estate left in their hands a sum of £3000 to be paid to the children. If that had been so, I daresay Mr Lees' contention would have been perfectly right. If there had been, as in *More Gordon's* case, a direction at a particular date to appropriate and set aside a sum of £3000 for that purpose of the trust, then the contention would have been right. But then it follows that if there had been any profit or loss on the £3000, it would have accrued to the children, and would not have had to be paid back; they would have been entitled to £4000 if it increased to that, or only to £2000 if it diminished to that extent. That would

have been the position. But that is not the position of this trust. The obligation imposed upon the trustees here is to retain the whole of the trust-estate, and only pay over the residue of the funds after the purposes of the trust have been fulfilled—that is to say, only when the event occurs in which the trustees must be in a position to pay over to the children the sum of £3000, neither more or less. This is the duty of the trustees under the marriage-contract, and what they wish to be in a position to do. Now, as was pointed out, if they are to have left in their hands £3000, and nothing else, and if they have nothing in bank beyond the £3000, how are they to provide £3000 to the children in the event of that £3000 becoming by the date of payment, not £3000, but only £2000 or £2500? That would not be implement of the obligation under their trust-deed. Their duty is, when the event occurs, to be in a position to produce £3000, and I do not see how they can do that except by doing what the marriage-contract says they should do, retain in their own hands the whole trust-estate until all the provisions are sufficiently secured. In my opinion merely to leave them with £3000 in their hands is not sufficient security for payment of these provisions, and I understand Mr Lees to admit that if that view of the case is not taken, he cannot say that the money in the hands of the trustees, or the whole security—for that is the position of it—would leave more than a margin as a security to meet the obligations of the trustees in future—to pay the £3000. That is my view of the case, and I agree with your Lordship.

LORD M'LAREN—The children of the defender Mr Henderson are entitled under their father's marriage-contract to a provision of £3000 payable at his death. That is the extent of the father's obligation. They are further entitled during his lifetime, in security of these provisions, to have conveyed to the trustees the surplus remaining of their father's interest under his father's trust-settlement. The obligation to give security was not fulfilled through circumstances to which I need not further refer, and this action is instituted by the marriage-contract trustees for the purpose of enforcing the obligation to give security. The defence is that although the stipulated security has not been given, yet the defender had given equivalent security to the satisfaction of the trustees when the demand was made. It may be that it was sound trust administration when the defender, in the opinion of the trustees, was unable at the time to restore the money, to take from him the best security that could be got, and no doubt the trustees were entitled to do this in their own interest, because in the event of his policies of insurance not being paid from any cause the trustees would be liable for their omission to get in the security fund. But then I am afraid that now, when the defender is believed to be in more prosperous circumstances and an action is brought against him for fulfilment of the marriage-contract obligation, it is no defence to say that by an arrangement between him and the trustees he had substituted something different from what his children were entitled to have. I agree with your Lordship in the chair that the determining consideration here is that the children have never discharged their right to the security—have never done anything to relax or impair the obligation in their favour contained in the marriage-contract. In that state of circumstances the trustees, I think, are within their rights in taking steps to enforce the obligation.

Of course, if the money is paid, it follows that those policies of insurance which were substituted for the prescribed security must be restored to Mr Henderson.

LORD KINNEAR concurred.

The Court pronounced this interlocutor—

"Recal the said interlocutor: Of new repel the defences: Find that the defender is bound to make payment to the pursuers of the sum of £961, 9s. 9d. sterling as concluded for, with interest thereon at the rate of five per cent. per annum from 2nd December 1898, but without interest prior to that date: Find the pursuers entitled to expenses to the date of the interlocutor: Allow an account thereof to be lodged, and remit the same to the Auditor to tax and to report: *Quoad ultra* continue the cause."

Counsel for the Pursuers—Ure, Q.C.—Macphail. Agents—Menzies, Black, & Menzies, W.S.

Counsel for the Defenders—Lees—Berry. Agents—Hagart & Burn-Murdoch, W.S.

Thursday, November 1.

FIRST DIVISION.

COCHRANE *v.* DAVID TRAILL & SONS.

Reparation — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *Sched.* 2, *sec.* 8—*A. S., 3rd June* 1898, *sec.* 7 (*a*)—*Application to Sheriff for Warrant to Register Memorandum of Agreement—Sheriff as Arbitrator—Appeal.*

In dealing with an application for a warrant to register an agreement under the provisions of the Workmen's Compensation Act 1897 the Sheriff is not acting as an arbitrator under the Act, and consequently it is not competent to bring his decision under review by means of a case stated for appeal under the Act.

Opinion (*per* Lord Adam)—That under section 8 of Schedule 2 of the Workmen's Compensation Act, and section 7 (*a*) of the Act of Sederunt, 3rd June 1898, the Sheriff, when the genuineness of a memorandum of agreement sent for registration is dis-