ties, and so to give the annuitants such protection as that class of annuities would afford. I wish to reserve my opinion on such a case as I have indicated, as also in regard to the case where a testator has conferred on his trustees a discretion to make the annuity alimentary.

I see no evidence, however, that this testator in directing his trustees to buy annuities intended anything more than to bestow these annuities as a convenient form of investment. There is no indication that he thought these ladies were likely to run into debt or to require protection by way of restriction, and that, I think, is why the annuities he selected were such as might be realised by the annuitants.

In these circumstances, the principle of *Tod* v. *Tod's Trustees*, 9 Macph. 728, and other cases, such as *White's Trustees* v. *Whyte*, 4 R. 786, is, I think, clearly applicable, because the Court ought not to compel a beneficiary to accept a gift in a disadvantageous form when it is in his power by calling it up to obtain possession of the principal sum.

LORD KINNEAR—I am of the same opinion. This testator has left sums of money to certain ladies, and he has given them the sole and exclusive right therein, so that no one else has any interest whatever in the sums so bequeathed; and there is no restriction or limitation whatever on the absolute right given to the legatees. I think it clear we cannot infer a direction to trustees to restrict the rights of an annuitant from the duty to select a good investment, even although among the investments favoured by the testator there may be one which would make it more difficult for the annuitant to sell and assign these annuities. If a testator wishes to confer on trustees a duty to restrict the rights of a beneficiary, he must do so in plain terms. There are many cases in which a discretion of this kind has been given to trustees for the protection of beneficiaries, but to infer such a discretion solely from the existence of a power to select one of several investments is I think out of the question.

As to the power to select investments, it was given, I think, for the ordinary and natural purpose of securing safety; and accordingly the trustees are directed to purchase from the Government or from a first-class company or annuity office. The beneficiaries demand payment of the money which it is proposed to sink in the purchase of annuities; and since there is nothing in the will to prevent their turning the annuities into money if they please, it is for them to determine whether it is more for their advantage to take their legacies in the one form or in the other. I think the case of *Tod* v. *Tod's Trustees*, 9 Macph. 728, which follows a long series of decisions, is sufficient authority for declaring that the beneficiaries are entitled to what they demand.

LORD PEARSON was absent.

The Court answered the third question in the case in the affirmative, found it unnecessary to answer the other questions, and decerned.

Counsel for First Parties—Chree. Agents—M. MacGregor & Company, W.S.

Counsel for Second Parties—Cullen, K.C.—Valentine. Agents—Alexander Morison & Company, W.S.

Saturday, May 30.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.

NELSON & COMPANY *v.* CORPORATION OF GLASGOW.

Expenses—Decree in Name of Agent-Disburser—Compensation.

In an action by the pursuer against the defenders for payment of a sum due for mason work executed under a contract, the defenders pleaded, *inter alia*, "No title to sue." The Lord Ordinary allowed a preliminary proof on the question of title, and thereafter, as a result of the proof, repelled the plea and found the pursuer entitled to expenses. The pursuer thereafter having moved for decree in name of the agents-disbursers, the Lord Ordinary superseded consideration of the motion *in hoc statu* in respect that a counter claim for expenses against the pursuer might arise in the subsequent course of the litigation. The pursuer having reclaimed, *held* that while the course taken by the Lord Ordinary was competent the interlocutor should in the circumstances be recalled, and decree granted as craved.

Hugh Nelson & Company, builders, Glasgow, brought an action against the Corporation of Glasgow concluding for payment of the sum of £750. This sum was the balance remaining due of the sum of £8323, 18s. 7d., being the sum fixed under a contract for mason work.

In a statement of facts the defenders averred that the contract founded upon was a contract between them and a firm of Nelson & Company which had gone bankrupt and whose sequestrated estates were in the hands of a trustee. They also stated that under the contract it was provided that if the work were not completed in time the contractor should be bound to allow a deduction of £10 for each day beyond the period fixed for completion of the work in the contract; that the work had not been timeously completed, and that the total amount of the deductions to be allowed by the contractor was £1200; that the contract also provided that if the contractor became bankrupt the defenders should have power to relet the contract, and that the contractor should be liable for the additional cost thereby incurred;

that the contractor's estate was sequestrated on 4th March 1903, and that the additional cost incurred through the bankruptcy amounted to £1100. They also founded on an arbitration clause in the contract.

They pleaded—"(1) No title to sue. (4) In respect that all questions and differences, either during the progress of the works or on the completion thereof, as to any matter or thing arising out of the contract condescended on, fall to be determined and finally settled by the arbiter under said contract, the present action is incompetent and should be dismissed with expenses. (5) Alternatively, the action ought to be sisted until the matters in dispute have been determined by arbitration in terms of the contract. (6) The said dissolved firm being due to the defenders a larger sum in name of damages for failure to carry out the contract than the sum payable under the contract in respect of work done, the defenders should be assoilzied. (7) The defenders should be assoilzied in respect that they are entitled to retain any sum payable under the contract with the said dissolved firm against the sum due to them owing to failure of the dissolved firm to fulfil said contract."

On 5th December 1907 the Lord Ordinary (MACKENZIE) allowed a proof on the question of title to sue. On 8th January 1908 the Lord Ordinary pronounced an interlocutor repelling the defenders' first plea-in-law, finding the pursuer entitled to expenses since 5th December 1907, allowing an account thereof to be lodged, and remitting the same to the Auditor to tax and to report.

On 10th January 1908 the Lord Ordinary sustained the defenders' fifth plea-in law; and thereafter on 18th February 1908 he pronounced the following interlocutor:—"The Lord Ordinary having heard counsel on the pursuers' motion for approval of the Auditor's report on their account of expenses and for decree in name of the agents-disbursers, supersedes consideration of said motion *in hoc statu:* Grants leave to reclaim."

The pursuers reclaimed, and argued—An agent had a preference on the costs to be recovered from his client's opponents, and was entitled to decree for expenses in his own name—Begg on Law Agents, 2nd ed., 190; Bell's Coms. vol. ii. p. 35. Such a decree might, however, be refused if the result of granting it would be to injure a right of compensation in the opposing parties—*Gordon* v. *Davidson*, June 13, 1865, 3 Macph. 938; *Oliver* v. *Wilkie*, December 12, 1901, 4 F. 362, 39 S.L.R. 251; *Lochgelly Iron Company, Limited* v. *Sinclair*, 1907, S.C. 442, 44 S.L.R. 364; but to warrant the refusal of decree there must be two liquid and existing debts arising in the same action or in cognate actions. In this case there was not, and might never be, any counter claim constituted against the pursuer, and the Lord Ordinary therefore had erred in refusing decree.

Argued for the respondents—The Lord Ordinary was right in the course which he had followed. In the opinions in *Oliver* v. *Wilkie*, *supra*, it was contemplated that an application for decree for interim expenses in name of the agent might be refused in view of what might be the ultimate result of the litigation. Here the defenders had stated counter claims against the pursuer which arose under the contract, and if the issue of the litigation were in favour of the defenders, and they were found entitled to expenses, their claim would be defeated if the pursuers' application were granted.

LORD JUSTICE-CLERK—If the question before us were whether the course taken by the Lord Ordinary was competent, I should hold that it was quite competent. I can easily see that there might be circumstances in a particular case in which the Lord Ordinary might be justified in doing what he has done here. But I must say, that, taking the facts of this case as they are presented to us, I think that decree should be granted in name of the agents-disbursers. The history of the case is very simple. The pursuers brought this action against the defenders to obtain payment of the sum of £750. The first plea with which they were met was the plea of no title to sue. That led to a proof which must have cost a considerable sum of money, with the result that the plea was held to be a bad plea and was repelled, the pursuers being found entitled to expenses. When the pursuers moved for approval of the Auditor's report and for decree in name of the agents-disbursers, the Lord Ordinary took the course of superseding consideration of that motion in respect that the merits of the case have still to be disposed of, and that the pursuers may fail and be found liable in expenses to the defenders. I know of no case in which such a course has ever been followed. The pursuers have been successful after incurring considerable expense, a great part of which must have been borne by the agents. To say that the agents are not to get decree for expenses already incurred, because the pursuers may ultimately be found liable to the defenders in expenses on the completion of the litigation, does not seem to me to be reasonable. I think that this is a case where we ought to carry out what the Lord Ordinary has done in finding the pursuers entitled to expenses by granting decree in name of the agents-disbursers.

LORD STORMONTH DARLING—This is a matter of procedure, and I quite recognise that in such cases it is undesirable to interfere with the discretion of the Lord Ordinary. But here it is evident that the Lord Ordinary must have thought the expenses of the proof a separable matter, because he found the pursuers entitled to these expenses. Then the Lord Ordinary was moved by the defenders to supersede consideration of the pursuers' motion for decree in name of the agents' disbursers, and he superseded consideration. That was a matter of discretion no doubt. But it was impossible for us to deal with the reclaim-

ing note without hearing what the defenders' counsel had to say in explanation of the request which they made to supersede consideration of the pursuers' motion. The only explanation that was given was that as against the pursuers' liquid claim there might arise in an arbitration a counter claim for expenses in favour of the defenders. I never heard of a counter claim which might arise being dealt with as if it had already arisen. I think that the course which the Lord Ordinary has taken sins against the rule that compensation can only operate when you have two liquid claims. I think therefore that the Lord Ordinary's interlocutor should be recalled, and decree granted in name of the agents-disbursers.

LORD LOW—I think it was clearly recognised in the case of *Oliver* that extract of a decree for expenses may be superseded if another litigation is going on between the same parties in which a cross award of expenses may be made. If that be so when different actions are going on, I think it must also be so when an incidental award of expenses is made during the course of an action. What the Lord Ordinary has done is practically to supersede extract, on the ground that a counter claim for expenses may arise. I have no doubt that that was a competent course to follow, and as incidental expenses in the Outer House are very much in the discretion of the Lord Ordinary, I confess I should always be slow to interfere with what the Lord Ordinary has done. But the Lord Ordinary evidently recognised that this was a matter on which the parties were entitled to take the judgment of the Inner House, because he granted leave to reclaim, which he was not bound to do. That leaves us free to consider the case on its merits, and so, considering it, I think it is one in which there should be decree in name of the agents-disbursers.

LORD ARDWALL—The only cases cited to us in which a motion for decree in the name of the agents-disbursers for expenses which have been found due has been refused have been those in which there was a then existing right of set-off for expenses already found due to the other party, and the ground for refusing the motion was that that existing right would be injured if the motion were granted. But no case has been cited to us in which a motion for decree in the name of the agents-disbursers has been refused merely because there might possibly arise, either in the same or in another action, a claim for expenses on the other side. In the case of *Oliver* v. *Wilkie*, where two actions were in dependence between the same parties, the facts were that an interlocutor in each of the separate actions was pronounced on the same day, and in one of the actions the Court found that the pursuer's expenses were of a certain amount, but found that she was not entitled to obtain decree therefor in her agent's name in respect that the defender was entitled to set off the expenses due to him in the other action. The whole question there dealt with, therefore, was as to two sets of expenses both presently due, and the observations in certain of the Judges' opinions as to supersession of extract were not strictly necessary for the decision of the case. What was said in these opinions was, that if two actions were running side by side, extract of the principal decree in one action might be superseded until decree should be pronounced in the other action. That, certainly, is a competent course for the Court to take. But it is only if it is clearly shown that one of the parties will be unjustly prejudiced that that course will be adopted, because when once a party has been found entitled to expenses he has a right to obtain extract of the decree, and it is only for very strong reasons that he will be deprived of that right. No such reasons have been shown in the present case, and, accordingly, I think the pursuer's motion should be granted.

The Court recalled the interlocutor reclaimed against and remitted to the Lord Ordinary to decern for the taxed amount of expenses in name of the agents-disbursers.

Counsel for the Pursuer (Reclaimer)—A. M. Anderson. Agents—Clark & Macdonald, S.S.C.

Counsel for the Defenders (Respondents)—Cooper, K.C.—Crawford. Agents—Simpson & Marwick, W.S.

Friday, June 5.

SECOND DIVISION.

[Lord Guthrie, Ordinary.

NATIONAL HOUSE PROPERTY INVESTMENT COMPANY, LIMITED *v.* WATSON.

Company—Contributory—Application for Shares—Calls Set off against Fees—Ultra vires—Directors.

A in applying for shares in a company paid in cash the amount due on application and entered into an agreement to pay the balance by allowing the fees to be earned by his firm as surveyors to the company to accumulate for that purpose.

The company having subsequently gone into liquidation, they and the liquidator sued A for the amount still unpaid on the shares for which he had applied.

Held that A was not a shareholder of the company, the agreement to set off calls against fees being *ultra vires* of the directors, and vitiating the whole contract.

Opinion that even had he been a shareholder, the pursuers would not have been entitled to obtain immediate payment of the calls, but only to