stated. It is unnecessary to answer the second and third queries.

LORD DUNDAS—I am of the same opinion and shall add but little to what your Lordship has said. Counsel for the second party suggested rather than maintained that the concluding sentence of the sixth purpose of the settlement should be read as a direction that the trust is to subsist until the occurence of the event contemplated, and is then to cease. This view is, I think, plainly wrong; the direction is merely that, in the event postulated, the trust should not terminate before the grandson of the testator attained majority. The real point, however, of the case turns upon the proper effect to be given, in the circumstances which have arisen, to the declaration in the said sixth purpose of the truster's intention that the trust should subsist for ten years after his death "and such further period as, having in view my ultimate object"—viz., freeing the estate of debt—"in so far as this may reasonably be attained, my trustees may consider it necessary and expedient to keep up the same." About thirty-five years have elapsed since the testator's death, during which the estate has admittedly been administered in a most prudent and careful fashion, but it is stated in the Case that "the trustees do not see any prospect of clearing the estate of the debt existing at the testator's death within any period that they can specify." In these circumstances it seems to me that, upon the trustees' own showing, the testator's "ultimate object" cannot now "reasonably be attained" within the meaning of the said sixth purpose, and that the trust must therefore end. It was argued that by the last purpose of the trust denuding was to take place only "on the purposes of this trust being fulfilled"; that this could not be said to have happened while there are subsisting annuities created by the settlement, and that if the trustees were to denude, these annuities might be endangered. I hope that the annuities may not be endangered, but I do not think that the fact of their subsistence can be regarded as a sufficient reason for continuing the trust, looking to the express direction in the settlement that the conveyance of the estate by the trustees should be under burden of, *inter alia*, these annuities. Nor do I consider that we can give effect to the trustees' argument against denuding based on the indebtedness of the second party to creditors, which seems to be considerable. The second party undertakes, prior to any conveyance of the estate to him, to discharge the debts and obligations incurred by him of which intimation has been made to the trustees, or which stand upon the record. On this being done I do not think the trustees or the Court have any concern with the pecuniary affairs or liabilities of the second party

On the whole matter, I have come, not without a feeling of regret, to the conclusion that we must answer in the affirmative the first question put to us by the Case (as amended). If this is done, the other questions do not require to be answered.

LORD KINNEAR—I concur.

Counsel for the First Parties—Chree, K.C.—D. Anderson. Agents—John C. Brodie & Sons, W.S.

Counsel for Second Party—Constable, K.C.—Ingram. Agent—J. George Reid, Solicitor.

Saturday, December 21.

SECOND DIVISION.

SCOTT AND OTHERS (SCOTT'S TRUSTEES).

Succession—Will—Construction—Approbate and Reprobate.

A testator, who had already made provision for his children by marriage contract, bequeathed to them by will a share of the residue of his estate, "equally between and among them, the lawful issue of any of them predeceasing taking the parent's place and share." The will provided that the bequests made thereunder should be accepted by the children in full satisfaction of the marriage-contract provisions. A son of the testator died after the marriage-contract provisions had vested, but before the vesting of the testamentary provisions, leaving a child.

Held that the executrix of the testator's son was entitled to the son's provision under the marriage contract, and that in terms of the will it fell to be deducted from that portion of the residue to which the son's child was entitled under the destination in the will to children's issue, and not from the general residue fund.

Alexander Whitson Scott and others, trustees under the trust-disposition and settlement of the late James Scott, manufacturer, Dundee, *first parties;* Mrs Bella Stewart Dawson or Scott, widow and executrix of Alfred Thomas Scott, a son of the truster, *second party;* James Eric Dawson Scott, only child of Alfred Thomas Scott, *third party;* and David Scott and others, children and grandchildren of the truster, *fourth parties*, presented a Special Case for the opinion and judgment of the Court of Session.

The following *narrative* is taken from the opinion of Lord Dundas, *infra*:—"Mr James Scott, manufacturer, Dundee, died on 26th January 1908. He was twice married. On the occasion of his first marriage, in 1850, he made no marriage contract; his wife died in 1873; there were five children, four of whom survived their father and still survive, while one predeceased him, leaving a child who still survives. Mr Scott married again in 1875. By antenuptial marriage contract he bound himself, his heirs, executors, and successors, to provide and secure one-tenth part of his free personal estate as at the day of his death to the children of

this marriage, which tenth part should be divisible among such children equally at his death, unless he should otherwise direct by writing under his hand; which provisions in favour of said children were declared to be in full satisfaction to them of all bairns' part of gear, legitim, portion natural, third or half of moveables, and all that they could in any way or manner claim or demand by or through his death. Mr Scott's second wife died in 1898. There were ten children of the marriage, all of whom survived their father. One of them, Alfred Scott, died on 16th February 1908, leaving a widow, who survives, and a child who is still in pupillarity. He left a settlement by which he made over to his wife his whole means and estate as her own absolute property. Mr James Scott left a trust-disposition and settlement, dated in 1903, by which he conveyed to trustees the whole estates and effects, of whatever description and wherever situated, belonging to him at the time of his death. His estate when he died amounted to £372,808, of which about £4100 was heritable. The first purpose of the trust was the usual one, for payment of all his just and lawful debts. By the third purpose he bequeathed certain legacies to his children by both marriages, and made provision for his family residences being kept for the use of his children living in family with him at the time of his death, and of means for the comfortable maintenance, support, and education, &c. of his children. With regard to the residue of his estate, Mr Scott provided—'In the sixth place, on my youngest child attaining the age of twenty-one years, I direct and appoint my trustees, with all convenient speed, and as and when they are in a position to do so, to divide the rest, remainder, and residue of my means and estates, both heritable and moveable, into three equal shares, which my trustees shall dispose of as follows—They shall pay and convey one of said shares to and among the children of my first marriage and the survivors and survivor of them equally between and among them, the lawful issue of any of them predeceasing taking the parent's place and share; and with regard to the other two shares, I direct my trustees to pay and convey the same to and among the children of my second marriage and the survivors and survivor of them equally between and among them, the lawful issue of any of them predeceasing taking the parent's place and share.' The youngest of Mr Scott's children attained majority on 30th November 1911. By the last purpose of his settlement Mr Scott provided and declared that the provisions conceived in favour of his children were and should be accepted of by them respectively in full satisfaction to them of all legitim and bairns' part of gear, and also of all conventional provisions whatsoever made by him in and under any marriage contract or otherwise, and of every other claim or provision whatever competent to them in any manner of way by or through or in the event of his death.

[His Lordship dealt with the first two questions in the case, finding that under the terms of the sixth purpose of the trust-disposition and settlement there was no vesting until the youngest child attained majority; that Alfred Scott therefore did not acquire a vested right; that his child was entitled to the share he would have taken had he survived; and that his widow as his executrix was entitled to his share of the fund settled in the marriage contract.]"

The party of the second part claimed, as trustee and executrix and universal legatory of the said Alfred Thomas Scott, to have a right to his share of the provision made by the said James Scott in and by his said marriage contract to the children of his second marriage, and the parties of the fourth part maintained that the whole sum so payable to the party of the second part must be paid exclusively from the share of residue destined by the trust-disposition and settlement of the said James Scott to the said Alfred Thomas Scott, and claimed by each of the second and third parties; and that the other shares of residue could not be diminished or affected by the said payment. This contention was disputed by the party of the third part, who maintained that any sum payable to the party of the second part in virtue of her claim must be paid from the general estate of the said James Scott, and must be borne rateably by all those interested in the residue thereof.

This *question of law* was, *inter alia*, submitted—"Does the said Alfred Thomas Scott's tenth share of the marriage provision in question fall to be paid exclusively from the share of residue to which the third party is entitled? or, Is the same payable from the general estate of the said James Scott?"

Argued for the third party—The residue divisible under the sixth purpose of the will was the balance of the estate after payment of the testator's debts and legacies; and the marriage-contract provisions were debts. The provision in the last clause of the will which excluded the children from taking both under the marriage contract and under the will did not apply either legally or equitably to the case of grandchildren so taking. Here there could be no election, because the claims of the second and third parties were totally independent of each other, being constituted under different deeds and in different form. There could only be election where there was a plurality of rights in the same person which that person had to elect between. Here there was only one right in each party—Story's Equity Jurisprudence (2nd ed.), sec. 1075; M'Laren's Wills and Succession, sec. 286; *Hewit's Trustees* v. *Lawson*, March 20, 1891, 18 R. 793, 28 S.L.R. 528; *Douglas' Trustees* v. *Douglas*, June 27, 1862, 24 D. 1191, *per* Lord Justice-Clerk (Inglis) at p. 1207 and Lord Benholme at p. 1205; *Rose* v. *Rogers*, 1870,

39 L.J. Ch. 791; *Hewitt* v. *Jardine*, 1872, L.R., 14 Eq. 58.

Argued for the fourth parties—This was not a question of election at all. It was simply a question of what did the testator intend the beneficiary should take, and that must be determined by a construction of the terms of the will. By the sixth clause the testator provided that grandchildren should take their "parent's place and share," and by the last clause he provided that the testamentary provisions should be accepted by the children in full satisfaction of the marriage-contract provisions. Therefore since Alfred Thomas Scott could not take under both the marriage contract and the will, the parties claiming through him could not together claim more than he could—*Fisher* v. *Dixon*, July 1, 1833, 6 W. & S. 431; *Jack, &c.* v. *Marshall*, January 21, 1879, 6 R. 543, 16 S.L.R. 326; *Snodie's Trustees* v. *Gibson's Trustees*, February 9, 1883, 10 R. 599, 20 S.L.R. 392; *Sinclair's Executors* v. *Rorison*, December 11, 1852, 15 D. 212, *per* Lord President (M'Neill) at p. 216; *Gray's Trustees* v. *Gray*, 1907 S.C. 54, 44 S.L.R. 39. *Rose* v. *Rogers* (*cit. sup.*) was different, because that was a question of a debt.

[On a question of vesting, which is not reported, counsel for the parties referred to the following authorities—*Young* v. *Robertson*, February 14, 1862, 4 Macq. 314; *Fyfe's Trustees* v. *Fyfe*, February 8, 1890, 17 R. 450, 27 S.L.R. 329; *Taylor's Trustees* v. *Christal's Trustees*, June 24, 1903, 5 F. 1010, 40 S.L.R. 738; *Macdonald* v. *Hall*, July 24, 1893, 20 R. (H.L.) 88, 31 S.L.R. 279.]

LORD DUNDAS—[*After narrative quoted supra*] — The third question is whether Alfred Scott's share of the marriage-contract fund, of which his executrix stands in right, falls to be paid exclusively from the share of residue to which his child is entitled, or from the general estate of Mr James Scott. A point is thus raised which requires more careful consideration. I am not aware of any decision bearing directly upon it, but my opinion is that the view presented in the first alternative branch of the question is the correct one. Alfred Scott having survived his father, might have claimed his share of the marriage-contract funds, but he could not, if he had survived the period of vesting, have claimed in addition to that the full amount of his conventional provisions under the settlement. I think we must hold, as matter of construction, that Mr Scott did not intend or contemplate that the share of the marriage-contract fund effeiring to any one of his children should be paid, and that the issue of such child should, over and above, receive the full share of residue destined to his father under this settlement. The issue of a child predeceasing the period of vesting is to take "the parent's place and share." It was argued that the "debts," which form a first charge upon the truster's estate before "residue" can be ascertained, must be taken to include any share of the marriage-contract fund which was claimed and had to be paid, and therefore any share paid to Alfred Scott, or to anyone in his right, must be deducted from the general estate before shares of residue are struck. I do not think this argument can avail the grandchild. Alfred Scott's share of the marriage-contract fund cannot form a proper debt of the truster's estate consistently with a claim by him (or by his child as taking his place) to his full share in the residue. The only condition on which the child can claim this share of residue is that his father's share of the marriage-contract provision should be paid from some other source than the truster's general estate—that is, it must be paid out of the child's own share of residue. The child has no separate and independent right apart from his own father, but merely a right of representation to take his "parent's place and share." I am therefore for answering the first branch of question three in the affirmative, and the second in the negative.

LORD SALVESEN — The third question raises a more difficult and to some extent a novel point, namely, whether the share of the testator's estate which is payable to the executrix of Alfred Thomas Scott falls to be met out of the general estate or from the share of residue to which the third party is entitled. The argument for the third party was that this was a debt which fell to be deducted from the general estate before the residue was ascertained, with the result that the executrix and child of Alfred Thomas Scott would together receive a larger share of the testator's estate than any of the other children of the second marriage.

It may be conceded that the testator did not contemplate such a result, but this by itself is not conclusive. In the case of *Fisher* v. *Dixon* (6 W. & S. 431), where a father had bequeathed a provision to his daughter in liferent allenarly and her children in fee, declaring that the provision should be in full of all that his daughter could claim from the estate, it was decided that the right of the children to the fee was not affected by the daughter repudiating the provision and betaking herself to her legal claims. The ground of the decision, as expressed by Lord Fullerton, was that the deed created two distinct and independent rights, and that the fee in favour of the children could not be affected by the act of their mother, the liferenter. In the present case there is only one right conferred by the settlement on the testator's children, to wit, a right to share in the residue of his estate contingently on the child surviving the period of distribution. Each child had, however, a vested right under the marriage contract in a smaller share of the testator's estate, but this right would have merged in the larger provision which each child would take who survived the period of distribution. If, therefore, Alfred Thomas Scott had deliberately elected to take the marriage-contract provision, he could only have claimed the benefit conferred upon him by the testator if he survived the period of vesting,

on the footing of equitably compensating the estate for the loss it had thereby suffered (*Gray's Trustee*, 1907 S.C. 54). In my opinion the other residuary legatees cannot be put in a worse position by Alfred Thomas Scott's executrix claiming the provision which had vested in him than they would be if the same provision had actually been paid to himself. This I think sufficiently appears from the language of the settlement. In the first place, I reject the argument that the claims of children under the marriage contract are to be included in the "just and lawful debts" etc., which fall to be deducted before the residue is ascertained. The children of the second marriage are under the contract, no doubt, as it has often been expressed, "creditors amongst heirs," but they are not creditors in the ordinary sense, and I think it may safely be inferred that a testator who gave his children by his settlement much larger provisions than they were entitled to under the marriage contract, did not contemplate that their possible claims under the marriage contract were to be provided for under the first purpose of his settlement. But further, the residue clause expressly provides that the lawful issue of a child who predeceases is to take his parent's place and share. Now the third party here would be getting more than his parent's share if his contention were well founded, because the parent himself could not claim his full share of the residue in addition to his share of the marriage-contract provision. On these grounds I am for answering the first alternative of the third question in the affirmative and the second in the negative.

The LORD JUSTICE-CLERK and LORD GUTHRIE concurred.

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

Counsel for the First and Fourth Parties —Chree, K.C.—Hon. W. Watson. Agents —Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Second Party—Clyde, K.C.—D. P. Fleming. Agents—M. J. Brown & Company, S.S.C.

Counsel for the Third Party—Morison, K.C.—R. C. Henderson. Agents—Davidson & Syme, W.S.

Saturday, December 21.

SECOND DIVISION.

[Sheriff Court at Edinburgh.

MOORE & COMPANY *v.* PRYDE.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, c.* 58), *Sched. II* (9)—*Application to Record Memorandum of Agreement—Terms of Memorandum Differing from Agreement Made.*

In an application by a workman to record a memorandum of an agreement to pay compensation under the Workmen's Compensation Act 1906, the employers objected to the genuineness of the memorandum on the ground that it omitted the words "during the period of total incapacity for work" contained in receipts signed by the workman or his representatives which formed the basis of the agreement. *Held* that as there was a difference, on the face of it not trivial, between the memorandum proposed to be recorded and the agreement entered into, the arbiter was bound to refuse a warrant to record.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, c.* 58), *Sched. I* (3)—*Partial Incapacity—Amount of Compensation—Review of Weekly Payments—Discretion of Arbiter.*

In reviewing an award of compensation under the Workmen's Compensation Act 1906, on the ground of partial recovery of capacity, the arbiter must not proceed on any hard and fast rule that compensation is not to be altered unless the amount added to the workman's present earnings is equal to or exceeds his previous earnings, but must in all cases exercise his discretion with reference to the facts of the case.

Circumstances in which, where the arbiter had refused to diminish compensation, the Court remitted to him in respect that no facts appeared in the case to show that he had so exercised his discretion.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) enacts—Sched. I (3)—"In fixing the amount of the weekly payment . . . in the case of partial incapacity the weekly payment shall in no case exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident, but shall bear such relation to the amount of that difference as under the circumstances of the case may appear proper."

Schedule II (9)—"Where the amount of compensation under this Act has been ascertained, . . . either by a committee, or by an arbitrator, or by agreement, a memorandum thereof shall be sent . . . to the sheriff-clerk, who shall . . ., on being satisfied as to its genuineness, record such memorandum in a special register without fee. . . ."

The Act of Sederunt of June 26, 1907, sec. 12, enacts—"Where the genuineness of a memorandum under section 9 of the Second Schedule appended to the Act is disputed, . . . the person disputing the genuineness . . . shall lodge a minute stating clearly all the grounds for his action, and the memorandum shall thereupon be dealt with as if it were an application to the Sheriff for settlement by arbitration of the questions raised by the minute."

A. G. Moore & Company, coalmasters, St Vincent Street, Glasgow, *appellants*,