Sunday school within the meaning of the Act of 1869?" Now upon that query, the first question is, Who are the disputants? There are none; because, instead of dispute, there is practical agreement. The County Council have not on this question joined issue with Mr Quarrier, and they contend—and the special case defines their contention and its grounds for our consideration—nothing which is negative of the first query. On the contrary, I think the fair reading of their case is, that their desire is that that question should be affirmed. Now, it will not do for this Court, in questions of assessments, to give an answer to a query where there is no dispute, and no parties who take opposite views. Therefore I think that that question will not do. Then, as Lord Adam has pointed out, the second question is entirely dependent upon our answering the first in the affirmative. For it begins, "If so," &c. That seems to form a short and conclusive objection to our entertaining this second query. But I must go on to observe that I do not think the parties here have arrived at any stage at which there is such a *lis* or controversy that the Court is entitled to step in. If the County Council had disposed of Mr Quarrier's appeal in a way adverse to him, I can understand his challenging the legality of their decision in this form, or in a declarator. If it appeared, for instance, that the County Council had refused to consider some question on which a right to exemption depended, it is not too bold to say that the remedy might have been found. But they have not done so; and for aught that appears, they might exempt Mr Quarrier.

LORD ADAM—I agree with what has been said. No doubt a special case is a very valuable and quick and cheap way of getting the opinion of the Court on matters appropriate for that purpose. But it appears to me that in this case the form of a special case has been used where there is no dispute between the parties. About the first question there is no dispute. Mr Quarrier maintains that his is a ragged school. It is set forth in this case that the County Council admit that it is a ragged school. That is not a proper *lis* or a proper case to bring before the Court in the shape of a special case. Then look at the other question. One would naturally suppose that the County Council would be the parties who were maintaining that they had the power of exemption. It is not likely that a board of any sort would be willing to deny that they had a right to exercise a certain discretion; yet here it is Mr Quarrier who wants to insist that his opponents have it, and his opponents, as I understand, are supposed to say that they have not got it. I do not think that is a fair question. Supposing we did decide these questions, our judgment would come to nothing if the County Council chose to say, we will exercise our discretion either way.

LORD KINNEAR—I am of the same opinion. I do not say that it would not be possible to obtain a judgment upon some of the questions indicated by Mr Clyde in the course of his argument as being those questions upon which the judgment of the Court is desired, and I do not say that it would be impossible to obtain those judgments in the form of a special case. But I agree with your Lordships that this case cannot be entertained because it discloses no controversy between the parties. Neither in its form nor in its substance does it appear to me to raise any question on which the parties are opposed. The proper mode of stating a special case is, to set out in the first place an articulate statement of the facts on which the parties are agreed, and then to set out, as clearly and articulately, the opposing pleas of the parties. Here we have no opposing contentions. We may gather that different views of the statute may be maintained, but we have no statement of opposing pleas by the parties to the case. I therefore agree with your Lordships that this case as it now stands cannot be entertained.

LORD M'LAREN was absent.

The Court refused the motion of the second parties for leave to amend, and dismissed the special case

Counsel for First Parties — Dundas — R. Monteith Smith—R. S. Brown. Agent —F. J. Martin, W.S.

Counsel for Second Parties—Balfour, Q.C. — Clyde. Agents — Dove, Lockhart, & Smart, S.S.C.

Wednesday, November 27.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

GRAY'S TRUSTEES *v.* ROYAL BANK.

Compensation — Retention — Balancing of Accounts in Bankruptcy — Mutuality of Debt and Credit—Retention by Bank of Trust Funds for Debt of Truster.

The executors in a testamentary trust which ultimately proved to be insolvent, deposited, *eo nomine*, realised assets of the trust with a bank to which the truster was indebted at the date of his death.

Held (1) that there was no mutuality of debt and credit between the bank and the executors, and that the bank were not entitled to apply the deposited trust funds in satisfaction of their claim against the deceased; and (2) that assuming such an equitable right to exist, the bank were barred from exercising it by their knowledge that the estate was insolvent, and that the realised assets were held by the executors as trustees for the benefit of all creditors upon the estate.

Thomas Aitken Gray, tanner and currier, Maybole, died on 16th April 1894. He left a trust-disposition and settlement, by which he assigned his whole estate to certain trustees and executors named, and granted them power to carry on his business in Maybole with the object of selling it as a going concern to the best advantage. The trustees were duly confirmed as executors. At the date of his death Mr Gray was indebted to the Royal Bank of Scotland in the sum of £5217, 17s. 7d. It proved impossible to dispose of the business as a going concern, and the estate proved ultimately to be insolvent, and was sequestrated on 22nd November 1894. Prior to this date, on 27th April, the testamentary trustees had opened two current accounts in their names as trustees and executors with the bank at the Maybole branch, on one of which, at the date of sequestration, there was a credit balance of £465, 8s. 5d., and on the other a credit balance of £537, 18s. 7d. James Gibson, solicitor, Maybole, the law-agent of the trustees, who was himself a trustee, had also deposited with the bank four sums, amounting in all to the sum of £4119, 6s., and the deposit-receipts were taken in the name of "James Gibson, solicitor, Maybole, for himself and others, trustees and executors of the late Mr T. A. Gray."

The testamentary trustees (with the concurrence of the trustee in the sequestration) raised an action against the bank for payment of the balance upon the current accounts above set forth, and Mr Gibson (with the concurrence of the testamentary trustees, and of the trustee in the sequestration) raised a second action for payment of the deposit-receipts.

The defenders pleaded in both actions—"(3) The defenders being justly entitled to retain the sums contained in the said deposit-receipts against, and apply them towards, satisfaction of the debt due to them by the late Mr Gray and his estate, decree of absolvitor should be pronounced with expenses."

The two actions were heard together both in the Outer and in the Inner House.

Upon 5th July 1895 the Lord Ordinary (STORMONTH DARLING) pronounced this interlocutor—"Sustains the third plea-in-law for the defenders, and in respect thereof assoilzies the defenders from the conclusions of the summons."

Note.—[*After stating the facts*]—"The answer which the pursuers make to the defenders' third plea is that compensation (or retention) can only be pleaded where the debts are mutual, and that in the words of Professor Bell (Com. ii. 124) 'to constitute this mutuality of debt and credit the sums reciprocally due must be owing to the parties in their own right respectively.' Here the pursuers say there is no mutuality, because the debt due to the bank was a debt due by the deceased, and the debt due by the bank was a debt due to the trustees in the one case, and to Mr Gibson, as representing the trustees, in the other.

"The fallacy of this argument is that the debt due to the bank, though originally due by Mr Gray himself, became on his death a debt due by the trustees as his representatives. It was a debt limited no doubt by the amount of the estate in their hands, but that affects merely the extent and not the quality of the obligation. The mutuality of the debts is completely satisfied by the one being due by and the other to the trust-estate. Accordingly, Erskine (Inst. iii. 4, 13), after stating the rule that each of the two parties must be both debtor and creditor in his own right, adds—'An executor confirmed is in this question accounted the same person with the deceased, for by the confirmation he becomes debtor to the creditors of the deceased, and creditor to his debtors.'

"The only case which the pursuers were able to adduce in their favour was an English one in 1855—*Rees* v. *Watts*, 11 H. & G. 410. But that was a case which turned on the wording of the English statute of set-off, and cannot be an authority on a rule like retention, which is founded on the common law of Scotland.

"Further, I think the bank is entitled to absolvitor *de plano*, for the figures are admitted, and none of the relevant facts are in dispute. In Gibson's action there is an averment that he placed the money on deposit-receipt for 'safe custody.' I take it that this is nothing more than a statement of the purpose which everybody has in depositing money with a bank. But in a case—*Robertson's Trustees* v. *Royal Bank*, 18 R. 12, in which the words 'for safe keeping on your account, and subject to your order,' appeared in the receipt which a bank granted for certain bonds deposited by a customer, the Court held that these words did not constitute a specific appropriation of the securities, and the late Lord President said—'The presumption is that custody gives a right of retention, and I think that that presumption cannot be rebutted without something express and distinct.

"Again, in both actions there is an averment that after the death of Mr Gray it was found to be doubtful whether his estate would prove solvent, and that this fact was well known to the bank. Also it is said that the bank is now trying to take advantage of the trustees having selected it as their bankers to the effect of obtaining an unfair and illegal preference over the other creditors of the deceased. But it is not said that the bank used any unfair means to obtain possession of the money, and it would be exacting rather too high a standard of virtue from a commercial company to expect them to say, when money is offered to them in the ordinary course of business, 'Don't you think you had better take the money to some other bank in case it may turn out that the estate is not worth twenty shillings in the pound?' The pursuers say that the trustee in the sequestration holds them personally liable for the money. That may be hard for them, but the considerations which would establish their liability are not before me, and the mere threat of the trustee cannot affect the decision of the present question."

The pursuers reclaimed, and argued—(1) The bank had no claim for compensation against the debt they owed to the

trustees in this case. The money was lodged in the bank by the trustees and executors of Thomas Gray, and was due to them as individuals; the debt which was due to the bank was the debt of the deceased, hence there was no mutual debt; and each of the parties was not debtor and creditor in his own right—Erskine, III. iv. 13; *Rees* v. *Watts*, June 30, 1855, 11 H. and G. 410. It was true that the pursuers were the trustees and executors on Gray's estate, but it was only against executors who had a beneficial interest under the deceased's settlement that compensation could be pleaded as regarded a debt due by the deceased—Stair, i. 18, 6; *Williamson* v. *Tweedie*, November 12, 1628, M. 2613; *Children of Monswell* v. *Lawrie*, February 14, 1662, M. 2614; *Heritable Securities, &c.* v. *Miller's Trustees*, March 18, 1893, 20 R. 675. (2) The bank was not entitled to claim compensation because this was practically a trust for creditors. It was admitted that if this had been purely and solely a trust for creditors the bank would not have been entitled to seize any moneys deposited therein by the trustees for safe custody, and pay a debt due by the truster to itself in full, thereby obtaining an illegal preference. In this case the bank knew that if Gray's business in Maybole could not be sold as a going business that the trust-estate was insolvent. They also knew that the business could not be sold as a going concern, and in these circumstances they were bound to look upon this trust as a trust for creditors, and act accordingly.

The respondent argued—This was truly a case of retention, not depending upon the technical rules applicable to compensation, and the question was whether there was such a mutuality of debts that the bank could retain funds lodged by the trustees, because if there was this mutuality then without a special agreement (and none such was averred) the bank was entitled to set off the one debt against the other—*Robertson's Trustee* v. *Royal Bank of Scotland*, October 24, 1890, 18 R. 12. It was plain there was this mutuality, and there was no specific appropriation of the sum lodged, because while the debt was due by the deceased to the bank before he died, the money now claimed by the bank had been lodged there by the deceased's representatives, who took up his whole estate and came in his place. The only authority that was cited against that view was the case of *Rees* v. *Watts* (cited *supra*), but that case did not apply, because it was decided upon the particular terms of the English Statute "2 Geo. II. cap. 22," which could not be accepted in Scotland, as it really took its rise from an attempt to simplify the complicated English system of pleading of that day. This was a testamentary trust, and did not partake of the nature of a trust for creditors, and there was neither an averment or plea of *mala fides* on the part of the bank in receiving this money, which was paid into the bank in the ordinary course of business.

At advising—

LORD YOUNG—Mr Gray, tanner and currier at Maybole, died in April 1894, and the pursuers are the trustees and executors nominated in his will. They acted as such till 22nd November 1894, when Mr Gray's estate proving to be insolvent was sequestrated under the Bankrupt Act. The trustee in the sequestration is a concurring pursuer. The purpose of the actions (for there are two) is to recover from the defenders £5122, 13s., being the amount of money belonging to the executry estate of the deceased which his trustees and executors had in the course of their duty, and within, I think, six months of his death, realised and deposited in the defenders' bank for safe-keeping, in accounts, and on deposit-receipts, in terms which signify the fact that the money was executry estate, and was deposited as such by the executors who were responsible for its safe-keeping till required for distribution among those beneficially interested. These facts are admitted.

On the other hand it is admitted that the defenders (the Royal Bank) were creditors of the deceased testator (Mr Gray) at the time of his death for £5207, 17s. 7d., due on a cash-credit account. The defenders' third plea-in-law (in each action), which the Lord Ordinary has sustained, is that they are entitled to retain the sums deposited by the executors, and at the credit of the executry accounts, and apply them towards satisfaction of the debt due to them by the late Mr Gray.

The Lord Ordinary sustains this plea, which he calls a plea of "retention." The misnomer (as I think it is) is immaterial—the right urged by the defenders, and on which alone the plea is founded, being a right to pay the debt due to them by the deceased with the money deposited by his executors, or to set off the one debt against the other. I think the proper Scotch term for this is "compensation." In England they appropriately call it "set-off."

It must, I should think, occur to anyone considering the matter, that the preference which the Lord Ordinary has by his judgment given to the defenders, by allowing them to keep over £5000 of the executry funds wherewith to pay their own debt in full, necessarily involves either injustice to the other creditors of the deceased, who, according to the amount of their debts, have the same beneficial interest in the executory estate as the defenders, or hardship to the executors, if the view of the trustee in the sequestration be sound, that they are personally liable to make the money good to the estate.

On the death of Mr Gray, when his estate passed to and was taken up by the pursuers for administration, the defenders were in no different position from other unsecured creditors, nor, so far as I can see, could they by any proceeding whatever obtain a preference. The whole estate of their debtor had passed to the pursuers as trustees for administration, for behoof of all who were legitimately interested. The defenders could not stop or interfere with the pursuers' administration so long as they acted according to their duty, which it is

not suggested they ever failed to do. Their duty was first to ascertain the amount of the estate and of the claims upon it; second, to realise and ingather the estate with reasonable despatch; third, to put the money realised into safe-keeping till needed for distribution; and finally to make the distribution among those beneficially interested according to the ability of the estate to meet their just claims. They were not only not bound, but not entitled to pay any of the deceased's creditors until they had, using due diligence, ascertained the amount of the estate available for the payment of all of them, and the amount of the debts to be paid. I now say nothing about privileged or secured debts. Leaving these out of view, and taking account only of unsecured and unprivileged creditors, such as the defenders admittedly were, the pursuers were certainly never in a position to pay any of them — for when they were superseded by the sequestration, and the trustee under it, the estate had been only partially realised and ingathered, and they could not know what dividend it would yield. It is superfluous to say that they could not lawfully—that is, consistently with their duty as trustees and executors, confer any preference upon the defenders to the prejudice of other creditors having equal interest in the estate under their administration.

These propositions seem, therefore, to be clear enough, viz., first, that at the commencement of this executry trust the defenders were ordinary unsecured creditors who could do nothing to interrupt the executory administration or obtain a preference over other creditors; and second—that the executors were at no time in a position to pay their debt or give them a preference.

The defenders, nevertheless, by the plea which the Lord Ordinary has sustained, claim a very substantial preference, or what may be so, which they had not to begin with, could do nothing to acquire, and which the executors could not lawfully or without violation of their duty to others, give them. The estate may, for aught we know, yield not much short of full payment to the creditors, but we must consider and decide upon this plea exactly as if the deposited money in question proved to be the whole estate, the defenders claiming it to the exclusion of all other creditors. It is, I suppose, not doubtful that it is the duty of an executor or other trustee who ingathers considerable sums of money, to be administered by him on account of others, to deposit it in a place of safety till needed for actual use, and that a respectable bank is usually selected, the deposit being so made as to identify it as trust property. In short, the mode adopted by the pursuers here in making the deposits in question with the defenders was a lawful, and the most usual mode of performing the duty which I am referring to, and which was undoubtedly laid upon them with respect to the trust-money deposited. I have therefore no hesitation in holding that these deposits were made by them in the performance of that duty, and with no intention of violating their duty to deal equally with all the creditors of the deceased by giving a security or preference to the defenders, or enabling them to pay the deceased's debt to them, and so dealing with them differently from other creditors in the same position, and therefore to the prejudice of these other creditors. The Lord Ordinary thinks, perhaps rightly, that a high standard of virtue ought not to be exacted from a commercial company. But virtue apart, and having regard only to common intelligence, I cannot think that the defenders' agents, or other officials, thought that Mr James Gibson, when he made the deposits of the executry money as he received it, meant to benefit the Royal Bank at the cost of the other creditors, or that he could lawfully, not to say honestly, do so.

The doctrine of compensation stands, as the text-writers all state very distinctly, upon consideration of expediency and justice, the expediency of avoiding cross actions and circuitous proceedings to settle accounts between parties mutually indebted, and where debts and credits may, without injustice to themselves or others, be set off against each other. The doctrine is in my opinion inapplicable to sufficiently identified trust money deposited for safe-keeping, or in the hands of a trustee or agent who has ingathered it. Such money must, according to well-established rules of law, be preserved while identifiable for behoof of those having the beneficial right to it. There is here, in my opinion, no *concursus* between the executor's claim against the bank for the executry money deposited, and the bank's claim against the executors for such a sum as may be found in the course of a due executry administration to be payable to them as unsecured creditors of the deceased. It is quite inaccurate to say that the executors are, or ever were, debtors to the bank for the deceased's debt to them, and to say that the estate is their debtor is to use figurative language. The executors are only debtors for a due administration of the executry estate, and to pay to each creditor what shall on such administration be found to be his share. Executors are only trustees, and responsible for no more than other trustees, viz., a due realisation of the trust-estate, and distribution of it among those having the beneficial right to it. The most proper language to use is that any creditor of a deceased testator or intestate is entitled to be paid such a dividend as his estate duly administered will yield, and that it will not signify to his right whether the administrator is an executor, a judicial factor, or a trustee in sequestration. When I say that an executor is not debtor for the debts of the testator or intestate, I mean more than that he is not personally liable. Of course he is not personally liable, an executry title not being a passive title, although an executor may make it so by misconduct, as, for example, by vicious intromission. What I mean is that the confirmation of an executor does not make him debtor to the

creditors of the deceased testator or intestate, any more than the due and regular appointment of a trustee on a sequestrated or other estate, or of a judicial factor, makes the person appointed a debtor to those having claims to be taken account of in the administration.

The only argument stated to us in support of the defenders' plea was that an executor being *eadem persona cum defuncto*, he may give any preference to a creditor of the defunct which the defunct himself could have given in his lifetime. I have no difficulty in rejecting that view. *Eadem persona cum defuncto* is at the best figurative language, which sometimes and in this case was, in my opinion, very inaccurately used. It is true that for many purposes an executor stands exactly in place of the deceased, and that questions between him and others, say a creditor of the deceased, may very properly be dealt with on the same grounds and considerations in fact and in law as they would have been with the deceased himself. Thus, if a question arises, whether a particular claim was a just debt of the deceased at the time of his death, or what is the amount of it, these questions will be considered and determined with the executor exactly as they would have been with the deceased, but the *eadem persona cum defuncto* argument is ridiculous upon the statement of it if you use it with reference to the power of an executor to deal with the estate. The deceased in his lifetime might have given away his property in charity, or spent it as he pleased, or he might, there being nothing but the bankruptcy laws to restrain him, have preferred one creditor to another. When a living debtor prefers one creditor to another, or puts his estate into that creditor's power, although it may be unfair to others, he is acting in the exercise of his legal right as a proprietor, unless where some rule of bankrupt law affords a remedy. But a trustee or executor (who is just a trustee) is not at liberty to deal with the estate otherwise than as a trustee, and with a due regard to the right of those beneficially interested in the trust-estate. He cannot give away the estate in charity, or spend it in riotous living as the owner might have done, and cannot prefer one creditor to another, but must deal justly and equally by all having equal rights. Take the case of Mr Gibson, who made the greatest part of the deposits in question (over £4000), and was the man of business of the trust, and himself a trustee. Suppose he had been the sole executor. It does not signify that he was acting along with others. As executor he was, according to the argument, *eadem persona cum defuncto*. As an individual he was, let us suppose, an unsecured creditor of the deceased for £4000 or more, and as trustee he ingathered £4000 of the executry estate. As *eadem persona cum defuncto* he could have paid his own debt in full leaving any number of other creditors to go unpaid. In short, this *eadem persona cum defuncto* argument would lead to this, that an executor, if also a creditor of the deceased, may pay his own debt with the first money which he ingathered, leaving other creditors only the chance of any residue after he is paid. The argument, good for this, if good for anything, was really the only argument that was stated to us, and without dwelling further upon it, I am of opinion that the Lord Ordinary has misapprehended the case, and that the trustees are entitled to judgment in terms of the conclusions of the action, the defence which the Lord Ordinary has sustained being repelled.

I have not distinguished in any way between the two small accounts in name of the trustees—one for about £500, and the other about £400, and the larger deposits made by Mr Gibson. I think the same legal considerations are applicable to them all. It is, however, proper to say that I think the explanation of these accounts is satisfactory. The trustees were empowered by the trust-deed, if they saw fit, to carry on the deceased's business for a time with the view of selling it as a going concern, and they did accordingly so carry it on for a few months, their conduct in doing so not being impugned. The money which went into these accounts was admittedly trust money, and is upon the face of the accounts identified as such. There is no other distinction; the other money is really in the very conspicuous position of trust-estate ingathered by the agent for the trust, and put into the bank for safe keeping, and to allow the bank to pay themselves with this, and leave the other creditors, it may be, to go without anything at all — I hope that is not the position of matters here—that the estate will yield a great deal more than the deposited money—but to allow the defenders to take an advantage over the other creditors, whether at the cost of the other creditors, or at the cost of the executors, if they are liable for this money as having been lost in their hands, would, in my opinion, be contrary to justice, and unsupported by any rule of law with which I am acquainted.

LORD TRAYNER—The plea which the Lord Ordinary has sustained is one under which the defenders maintain their right to retain money lodged with them by the pursuers in extinction of a debt due to the defenders by the deceased Mr Gray, whose trustees the pursuers are. In the argument addressed to us, the distinction between a right to compensate or set off one debt against another, and the right to retain, as on a balancing of accounts in bankruptcy, was not always carefully observed. And I think this must also have been the case in the Outer House. The distinction, however, is or may be important, for although the pleas of compensation and the right to retain, as on a balancing of accounts in bankruptcy, come very near each other, yet there are conditions necessary to admit of the application of the former which are not required in the case of the latter.

This being, as I have said, a case of retention and not of compensation, I agree with the Lord Ordinary in thinking that the case of *Rees* v. *Watts*, cited by the pursuers,

has no application. That was a proper case of compensation or set-off, and its decision depended upon the construction of a special statute. I should doubt whether, even in England, that case would be regarded as an authority in a case like the present, having regard to what was said by Parke, B., in the case of *Foster* v. *Wilson*, 22 L.J. Excheq. 191, who points out that the right of set-off is dependent on statutory provisions which are and have long been distinct and separate from other statutory enactments which provide for the case of retention in bankruptcy. I think the pursuers, if desirous of supporting their views by a citation of English authorities, would have found something nearer to the point here at issue, in the principles which were given effect to in the more recent case of *Bailey* v. *Finch*, L.R., 7 Q.B. 34. But decisions in England which depend upon the construction and application of statutory provisions, special to England, can scarcely be regarded as authorities in the disposal of a question which depends upon the common law of Scotland.

The facts of the present case have already been referred to sufficiently. The question is, can the defenders retain money lodged in their hands by the testamentary trustees of Mr Gray, *eo nomine*, in satisfaction of a debt due to them by Mr Gray? I agree in thinking that they cannot. It appears to me that the Lord Ordinary has erred in holding that there is here mutuality of debt and credit. The defenders are the creditors of the late Mr Gray, but they are the debtors of Mr Gray's trustees. The Lord Ordinary thinks that this amounts to the same thing, and that the bank are creditors of the trustees, because the debt due to the bank is now due "by the trustees" as the representatives of Mr Gray, and he refers to a passage in Erskine in support of this. I venture to think otherwise. The trustees represent Mr Gray only in a popular sense, and as used in this case I fear that sense is misleading. The defenders do not certainly represent Mr Gray in the sense in which an heir *in mobilibus* (called an executor in our law as distinguishing him from an heir, *i.e.*, in heritage) represents the person to whom he succeeds. Such an executor, in a former state of our law, incurred absolute liability for all the debts and obligations of the deceased. He took the whole moveable estate, and with it all the debts and liabilities. He was *eadem persona cum defuncto*. But there were other executors who did not so represent the deceased. An executor-creditor does not do so, because he is not an heir or successor, but an administrator merely for his own behoof, and for behoof of others having claims against the deceased. In my opinion the defenders are only executors in that sense. They are bound to administer the estate for behoof of all concerned, but have no liability or obligation beyond the duty of due administration. I doubt whether in the passage referred to Erskine had in view any other than an executor proper (or heir *in mobilibus*), and Stair (i. 18, 6), in dealing with the same subject, I think plainly means such executor, for he puts "heir" and "executor" together in a manner which shows that he is speaking of successors, heirs in heritage, and heirs in moveables. If this be so, then there is no authority for holding that testamentary trustees represent the testator in the sense in which an executor or heir in moveables represents the person whom he succeeds. They are not like him *eadem persona cum defuncto*. But if not, then the mutuality of debt and credit fails.

The Lord Ordinary further observes that the mutuality of debt and credit is completely satisfied by the one debt being due by and the other to the trust estate. But what is the defenders' claim at the present moment against the pursuers? Surely not for the debt due to them by the deceased. The pursuers may never be liable for that sum. If preferable claims carried off the whole assets of the deceased, the defenders would have no claim whatever against the trustees or the estate. All that the trustees are bound for at present—the only obligation which the defenders could enforce against them—is due and fair administration. It is difficult to see how the defenders can plead retention of money paid to them by the pursuers against a debt not demandable from them—a debt which in easily conceivable circumstances may never be demandable, and a debt which, in its entirety, never can be demandable if the deceased's estate is insolvent.

In addition to what I have said, it has to be remembered that the right of retention as on a balancing of accounts in bankruptcy is an equitable remedy. If a person has money or securities in his hands belonging to his debtor, he may retain them till his debt is satisfied. If the deceased had lodged moneys or securities with the defenders, then their right of retention would have been clear. But are they to take the same benefit from the accident—for it was an accident—that the pursuers lodged with them the funds realised by them in the execution of their duty as administrators? I think not. The trustees never intended to benefit the defenders in that way, and were not entitled to confer any such benefit, for any benefit conferred on the defenders was just so much loss or detriment to the general body of creditors. Nor can the defenders in equity claim such a benefit. The funds in question were deposited with them in name of the pursuers as trustees, plainly intimating thereby that they were trust funds. The defenders, therefore, knew that these funds were subject, with the other assets of the deceased Mr Gray, to all claims competent against him, and if the estate was insolvent, then to all the deceased's creditors according to their several rights. The defenders suffer no wrong if these funds be now applied as at the time of their deposit the defenders knew they should be, and only could be, lawfully applied. I think the defenders' case is not covered by the equitable remedy on which their defence is based, and am of opinion on the whole matter that the defences should be repelled.

The LORD JUSTICE-CLERK concurred.

LORD RUTHERFURD CLARK was absent.

The Court recalled the interlocutor reclaimed against, and in the action by the trustees decerned against the defenders for the amounts of the accounts-current, with interest; and in the action by James Gibson decerned against the defenders for the amount of the deposit-receipts, with interest in terms of the conclusions of the said actions.

Counsel for the Pursuers and Reclaimers—Dickson—Aitken. Agent—David Turnbull, W.S.

Counsel for the Defenders and Respondents—Balfour, Q.C.—H. Johnston—Dundas. Agents—Dundas & Wilson, C.S.

Wednesday, November 27.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

GLASGOW, YOKER, AND CLYDEBANK RAILWAY COMPANY *v.* LIDGERWOOD.

Arbitration—Compulsory Purchase—Railway—Lands Injuriously Affected—Jurisdiction—Interdict.

Where a claim for compensation is made under the Lands Clauses Consolidation Act 1845, the Court will not supersede the statutory arbitration for the purpose of determining the amount of such compensation, unless it is satisfied that the claim is irrelevant, or that the arbiter is asked to exercise a jurisdiction which he does not possess, or that the claimant's *prima facie* right to compensation is otherwise met by an objection which excludes inquiry.

Railway—Railway Operations—Compensation for Lands Injuriously Affected—Deprivation of Frontage and Access.

A claim for compensation, by the owner of lands, under section 6 of the Railways Clauses Act 1845, on the ground that he had been deprived of frontage to a road, and of frontage and access to a canal, in consequence of the railway company diverting the line of the road and of the canal, *held* relevant.

The Glasgow, Yoker, and Clydebank Railway Company, incorporated by Act of Parliament, 1878, are empowered by their Act of 1893 to divert the Forth and Clyde Canal, and the Boquhanran Road, near Clydebank, for the purpose of constructing a branch line. While these operations were in the course of being carried out, Mr William Van Vleck Lidgerwood served a notice of claim against the Railway Company, dated 3rd May 1895. The notice was in the following terms:—"The claimant is heritable proprietor of land at Clydebank, in the parish of Old Kilpatrick and county of Dumbarton, bounded on the north by the centre of the road to the south of the North British Railway; on the east by ground belonging to the Singer Manufacturing Company; on the south by land belonging to the proprietors of the Forth and Clyde Canal; and on the west by the Boquhanran Road, with the buildings and other erections thereon. The claimant himself occupies the said lands and buildings in connection with his business. In exercise of the powers conferred upon them by 'The Glasgow, Yoker, and Clydebank Railway Act 1893,' the said company are in course of diverting the Forth and Clyde Canal so as to take away from the said land about 900 feet of canal frontage. The said company further are in course of diverting the Boquhanran Road so as to take away from the said land about 120 feet of frontage to that road. The taking away from the said land of the canal and road frontage above referred to will injuriously affect the said land and the buildings thereon, and cause serious loss and damage to the claimant as owner and occupier thereof. In respect of the above-mentioned injurious affection to the said land and buildings, and all loss and damage incurred and to be incurred by the claimant as owner and occupier thereof, the claimant claims as compensation from the said Glasgow, Yoker, and Clydebank Railway Company the sum of (£7680) seven thousand six hundred and eighty pounds; and unless the said company be willing to pay the amount of compensation above claimed, and enter into a written agreement for that purpose within twenty-one days after the receipt of this notice, the claimant requires that the amount of such compensation shall be settled by arbitration in the manner provided by 'The Lands Clauses Consolidation (Scotland) Act 1845,' and 'The Railways Clauses Consolidation (Scotland) Act 1845.'"

On 31st May the claimant, by deed of nomination and submission, nominated Mr William Copland, engineer, Glasgow, as arbiter on his part, and on 21st June the Company, under protest and without admitting liability, nominated Mr William Borland as their arbiter.

The company thereafter presented a note of suspension and interdict against the claimant and the two arbiters, craving the Court to suspend the proceedings in the reference, and to interdict the arbiters from assessing the compensation claimed by the respondent Lidgerwood.

The complainers averred—(Stat. 2) "The lands belonging to the respondent William Van Vleck Lidgerwood, in respect of which he claims compensation for alleged damage by the exercise by the complainers of the powers conferred upon them by their said Act of 1893, are situated to the north of a strip of land which intervenes between his lands and the said canal as existing. The said respondent's lands are bounded on the west by the Boquhanran Road, but they nowhere immediately adjoin the said canal, nor does the canal intersect his lands. . . . A strip of land from 30 to 100 feet wide lies between the respondent's lands and the portion of the canal to be diverted." (Stat. 3) "The com-