but it was clear that the children were only conditional institutes. "And" here was equivalent to "whom failing"—*M'Lauchlan's Trustees* v. *Harvey*, November 26, 1908, 46 S.L.R. 156.

LORD JUSTICE-CLERK—I understand that this case has been brought for the sole purpose of letting the trustees know in what manner the trust fund is to be divided. I think the true meaning of the deed is that on the death of the liferentrix the fund is to be divided among her children, or if any child had predeceased survived by children, such children should take their parent's share. I think, therefore, that the first question of law should be answered in the affirmative.

LORD PEARSON—I concur.

LORD ARDWALL—The difficulty in this case arises from an endeavour on the testator's part to express himself shortly. Such attempts often land parties interested in a deed in greater difficulty than would have been caused had the usual conveyancing expressions been adopted. I am of opinion that the testator's intention was to call grandchildren only in the event of children predeceasing their mother, the liferentrix, and leaving issue. It is suggested that children and grandchildren must be placed on the same plane, and that each is entitled to an equal share. That is contrary to the direction in the will as the division is to be *per stirpes* as well as equal. In short, to divide equally *per stirpes* among individual persons who are descendants of different degrees is impossible. We are thrown back on the interpretation that an ordinary person of good sense would adopt apart from the difficulties of construction that may be raised by the endeavour to give a meaning to every word in the clause according to testament rules. Accordingly I am of opinion that the first question should be answered in the affirmative, and the second and third in the negative.

LORD LOW and LORD DUNDAS were sitting in the Valuation Appeal Court.

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

Counsel for the First and Third Parties—A. R. Brown. Agents—Henry & Scott, W.S.

Counsel for the Second Party—Maitland. Agent—J. Gordon Mason, S.S.C.

Saturday, February 27.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.

FINE *v.* EDINBURGH LIFE ASSURANCE COMPANY AND OTHERS.

Expenses—Compensation—Right to Set-off Decree for Costs in One Action against Decree for Expenses in Another Action—Prior Action no longer Pending nor Pars ejusdem negotii—Agent-Disburser.

A obtained a judgment with costs against B in the English Courts. He thereafter used arrestments in Scotland in the hands of C, by which he sought to attach an annuity due at the date of arrestment by C to B. Having brought an action of furthcoming in the Court of Session against C as arrestee and B as principal debtor, and having been found liable in certain expenses therein, he objected to decree therefor going out in the name of the defender's agent as agent-disburser, on the ground that he, the pursuer, was entitled to set-off the sums in the English decree against the expenses in the action of furthcoming.

Held that the agent-disburser was entitled to decree in his own name, in respect (1) that at the date of the action of furthcoming the prior action was no longer pending, and (2) that the two processes were not *partes ejusdem negotii*, as each raised a different question.

Louis Fine, 204 Gloucester Road, Bristol, having raised an action in the English Courts against Mrs Mary Selina Eyre, wife of Edward Eyre, Wotton-under-Edge, Gloucestershire, obtained a judgment against her, on 6th June 1907, for a debt of £158, 15s. 6d., with £8, 10s. of costs. This judgment was registered in the Books of Council and Session at Edinburgh on 24th June 1907, in terms of the Judgments Extension Act 1868 (31 and 32 Vict. cap. 54).

Fine thereafter used arrestments on 1st July 1907, in the hands of the Edinburgh Life Assurance Company, by which he sought to attach £43, 15s., the amount due on that date for the preceding quarter of an annuity of £175 payable to Mrs Eyre. On 4th July 1907 he brought the present action of furthcoming against the Assurance Company, as arrestees, and Mrs Eyre as principal debtor. [The dispute in the action was whether the annuity could be made available for payment of the debt.]

The action was dismissed as irrelevant in the Outer House, because there was no averment of what the law of England was upon which the decision of the question at issue depended. The pursuer was allowed to amend his record in the Inner House, but was found liable, on 15th December 1908, in expenses since the closing of the record. Thereafter the defender's agent moved the Lord Ordinary that decree for

the taxed amount of the said expenses, amounting to £43, 16s. 1d., should be allowed to go out in his name as agent-disburser.

On 13th January 1909 the Lord Ordinary (MACKENZIE) granted the motion.

Opinion.— . . . [*After narrating the facts ut supra*]—"A motion is now made that decree for these expenses shall go out in the name of the agent-disburser. This is resisted by the pursuer, who says (1) that he has a decree for £8, 10s. in an action which is *pars ejusdem negotii*; that he is entitled to set this amount off against the expenses for which he was held liable by the interlocutor of 15th December 1908; that therefore decree should not pass in the agent-disburser's name to any extent; and (2) that he is entitled to set off his debt of £158, 15s. 6d. against the expenses, and therefore the agent-disburser is barred from taking decree in his own name.

"It is settled that compensation may be pleaded when cross awards of expenses have been made in the same action, but not between awards of expenses in different actions, as the right of the agent-disburser cannot be cut down by an extrinsic claim—*Gordon* v. *Davidson*, 1865, 3 Macph. 938; *M'Gillivray* v. *Mackintosh*, 1890, 19 R. 103. This principle was extended so as to apply when the two sets of expenses arose out of the same matter, though in different actions—*Lochgelly Iron and Coal Company* v. *Sinclair*, 1907 S.C. 442; *Oliver* v. *Wilkie*, 1901, 4 F. 362. The principle was applied in different circumstances in *Grieve's Trustees* v. *Grieve*, 1907 S.C. 963. In that case trustees had paid a claimant, in a multiplepoinding, £500 to account, under a judgment of the Court of Session. This judgment was reversed in the House of Lords. All the parties were awarded their expenses out of the estate. The agent of the claimant was held not entitled to decree for expenses in his name as agent-disburser, as this would deprive the trustees of their right to claim retention of the expenses against the £500.

"In *Paolo* v. *Parias*, 1897, 24 R. 1030, however, when the decree for expenses in the first action had been granted and extracted, before the appeal in the second case came into Court, it was held that the agent-disburser in the appeal was entitled to decree for expenses in his own name. The Lord President pointed out that the decree in the first action had passed into the region of a judgment debt, historically arising out of a dispute on the same subject-matter, but not out of a living proceeding.

"Here both the sums of £158, 15s. 6d. and £8, 10s. have passed into the region of judgment debts. Upon this ground it appears to me the motion by the agent-disburser cannot be refused.

"Further, I do not think the claim founded on the English judgment can be regarded as other than extrinsic. The English proceedings were for the purpose of constituting the debt.

"The present litigation, for the purpose of recovering funds of the debtor, seems to me not *pars ejusdem negotii* in the sense of the cases, but a separate action.

"I am of opinion that the motion should be granted."

The pursuer reclaimed, and argued—Decree for expenses should not have been granted in name of the agent-disburser. The present action was a diligence to render the English decree effectual. The two processes were *partes ejusdem negotii*, and the pursuer was entitled to set off the sums for which he had obtained decree in England against the expenses for which he had been found liable here. His right of compensation ought not to be defeated by the defender's agent taking decree as agent-disburser—*Gordon* v. *Davidson*, June 13, 1865, 3 Macph. 938; *Macgillvray* v. *Mackintosh*, November 14, 1891, 19 R. 103, 29 S.L.R. 103; *Lochgelly Iron and Coal Company, Limited* v. *Sinclair*, January 22, 1907, 1907 S.C. 442, 44 S.L.R. 364. The case of *Paolo* v. *Parias*, July 3, 1897, 24 R. 1030, 34 S.L.R. 780, was distinguishable.

Counsel for the respondent were not called upon.

LORD JUSTICE-CLERK—I am of opinion that the Lord Ordinary's judgment should be affirmed, and that the motion for decree in name of the agent-disburser for the taxed amount of expenses should be granted. Here both the sums of £158, 15s. 6d. and £8, 10s. have, to use the words of the late Lord President Robertson in *Paolo* v. *Parias*, July 3, 1897, 24 R. 1030, passed into the region of judgment debts, and upon this ground alone it appears to me that the motion for the agent-disburser cannot be refused. I am also of opinion that the present action is in no proper sense of the words *pars ejusdem negotii* with the former, although I must admit that the present stage of proceedings is not the most satisfactory at which to determine that question, inasmuch as the rights of the parties have not yet been fully expiscated.

LORD LOW—I am of the same opinion. The question in the English action was whether Mrs Eyre was indebted to Fine, the pursuer in the present action. Fine was successful, and obtained an order against Mrs Eyre for the sum of £158, 15s. 6d. and £8, 10s. of costs. In the present action the question is an entirely different one, viz., whether a certain sum in the hands of the Edinburgh Life Assurance Company, due by way of an annuity to Mrs Eyre, is liable for payment of the debt for which Fine got decree in the English action. The two questions accordingly are entirely different, and in no way *pars ejusdem negotii*. I am accordingly of opinion that there is no good reason for refusing decree for expenses in name of the agent-disburser.

LORD ARDWALL—I concur.

LORD DUNDAS—I concur. Mr Lippe for the pursuer made the most that could be made of the phrase *pars ejusdem negotii*. But there are in fact two litigations to be considered, and not one only; and although

his client succeeded in the first, it does not follow that he may not be unsuccessful in the second, which raises quite a different question.

The Court adhered.

Counsel for the Pursuer—M'Lennan, K.C.—Lippe. Agent—W. Croft Gray, S.S.C.

Counsel for the Defender, Mrs Eyre—Wilson, K.C.—Trotter. Agent—John Robertson, Solicitor.

Tuesday, March 2.

FIRST DIVISION.

[Sheriff Court at Glasgow.

TAYLOR *v.* BURNHAM & COMPANY.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, c.* 58), *sec.* 8 (1) (*i*)—*Production of Surgeon's Certificate—Necessity for Producing Certificate before Making Claim.*

The Workmen's Compensation Act 1906, section 8, enacts—"(1) When (i) the certifying surgeon . . . certifies that the workman is suffering from a disease mentioned in the third schedule to this Act, and is thereby disabled from earning full wages, . . . and the disease is due to the nature of any employment in which the workman was employed at any time within the twelve months previous to the date of the disablement, . . . he . . . shall be entitled to compensation under this Act as if the disease were a personal injury by accident. . . ."

Held that an arbitration was not rendered incompetent by reason of the certificate required under section 8 of the Act not being obtained, or produced, until after the commencement of arbitration proceedings.

The Workmen's Compensation Act 1906, section 8, so far as material, is quoted in the rubric.

John Taylor, letter fixer, Glasgow, claimed compensation under the Workmen's Compensation Act 1906, from Burnham & Company, Jamaica Street, Glasgow, his employers, and being dissatisfied with the determination of the Sheriff-Substitute of Lanarkshire (DAVIDSON), acting as arbitrator under the Act, took an appeal by way of stated case.

The case stated:—"This is an arbitration under the Workmen's Compensation Act 1906, brought before the Sheriff of Lanarkshire at Glasgow, in which the Sheriff was asked to award the appellant compensation at the rate of £1 per week from and after 2nd April 1908, in terms of said Act, and to find the respondents liable in expenses.

"The averments of the appellant were that he was a workman in the employment of the respondents as a fixer of enamel letters; that his weekly earnings were £2; that on or about 1st March 1908 he first felt symptoms of lead poisoning upon him, owing to working with white lead; that he was, owing to his poisoned condition, dismissed by respondents upon 27th April 1908; and that he was, in consequence of the disease of lead poisoning, disabled from earning full wages at the work at which he was employed, and had thus sustained a personal injury through his hands and arms becoming paralysed by accident arising out of and in the course of his employment with the respondents. The respondents denied that the appellant was a workman in their employment within the meaning of the Workmen's Compensation Act 1906, and averred that he was at the date of the accident, and had been for a number of years, carrying on business on his own account as a fixer of enamel letters, and in particular that prior to said 1st March 1908, and since then, the appellant had been doing business as an independent contractor as a fixer of enamel letters, not only for advertising contractors who had contracts for putting up advertisements by means of enamel letters, but also for private customers of his own, and that having found him defrauding them they (respondents) stopped giving him jobbing.

"The first deliverance on the petition by the appellant was dated 17th July 1908. The case was called in Court on 31st July 1908, and after certain procedure the appellant, on 29th September 1908, obtained from Alexander Scott, M.D., a certifying surgeon appointed under the Factory and Workshop Act 1901 for the district of Central Glasgow, a certificate that he (the appellant) was suffering from chronic lead poisoning, and that the disablement commenced on 30th April 1908, which certificate was lodged in process on 1st October 1908.

"The case was debated before me on 21st October 1908, when I found that the appellant's claim was one made in virtue of section 8 (1) (i) of the Workmen's Compensation Act 1906; that at the date on which it was made no certificate had been obtained from a certifying surgeon appointed under the Factory and Workshop Act 1901, as directed by the Workmen's Compensation Act 1906, and I found that the claim was for that reason incompetent. I therefore dismissed the petition, and found the respondents entitled to expenses."

The *question of law* for the opinion of the Court was—"Whether the obtaining by the appellant of a certificate from the certifying surgeon appointed under the Factory and Workshop Act 1901, and notification thereof by the appellant to the respondents, are conditions-precedent to any claim for compensation in respect of disablement through industrial disease under section 8 (1) (i) of the Workmen's Compensation Act 1906?"

Argued for the appellant—There was nothing in section 8 (1) (i) of the Act, or any other section, which expressly or by implication required a certificate to be produced before a claim for compensation could be made.