7, 1888, 15 R. 862, 25 S.L.R. 606; *Magistrates of Aberchirder* v. *Banff District Committee*, March 3, 1906, 8 F. 571, 43 S.L.R. 409. The trustees could doubtless charge their extrajudicial expenses against the trust estate which they administered, but not against the accumulated funds, which being intestate estate were not in their hands in virtue of the trust estate, only by accident.

Argued for the first parties—The trustees could not recover their extrajudicial expenses out of the general trust estate, which was not subject to the litigation in which the agreement as to expenses was made and the interlocutor pronounced. The rule that expenses meant as between party and party applied only to the parties other than the trustees, for when trustees were awarded expenses that meant expenses as between agent and client—*Merrilees* v. *Leckie's Trustees*, 1908 S.C. 576, 45 S.L.R. 449; *Davidson's Trustee* v. *Simmons*, July 9, 1896, 23 R. 1117, 33 S.L.R. 748.

LORD JUSTICE-CLERK—The last observation alone by counsel for the first parties requires to be dealt with, namely, that where trustees appear as trustees and there is a remit to the Auditor to tax the account incurred by them, the taxation must in general be as between agent and client. That may be perfectly right in the ordinary case, because it is not disputed that trustees are entitled to be indemnified against expense incurred in the administration of the estate under their charge. But we have here a peculiar case dealing with a particular fund in the hands of the trustees. The interlocutor, which proceeds on an agreement by the parties to the Special Case, finds all the parties "entitled to their expenses, as the same may be taxed by the Auditor, out of the surplus accumulated funds in the hands of the first parties." In these circumstances it very plainly appears that Mr Jameson's client would be subjected to absolute injustice if the first parties are to get their expenses as between agent and client out of the accumulated funds in question, for that would involve payment of a very large sum out of the half of the funds to which Mr Jameson's client has been found entitled. On the whole matter, therefore, I think that the first parties' account should be again remitted to the Auditor with instructions to tax it as between party and party.

LORD SALVESEN—I entirely agree. I think the finding as to expenses which the Court pronounced, and which proceeded on the agreement as to expenses by the parties to the Special Case, must be construed as a direction to the Auditor to tax the accounts of the parties, including that of the trustees, as between party and party. I am not disposed to say anything which will prevent the trustees from recovering their extrajudicial expenses out of the rest of the estate under their charge. That question, however, is not before us now.

LORD GUTHRIE—I agree. The trustees are among the parties to the Special Case, and are therefore parties to the agreement as to expenses. Had they chosen they might have refused to enter into the agreement, with the result that their whole expenses, judicial and extrajudicial, would have been charged against the general trust estate. But there was nothing to prevent them agreeing to charge their judicial expenses against the accumulated funds and their extrajudicial expenses against the general trust estate, and I think that is the effect of the agreement as to expenses to which they were parties.

LORD DUNDAS was sitting in the First Division.

The Court sustained the objections and remitted the account to the Auditor to tax as between party and party.

Counsel for the First Parties—J. R. Dickson. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Second Party—Jameson. Agents—Wishart & Sanderson, W.S.

Thursday, December 21.

SECOND DIVISION.

SIMPSON AND OTHERS (SIMPSON'S TRUSTEES) *v.* SIMPSON.

Marriage Contract—Antenuptial Contract — Children's Provisions — Discharge of Legitim—Revocation—Power to Revoke Contained in Deed itself—Repugnancy.

By antenuptial marriage contract a husband bound himself to provide a free annuity to his widow, and conveyed to the children his whole heritable and moveable estate, to be accepted by them in full satisfaction of their legal rights. The deed also reserved power to the husband "to revoke, alter, or vary these presents in so far as regards the provisions to his children." The husband afterwards made a will leaving the residue of his estate for behoof of his children equally in liferent and their issue *per stirpes* in fee.

Held that the clause in the marriage contract empowering the husband to revoke was not invalid on the ground of repugnancy to the contract, and that in virtue thereof the will was effectual.

Fowler's Trustees v. *Fowler*, June 17, 1898, 25 R. 1034, 35 S.L.R. 813, *followed*.

Question—whether if the will had made no provision for the children, the discharge of legitim in the contract would have been valid?

A Special Case was presented for the opinion and judgment of the Court by (1) Mrs Catherine Paterson Forbes or Simpson, widow of George Simpson, residing at Stagshaw, Mayfield Gardens, Edinburgh, and others, trustees acting under the trust-disposition and settlement of the said George Simpson, *first parties*; (2) the said Mrs Catherine Paterson or Simpson as an

individual, *second party;* (3) the three daughters of the said George Simpson, viz., Mrs Catherine Monro Forbes Simpson or Taylor, Miss Alison Nisbet Simpson, and Mrs Jessie Forbes Simpson or Adair, *third parties;* (4) Frederick George Simpson, only surviving son of the said George Simpson, *fourth party;* (5) Miss Elizabeth Forbes, sister-in-law of the said George Simpson, *fifth party;* and (6) the whole grandchildren of the said George Simpson, *sixth parties.*

The following *narrative* is taken from the opinion of Lord Dundas—"The late Gerge Simpson, wine and spirit merchant, died on 11th November 1896, leaving a trust-disposition and settlement, dated in 1892. In 1862 he had entered into an antenuptial contract of marriage with Miss Catherine Forbes, by whom and by five children of their marriage he was survived. By that contract, after binding himself and his heirs and executors to pay an annuity to his wife if she survived him, and to settle a small heritable subject upon his sister in liferent, Mr Simpson, for a provision to his children, under burden of his own liferent, disponed and conveyed from him, his heirs and successors, to and in favour of the children to be procreated of the marriage, and of any other marriage he might contract, but always in the terms, upon the conditions, and under the burdens and reservations thereinafter expressed, the whole heritable and moveable estate (with the unimportant exception of the property to be settled upon his sister) then belonging to him, or which should belong to him at the time of his death, reserving power to himself to allocate and distribute the residue of his whole means and estate among his said whole children in such proportions or shares and under such conditions as he should think proper; and it was stipulated that the provisions in favour of his children should be, and were to be, accepted by them as in full satisfaction of all bairn's part of gear, legitim, portion natural, executry, and every other thing they could claim or demand by and through his decease. There is no need to discuss—though a good deal was said about it in the argument at our bar—whether as matter of general policy it is wise and prudent or the reverse for a contracting party to tie up irrevocably on the occasion of his marriage his whole present and future fortune and estate. The thing is not uncommonly done, and is certainly not illegal, nor, if proper phraseology is used, ineffectual. By the contract under consideration the intending wife, for the causes above summarised and on the other part, made certain provisions; and it was agreed that execution for implement of the provisions in favour of her and the children should pass at the instance of persons named, who were also appointed to be Mr Simpson's sole executors. Various powers of an ordinary character were then conferred on these persons, and at the very end of the document there occurred this singular clause—'and the said George Simpson reserves his own liferent and power to revoke, alter, or vary these presents in so far as regards the provisions to his children as aforesaid.'"

The contract also empowered Mr Simpson to increase the provisions in favour of his widow.

The provisions of the trust-disposition and settlement were thus summarised by Lord Dundas—"The settlement begins with a universal conveyance to trustees of the truster's whole means and estate. The sixth purpose, which I need not quote, deals with the residue, and in brief amounts to a direction to the trustees to hold it for payment of the revenue equally to and among his children in liferent alimentary, and the fee to their issue, but with power to make certain advances out of capital to his daughters on marriage, and to his sons for setting them up in business, or otherwise for their advantage. The truster declared 'that in consequence of my estate having very materially increased since the date of my marriage, it is my desire and intention that the foregoing provisions in favour of my said children shall come in place of and supersede the provisions conferred on them under the foresaid antenuptial contract of marriage between me and the said Mrs Catherine Paterson Forbes or Simpson, and that the provisions hereinbefore mentioned shall be in full of all they can ask or claim by or through my decease'; and he went on to provide that in the event of any of his said children successfully challenging the trust settlement, then and in that event, in virtue of the powers reserved to him under the marriage contract, he allocated and restricted the share or shares of such child or children in his estate to the sum of £1000 each in full of all that they or their issue should be entitled to demand by or through his decease, with corresponding benefit, by way of accretion, to the acquiescing children and their issue."

The settlement also directed the trustees to hold the sum of £1000 for behoof of his sister-in-law, the fifth party, in liferent, and on her death to divide the capital equally among his daughters or the survivors.

The *contentions* of the parties as set forth in the Special Case were, *inter alia,* as follows—"The first, second, fifth, and sixth parties contend that the estate falls to be administered in terms of the provisions of the trust-disposition and settlement and codicil, in respect that the reservation of power to revoke, alter, or vary the provisions of the marriage contract in favour of his children was a valid reservation, and that the power was effectually exercised by the deceased Mr Simpson in his trust-disposition and settlement. . . . The third and fourth parties contend that the reservation of power to revoke, alter, or vary the provisions in their favour in the marriage contract was invalid, and must be held *pro non scripto* as being repugnant to the contract, by which the children's right to legitim is expressly discharged. They further maintain that the estate of the said George Simpson must follow the destination in the said marriage contract."

The *questions of law* for the opinion of

the Court were, *inter alia*, as follows—"(1) Was the reservation by George Simpson of power to revoke, alter, or vary the provisions to his children in the marriage contract a valid and effectual reservation by him? (2) If the first question is answered in the affirmative, was the power to revoke, alter, or vary validly exercised by the trust-disposition and settlement?"

Argued for the first, second, fifth, and sixth parties—The reservation of power to revoke was not invalid on the ground of repugnancy. It was perfectly competent to make such a reservation in a contract, and it must receive effect—*Fowler's Trustees* v. *Fowler*, June 17, 1898, 25 R. 1034, 35 S.L.R. 812. It might be that the children had discharged their rights without receiving anything more than a mere *spes successionis*, but that did not necessarily make the discharge ineffectual—*Maitland* v. *Maitland*, December 14, 1843, 6 D. 244, *per* Lord Mackenzie at p. 247; *Countess Dowager of Kintore* v. *Earl of Kintore*, June 29, 1886, 13 R. (H.L.) 93, 23 S.L.R. 877, 11 R. 1013, 21 S.L.R. 647; M'Laren, Wills and Succession, 3rd ed. i, p. 136. The clause could not be construed as a mere repetition of the power to increase the widow's annuity and to appoint among the children. That was not the natural construction, and did not give full effect to the word "revoke."

Argued for the third and fourth parties—If the clause reserving power to revoke was to be read in the way contended for by the first, second, fifth, and sixth parties, then by reason of repugnancy to the rest of the contract it was invalid. Though the marriage contract contained provisions in favour of others than the wife and children of the marriage, the provisions in favour of the children were none the less contractual—*Mackie* v. *Gloag's Trustees*, March 6, 1884, 11 R. (H.L.) 10, 21 S.L.R. 465; *Haldane* v. *Hutchison*, November 13, 1885, 13 R. 179, 23 S.L.R. 119. They were therefore irrevocable, and the power to revoke must be treated, *pro non scripto*, as being repugnant to the contract made—*Furnivall* v. *Coombes and Others*, 1843, 21 L.J., C.P. 265. Further, if the clause were to receive effect, then the legal rights of the children were destroyed without any provision being made in lieu. Such a discharge was not effectual—*per* Lord Fraser in *Countess Dowager of Kintore* v. *Earl of Kintore*, *cit.* in 11 R. at p. 1025, 21 S.L.R. at p. 654. But the clause in question really did no more than repeat the powers already reserved, viz., to increase the widow's annuity and to appoint among the children. It was quite true that the word "revoke" was not used before, but an increase of the widow's annuity involved *pro tanto* a revocation of the provisions in favour of the children. This view might involve tautology, but so did any view, because the testator's liferent was twice reserved on any construction of the clause. The words "as aforesaid" might quite well modify the whole preceding words of the clause. This construction of the clause was to be preferred, because it made it of some effect. Trayner, Latin Maxims and Phrases, 4th ed. p. 56; Leake, Law of Contracts, 6th ed. p. 149. Counsel also referred, on questions which the Court found it unnecessary to decide, to *Gillon's Trustees* v. *Gillon*, February 8, 1890, 17 R. 435, 27 S.L.R. 338; *Neill's Trustees* v. *Neill*, March 7, 1902, 4 F. 636, 39 S.L.R. 426; *Matthews Duncan's Trustees* v. *Matthews Duncan*, February 20, 1901, 3 F. 533, 38 S.L.R. 401.

At advising—

LORD DUNDAS — [*After the narrative above quoted*]—The main question for our decision is whether Mr Simpson's estate was irrevocably destined by the marriage contract as a provision for his children, or whether, looking to the terms of the clause just quoted, he was entitled to alter that provision by a subsequent testamentary settlement. It was contended by counsel for some of the parties to the case that a power to revoke, alter, or vary the provision made for the children in the antenuptial contract of marriage was wholly invalid, and must be held, *pro non scripto*, as repugnant to the nature of the contract. The clause is certainly a very unusual one to find place in a marriage contract, and it occurs oddly as regards sequence and collocation, but I am not prepared to treat it in the way suggested. Its language is not, to my mind, at all ambiguous, and I cannot accept the argument that it was intended merely as a superfluous echo or repetition of the power to allocate and distribute already reserved by Mr Simpson. We cannot, I think, deny all legal effect to the clause. The case of *Fowler's Trs.* (1898, 25 R. 1034), to which we were referred, seems to support this view, for literal effect was there given to a clause in an antenuptial contract of marriage which provided that the trustees should be bound at any time during the subsistence of the marriage to pay over to the lady, on her written demand, the whole or any portion of the trust funds conveyed by her to them, although the legal rights of the children (as counsel informed us, from a perusal of the session papers) bore to be expressly discharged in respect of the provision to them by the contract of the ultimate fee of the said trust funds.

If my conclusion on this point is correct, there seems to be no difficulty in regard to the next question, viz., whether Mr Simpson intended to exercise, and did effectually exercise, by his trust settlement the power reserved to him by the clause in his marriage contract above quoted. [*His Lordship summarised the provisions of the settlement ut supra.*] It seems to me to be clear that Mr Simpson intended by his settlement to exercise the power reserved by his marriage contract to alter or vary the provisions thereby made for his children, and that he has legally and effectually done so. It is unnecessary to consider or decide whether any child or children could have asserted a valid claim to legal rights, notwithstanding the discharge of these by the marriage contract, if Mr Simpson had

by his testamentary settlement totally disinherited one or more of them or reduced their provision to an amount which the Court considered merely illusory. No such question arises here, and I express no opinion upon the matter.

For the reasons stated I think we ought to answer the first and second questions in the case in the affirmative. In that view the remaining questions are superseded, and need not be answered. The third question is only put to us in the event of the first question being answered in the negative; and counsel explained to us that the fourth and fifth questions would arise for decision only if we were to answer the second question in the negative.

LORD SALVESEN—The leading question in this case arises under the antenuptial contract of marriage entered into between George Simpson and the lady who became his wife and is now his widow. The contract itself is in its main provisions not unlike many contracts which were in use to be made at that time, but which I am glad to think are not so common now. By this deed Mr Simpson bound himself to provide a free annuity of £50 sterling to his widow, and also assigned to her for her liferent use the furniture and plenishings which might belong to him at his death. To his children he assigned and made over, but under the burdens and reservations thereinafter expressed, his whole heritable and moveable estate. The only express reservations were that he should have power at any time during his life, and even on deathbed, to increase the provisions in favour of his widow and right to apportion his estate amongst his children as he should think proper. In respect of these obligations Mrs Simpson and her children discharged their legal rights. The lady, on the other hand, disponed such property as she might succeed to through the death of her mother to her children, and failing children to her own sister in liferent.

Had these been the only provisions in the antenuptial contract there would have been no difficulty in its interpretation. In consideration of an annuity which was in no way secured, and which, although suitable enough in the then circumstances of the husband, might have no relation to the estate which he left at his death, Mrs Simpson discharged absolutely her legal rights as his widow; while the children discharged their legal rights in respect of a provision which gave them no security against their father's misfortunes, and enabled him, if he left estate, to apportion the whole to one or more of them, leaving the others entirely unprovided for. Although, as I have said, such clauses were not uncommon in antenuptial contracts, they really served no object except the somewhat illegitimate one of enabling the husband to exercise such caprice in the division of his estate as would be impossible under our common law. The validity of such a discharge of legitim when contained in an antenuptial contract has been too long settled to be now challenged, but I cannot say that the so-called principle upon which the courts have proceeded, "that the children cannot object to the contract by which they were brought into existence"—*Maitland*, 6 D. 244, *per* Lord Mackenzie—commends itself to my mind. That intending spouses should be able by an antenuptial contract to exclude their children, or some of them, from their legal rights of succession—which they could not do by any other deed, whether executed before or after their birth—is in my opinion contrary to sound legal principle, and I cannot but regret that the rule was ever established.

From the point of view of the intending husband such a contract is not less objectionable. It is quite settled law that a provision of the whole means and estate of which he might die possessed to his children deprives him of his testamentary capacity properly so called. If he has tied himself by such a contract he cannot give legacies to any persons or institutions whom he may desire to favour. If his children or some of them prove to be incapable of managing their affairs so that they cannot safely be entrusted with money, he cannot restrict them to a liferent. If he leaves only one insane child, that child must inherit the fee of his whole estate. He cannot even bequeath legacies to his grandchildren—*Gillon's Trustees* v. *Gillon*, 17 R. 435. On the other hand, he retains the power of settling practically the whole of his estate on one or more children, leaving the others unprovided for.

These observations have a very direct bearing on the construction of the unusual clause appearing towards the end of the antenuptial contract in question. The clause is expressed as follows—"And the said George Simpson reserves his own liferent and power to revoke, alter, or vary these presents in so far as regards the provisions to his children as aforesaid." It was argued for the third and fourth parties, who represent the children, that this clause was a mere repetition of the powers which Mr Simpson had expressly reserved, namely, a power to increase his widow's annuity, and so (it was said) in effect to revoke, to the extent that the power might be exercised, the provisions in favour of his children and the power of apportionment amongst them. I cannot so read the clause. It is true that so far as concerns his own liferent that had already been reserved in different language, but I see no reason for limiting the operation of the clause according to its plain meaning on the footing that it cannot have meant what it expressed. How this clause came to be inserted in the marriage contract is of course purely matter of conjecture, but it seems to me far more likely that Mr Simpson declined to deprive himself of all testamentary capacity than that it was the result merely of bungled conveyancing. At all events the clause is there and must receive effect according to its terms, for I think it is impossible to read in the words "as aforesaid" before

"these presents," as the third parties desire us to do, and so to deprive it of all effect.

The next argument which was submitted to us on behalf of the same parties, and which seems to have been the only one present to their minds when this Special Case was framed, was that "the reservation of power to revoke, alter, or vary" the provisions in favour of the children "in the marriage contract was invalid, and must be held, *pro non scripto*, as being repugnant to the contract by which the children's right to legitim is expressly discharged." No authority was cited in favour of this proposition. It may be that if the power had been so exercised as to deprive the children of all right in their father's succession, the discharge of legitim contained in the contract would not have been effectual. It is still an open question whether legal rights of children in their parents' succession can be discharged by an antenuptial contract between the parents unless some provision is made in their favour, although if the reason for the rule in the ordinary case is correctly stated in the passage I have quoted from Lord Mackenzie no such distinction would be tenable. We are not, however, concerned with a case of that kind here, as Mr Simpson made generous provisions for his children, although he also thought fit to leave his sister-in-law an alimentary liferent of £1000. The antenuptial contract would have been a perfectly valid deed though it had contained no provisions in favour of children, and, as framed in this case, it would have operated as a valid testament so long as it was not revoked or altered. Indeed, there are other clauses in the deed which seem to show that Mr Simpson's true intention was merely to regulate his succession and not to come under any contractual obligations to his future wife as to its disposal. Thus the clause by which the whole estate is conveyed to the children is conceived in favour, not only of the children to be procreated of the intended marriage, but also of the children of any other marriage which George Simpson might contract, and there is also an obligation in favour of his own sister with regard to part of his heritable estate which was certainly not contractual. We are, however, not left without guidance as to the law, for in the case of *Fowler's Trustees* (25 R. 1034) it was decided that a clause in a marriage contract which had the effect of rendering it entirely nugatory was not invalid. That case was much stronger than the present, for it gave the wife an absolute power to recal or annul the trust at pleasure, while the clause in the present case is limited in its operation to the provisions in favour of the children. I have therefore come to the conclusion that we must answer the first and second questions in the affirmative. The other questions, which proceed on the assumption of our taking an opposite view, are of course superseded.

The LORD JUSTICE-CLERK concurred.

LORD GUTHRIE had not taken his seat in the Second Division when the case was heard.

The Court answered the first and second questions in the affirmative.

Counsel for First, Second, Fifth, and Sixth Parties — Blackburn, K.C. — Lord Kinross. Agents—Pearson, Robertson, & Finlay, W.S.

Counsel for Third Parties — Christie — Chree. Agents—Mackay & Hay, W.S.— Gordon, Falconer, & Fairweather, W.S.

Counsel for Fourth Party—J. Macdonald. Agent—A. W. Lowe, Solicitor.

Saturday, December 23.

FIRST DIVISION.

[Sheriff Court at Stirling.

GRAY *v.* CALEDONIAN RAILWAY COMPANY.

Railway—Reparation—Negligence—Spark from Engine.

A pursuer, as administrator-in-law of his children and as an individual, sued a railway company for damages for personal injuries to his six pupil children. He averred that they were waiting on a platform for a train; that the engine approached with steam shut off; that while passing along the platform steam was applied suddenly and in such volume that large quantities of soot and live cinders were driven out of the funnel; that a live cinder fell on the neck of one of his sons and severely burnt him; and that the soot and cinders caused nervous shock to the other children and spoilt the clothes they wore; that the engine driver ought not while passing along the platform to have applied steam with such suddenness and in such volume, and was negligent in so doing; and that the defenders or their servants were in fault in not having the funnel properly cleaned from time to time, and in not having a cage at the mouth of the funnel, or adopting other means of preventing live cinders and soot being emitted therefrom in large and dangerous quantities.

Held that there was no relevant averment of improper construction of the engine, but that there was a relevant averment of the improper use thereof.

Reparation—Process—Minor and Pupil—Parent and Child—Action by Parent as Tutor and Administrator-in-Law for Pupil Children for Damages for Personal Injuries to them.

Held that a father, suing as administrator-in-law for damages for personal injuries to several pupil children, should conclude for a separate sum for each and not for a slump sum.

Thomas Gray, miner, Stirling, as tutor and administrator-in-law for his six pupil