read it as having any reference to the obligations of the charterer at all.

Even if it had, I agree that there was no strike here to which that clause could possibly apply. It was a very remote consequence of the strike, not at the port of Bo'ness, but at the collieries throughout the greater part of the country, that coal prices were high and that the defenders were induced to take up the erroneous position that they did. It was not a strike which had any connection with the discharge of this vessel. On the whole matter I have no difficulty in reaching the result which the Sheriff-Substitute reached, and which I think he has expressed with remarkable clearness and fairness.

LORD GUTHRIE—I agree. The Sheriff-Substitute has dealt properly with the case, and I also think that the additional ground of judgment which your Lordships have referred to is sound. The defenders found in their answers on the strike clause in the charter-party as one to which they are entitled to appeal, and they also say that it is applicable in the circumstances. The pursuers cover in their plea 4 both these points. In his judgment the Sheriff-Substitute assumes that the strike clause is one they can found on, but he decides the case on the footing that the delay was not due to the strike. In his opinion he elaborates that point and takes the view which was submitted by the pursuers, namely, "In such a case as the present the defenders could not escape from the absolute obligation of the charter-party by an appeal to the 'strike' exception if at reasonable trouble and expense they could have obviated the effects of the strike."

I agree with your Lordships that the judgment of the Sheriff-Substitute can be supported on the additional ground proposed in the words of the pursuers' plea that the strike clause was not one that was framed for the benefit of the defenders or is available to them.

The Court dismissed the appeal.

Counsel for the Pursuers and Respondents —Sandeman, K.C.—W. T. Watson. Agents —Gray, Muirhead, & Carmichael, S.S.C.

Counsel for the Defenders and Appellants — Horne, K.C. — Maconochie. Agents — Bruce & Stoddart, S.S.C.

Tuesday, May 30.

SECOND DIVISION.

GRAHAM'S TRUSTEES *v.* LANG'S TRUSTEES.

Succession—Vesting—Double Contingency —Direction to Trustees upon the Death of a Liferentrix to Pay Money Liferented by her to her Lawful Issue, failing Appointment by her, Equally among them, and upon her Death without Leaving Issue, to Pay the Money to the Truster's Other Children Equally among them.

A testator directed that in the event of the marriage of any of his daughters her share of his estate was to be retained by his trustees, such daughter to receive the annual proceeds during her life; and when such daughter should die the money was to be paid to the lawful issue of such daughter, failing appointment by her, equally among them, share and share alike. There was a subsequent direction to the trustees, in case any daughter should die without leaving lawful issue, to pay the money to the other children of the truster equally among them.

Held that vesting was suspended until the daughter's death, and in a competition between an assignee of her son (who had predeceased her) and his children, that no part of the share was carried by the assignation.

Binnie's Trustees v. *Prendergast*, 1910 S.C. 735, 47 S.L.R. 271, *followed*, and *Hickling's Trustees* v. *Garland's Trustees*, 1898, 1 F. (H.L.) 7, 35 S.L.R. 975, *distinguished.*

Sir Henry John Lowndes Graham, K.C.B., barrister-at-law, Clerk of the Parliaments, House of Lords, London, and others, trustees under the trust-disposition and settlement of the deceased William Graham jun., merchant, Glasgow, *the testator*, dated 27th February 1851, and relative codicils, *first parties;* William Graham Lang, residing at Broadmeadows, in the county of Selkirk, and others, trustees under the trust-disposition and settlement of the deceased Mrs Margaret Graham or Lang of Broadmeadows aforesaid, dated 28th August 1900, and sundry relative codicils, *second parties;* (*a*) the said William Graham Lang and another, the trustees acting under the antenuptial contract of marriage between Rear-Admiral Spencer Yorke de Horsey, R.N., and Mrs Cicely Jane Lang or de Horsey, his wife; (*b*) the said William Graham Lang, the sole surviving trustee acting under the antenuptial contract of marriage between Thomas George Taylor, lieutenant in the Gordon Highlanders, and Mrs Josephine Margaret Lang or Taylor, his wife; and (*c*) Hugh Cyril Lang of Broadmeadows aforesaid, the said Mrs de Horsey, Mrs Taylor, and Hugh Cyril Lang being the children of Robert James Lang, a son of Mrs Margaret Graham or Lang who predeceased her, *third parties;* and the said William Graham Lang and others, being the six surviving sons and

daughters (with their husbands) of the said Mrs Margaret Graham or Lang, *fourth parties*—brought a Special Case dealing with the disposal of a one-seventh of the share of the residue of the testator's estate which had been liferented by the said Mrs Graham or Lang.

The testator's *trust-disposition and settlement* provided, *inter alia*—"In the third place, I appoint my said trustees and theirs aforesaid to divide the whole residue and remainder of my said means and estate into as many shares as I shall have children surviving at the period of my decease, whether of my former or present marriage, and to make over or hold the said shares for behoof of my several children in manner and subject to the conditions after mentioned; declaring that if any of my children shall predecease me leaving lawful issue, such issue shall receive (if more than one equally among them) the share which would have fallen to the deceased parent had he or she survived; and declaring that, in case any of my children shall die in minority unmarried, or in case any of my sons whose share shall be retained as after mentioned shall die unmarried before attaining the age of twenty-five years, the share of such deceaser or deceasers shall be divided equally among my whole surviving children of both marriages, share and share alike (the lawful issue of any of my children who may have previously died leaving such issue receiving the share their parents would have received had he or she survived, if more than one, equally among them), and all sums so falling to any of my children shall be held and disposed of by my said trustees in all respects in the same way and subject to the same regulations as the original provisions in favour of such children respectively. . . . In the fifth place, in regard to the shares of my daughters, I appoint my said trustees and theirs aforesaid to hold the shares of my means and estate falling to such of my daughters as may at their majority be unmarried, and so long as they continue unmarried, in their own names as trustees aforesaid, and to pay over to them the whole interest or annual profits of their respective shares, and that at Whitsunday and Martinmas yearly by equal portions, which share shall not be liable to the debts or deeds of my said unmarried daughters, who shall only have an alimentary liferent thereof, not assignable by my said daughters nor liable for their debts or deeds, but the shares of my said unmarried daughters shall be at their own disposal by deeds to take effect at their death, but by such deeds alone, and failing such deeds shall fall to my other children of whatever marriage equally among them (the lawful issue of such of my children as may have died receiving their parents' share as aforesaid), and in the event of the marriage of any of my daughters, whether in minority or after majority, I direct and appoint my said trustees to retain the whole of the shares of such daughters, such retention to continue during all the days and years of the lives of such daughters, and I hereby direct my said trustees and theirs aforesaid to pay to my said married daughters the interest or annual proceeds of the money so retained in trust during their respective lives, and when they shall respectively die to pay the money so retained or convey the property in which such money shall be invested to the lawful issue of such daughters in such proportions as such daughters may have appointed by writings under their hands, and failing such writings equally among such issue, share and share alike, my said daughters being entitled, even although they shall leave lawful issue by deed to take effect at their death, to grant the liferent of one-half of the sums so held in trust to their respective husbands but to no greater extent, and that only as an alimentary liferent to such husbands, not assignable by them nor attachable by their creditors, and in case such daughters or any of them shall die without leaving lawful issue, then my said trustees shall pay the sums held in trust for their behoof or convey the property in which such sums may be invested to such other person or persons as such daughters may respectively appoint by deeds to take effect at their death, and failing such deeds to my other children of whichever marriage equally among them, the lawful issue of such of my children as may have died receiving their parents' share as aforesaid; and it is hereby expressly provided and declared that the *jus mariti* and right of administration of the husbands of my daughters shall be, and the same are hereby, expressly excluded in so far as regards the sums retained by my said trustees and interest and annual profits thereof: And declaring that the sums so retained, as well as the interest or annual profits thereof, shall not be affected by the debts or deeds of the husbands of my said daughters, nor attachable by the diligence of their own or of their husbands' creditors of any kind or nature, the liferent interest of my said daughters therein being purely alimentary and not assignable, for which liferent the receipts of my said daughters alone, without consent of their husbands, shall be sufficient exoneration to my said trustees and theirs aforesaid: And I appoint my said trustees and theirs aforesaid, previous to the majority or marriage of my said daughters, to expend such portion of the income of their respective shares as my said trustees may think proper and necessary in each case."

By *codicil* dated June 24, 1851, the testator, *inter alia*, provided—"And seeing that I have resolved to alter the before-recited directions in regard to the shares of my daughters in so far as they confer on them the power of disposing of the same by *mortis causa* deed in the event of their dying unmarried or without leaving issue: Therefore I do hereby revoke and recall so much of the said fifth purpose of the said trust as directs and appoints that the shares of my unmarried daughters shall be at their own disposal by deeds to take effect at their death, and appoints my trustees, in case my married daughters or any of them should die without leaving lawful issue, to pay the sums held in trust for their behoof, or con-

vey the property in which such sums may be invested to such person or persons as such daughters may respectively appoint by deeds to take effect at their death: And in place thereof I direct and appoint my trustees, in the event of my daughters or any of them dying without leaving issue, to divide and pay, convey, or make over the shares or provisions of such daughters (subject to the liferents of their husbands, if any such there be) equally to and amongst my surviving children of whichever marriage, and the issue of such of them as may have predeceased, leaving issue, such issue, if more than one child, taking their parent's shares equally amongst them, share and share alike; but I direct that all sums of money or subjects to which my sons and daughters, or any of them, may succeed by the decease of any of their brothers or sisters without issue under the above directions, or those contained in the before-written trust-disposition and settlement, shall be held and retained or paid by my trustees in terms of the directions, and subject to the limitations, powers, conditions, and destinations contained in the said trust-disposition and settlement in the same manner as if the said sums of money or subjects had formed part of the original shares or provisions provided to my sons and daughters: And notwithstanding of the directions herein, and in the trust-disposition and settlement contained, I authorise and empower my trustees, out of the shares or provisions of my daughters, to pay to them on their marriage a sum not exceeding Five hundred pounds sterling to each for their outfit, these sums to be deducted from the shares of capital provided to them in liferent."

The Case stated—"The testator was survived by his wife [*and several children, one of them being*] Mrs Margaret Graham or Lang. . . . The testator's daughter, the said Mrs Margaret Graham or Lang, died on 18th August 1914, predeceased by her husband Hugh Morris Lang of Broadmeadows in the county of Selkirk. Mrs Lang left a trust-disposition and settlement, dated 28th August 1900, and sundry relative codicils, whereby she disponed and assigned her whole estate to the trustees therein nominated in trust for the purposes therein set forth; but she did not exercise the power of apportionment among her issue conferred on her by the fifth purpose of the testator's trust-disposition and settlement. Mrs Lang was survived by six children. . . . Another child, Robert James Lang, predeceased Mrs Lang on 3rd July 1914, leaving three children, who all survive. . . . Prior to his death the said Robert James Lang, by assignation dated 19th October, and duly intimated to the testator's trustees on 6th and 8th November 1900, in consideration of the sum of £1500 paid to him by his mother the said Mrs Lang, assigned and disponed to her, her heirs, executors, and assignees whomsoever absolutely, immediately, and irredeemably his whole right, title, and interest of whatever kind, whether present, contingent, reversionary, or future, or vested or to become vested in and to the residue of the testator's estate. In these circumstances a question has arisen whether a one-seventh part of the share of the residue of the testator's estate liferented by the said Mrs Margaret Graham or Lang vested in her son the said Robert James Lang and was carried to her by his said assignation, or whether the said one-seventh part falls to be paid to the said Robert James Lang's three children or those representing them in equal shares. . . ."

The *contentions* of the parties as set forth in the case were as follows:—"The second parties maintain (first) that a one-seventh share of the portion of the residue of the testator's estate liferented by the said Mrs Margaret Graham or Lang had vested in the said Robert James Lang at his death, defeasance not having taken place in respect that all his mother's issue did not predecease her, and that there has been no exclusion of the said Robert James Lang by an exercise by his mother of the power of appointment conferred on her. Said one-seventh share was accordingly carried by the said assignation by the said Robert James Lang. . . .

"The third parties maintain (first) that at the date of his death the said Robert James Lang had not acquired a vested interest in the one-seventh share of the portion of the residue of the testator's estate which was liferented by his mother the said Mrs Margaret Graham or Lang, that the assignation executed by the said Robert James Lang of date 19th October 1900 carried to the assignees therein no right or interest in the said one-seventh share, that on the death of the said Mrs Margaret Graham or Lang the children of the said Robert James Lang as coming in his place acquired a vested interest in the said one-seventh share, which is accordingly now divisible among the third parties in three equal shares. . . .

The following *question of law* was, *inter alia*, stated—"1. Was a one-seventh share of the portion of the residue of the testator's estate liferented by the said Mrs Margaret Graham or Lang vested in the said Robert James Lang so as to be carried by his said assignation dated 19th October 1900?"

Argued for the second parties—There was vesting *a morte testatoris* in the children of the liferentrix. The only contingency resolutive of their right was if the liferentrix died without leaving issue. The right of the liferentrix to appoint the settled estate was not in reality a contingency. The existence of a power of appointment did not suspend vesting, but only rendered such defeasible if and in so far as the power was exercised — *Chambers' Trustees* v. *Smith*, 1878, 5 R. (H.L.) 151, *per* Lord Blackburn at p. 161, 15 S.L.R. 541; *Watson* v. *Marjoribanks*, 1837, 15 S. 586 This was a class gift, and as such there was vesting *a morte testatoris—Corbet's Trustees* v. *Elliot's Trustees*, 1906, 8 F. 610, *per* Lord Kyllachy at p. 612, 43 S.L.R. 379. There was no essential distinction between this case and *Hickling's Trustees* v. *Garland's Trustees*, 1898, 1 F. (H.L.) 7, 35 S.L.R. 975. In *Hickling's Trustees* (*cit.*) there was a residue clause, which took the place of a true destination-over (see

Lord Watson, *ibid.*, at 1 F. (H.L.) p. 10). The liferentrix had not exercised the power of appointment in favour of the other members of the class. Robert James Lang must therefore be held entitled to a right, vested *a morte testatoris* in one-seventh of the liferent fund. The fact that he predeceased his mother did not affect his right, because defeasance took place only if Mrs Lang was survived by none of her children — *M'Lachlan* v. *Taitt*, 1860, 2 De G. F. & J. 449; *Boulton* v. *Beard*, 1853, 3 De G. M. & G. 608; *Bromhead* v. *Hunt*, 1821, 2 J. & W. 459. *Hickling's Trustees* decided that contingent gifts to a class vested *de presenti*. The principle of that decision existed in *Carleton* v. *Thomson*, 1867, 5 Macph. (H.L.) 151, 4 S.L.R. 226; *Chambers' Trustees* v. *Smith* (*cit.*); *Cunningham* v. *Cunningham*, 1889, 17 R. 218, 27 S.L.R. 106. *Binnie's Trustees* v. *Prendergast*, 1910 S.C. 735, 47 S.L.R. 271, was at variance with the cases cited.

Argued for the third parties—It was only on the death of the testator's daughters that the issue took. Further, there was a second contingency, in respect that the testator's daughters might exercise the power of appointment and carry the fee away from any of the children. There was thus a double contingency in the present case, which clearly distinguished it from the case of *Hickling's Trustees* (*cit.*). The doctrine of vesting subject to defeasance was not applicable to a case of double contingency — *Johnston's Trustees* v. *Dewar*, 1911 S.C. 722, *per* Lord Kinnear at p. 729, 48 S.L.R. 382. The doctrine could be applied when there was an alternative contingency —*Coulson's Trustees* v. *Coulson's Trustees*, 1911 S.C. 881, 48 S.L.R. 814; *Bannatyne's Trustees* v. *Watson's Trustees*, 1914 S.C. 693, *per* Lord Mackenzie at p. 702, 51 S.L.R. 605. It was always a question on the language of the particular settlement whether the inference should be drawn that the testator meant that there should be vesting. Such an inference could not be drawn here, as the terms of the deed contemplated that the persons in whom the fund should vest were those alive at the date of payment. The gift to Mrs Lang's issue was contingent upon each child's survivance, and her power to defeat his claim by appointment, and here the conditions were personal to each member of the class claiming under the deed. The case was ruled by *Binnie's Trustees* v. *Prendergast* (*cit.*), where, as here, there was a proper destination-over —Theobald on Wills (593) and cases (*cit.*). These specialties did not occur in the deed under consideration in *Hickling's Trustees* (*cit.*). That case had recognised vesting in a class, and the principle there applied should not be extended. Robert James Lang had accordingly acquired no vested interest in the fund liferented by his mother, and no part thereof had been carried by his assignation.

The fourth parties adopted the argument of the third parties on the question whether Robert James Lang had acquired any vested interest.

At advising—

Lord Dundas — The first question in this case is whether or not a portion of the share of the truster's estate liferented by his daughter the late Mrs Lang vested in her eldest son Robert, who predeceased her. By the fifth purpose of the settlement the trustees were directed, in the event of the marriage of any of the truster's daughters, to retain her share and pay her the annual proceeds during her life, and when such daughter shall die, to pay the money to her lawful issue, failing appointment by her, equally among them, share and share alike. I should be disposed to read that direction as importing a suspension of vesting in any of the issue until the mother's death. It is true that actual words of survivorship are not used, but there is no gift of the money to issue until the death of the mother, which looks as if vesting were postponed until the period of distribution and payment. This view is strengthened and confirmed by the subsequent direction to the trustees, in case such daughter should die without leaving lawful issue, to pay the money to the other children of the truster equally among them, which seems to me to import that the issue were not intended to take a vested right unless they were alive at the mother's death. Upon a question of intention and construction such as this, a copious reference to authority tends, I am afraid, to complicate rather than elucidate a solution of the problem. But as decisions were cited I may say that I think the present case is distinguishable from that of *Hickling's Trustees*, 1 F. (H.L.) 7, and seems to resemble more closely the case of *Binnie's Trustees*, 1910 S.C. 735. In *Binnie's* case, as here, there was a distinct destination-over on the failure of issue, while in *Hickling's Trustees* the noble and learned Lords who formed the majority seem to have held that there was no such destination-over; Lord Shand expressly states this (at p. 17). I am therefore for answering the first question in the negative. [*His Lordship then dealt with the second and third questions in the case, and held that Robert Lang's share fell to his children under the conditio si sine liberis.*]

Lord Salvesen — This Special Case relates to one-seventh share of the portion of the residue of the estate of the late Mr William Graham which was liferented by his daughter Mrs Lang, and the main question which we have to decide is whether that share vested in Mrs Lang's son Robert James Lang, who predeceased his mother but was survived by three children. The competition is between Mr Lang's assignee, who acquired his share for value, and his three children, who maintain that as Mr Lang's share had not vested in him it was not carried by the assignation in question. The competing views are that the share of the residue liferented by Mrs Lang vested in her children as a class, subject to defeasance in the event of Mrs Lang not leaving

any surviving issue at her death; and so far as each of her children was concerned, subject also to her right of appointment amongst her children, which, according to settled authority, implied her right to defeat any one or more of them so long as the deed of appointment was in favour of one or more of the others. This construction of the deed would result in the anomaly that provided one of Mrs Lang's children survived her, all the other predeceasing children, whether they died childless or leaving issue, would receive an aliquot part of the share liferented by her, provided she did not exercise the power of appointment; whereas if Mrs Lang had no children surviving her none would take a vested interest.

It was strongly urged upon us that this construction of the testator's will was the logical result of the decision of the House of Lords in the case of *Hickling's Trustees* v. *Garland's Trustees*, 1 F. (H.L.) 7, a decision which is binding upon us although only reached by a very narrow majority. In my opinion, however, that decision does not apply to the much more complex provisions contained in the fifth purpose of Mr Graham's settlement. There is this similarity between the two cases, that there, as here, there was no gift of the liferented shares of the daughters until the expiry of the liferents. The trustees here are directed to hold the shares of the daughters who married during their lives, and to pay the money so retained to the lawful issue of such daughters when they shall respectively die. In *Hickling's* case, however, no power of appointment was conferred upon the daughters; nor was there, as here, a power to grant a liferent of one-half to a surviving husband. Moreover, while in *Hickling's* case the direction was that "on the death of the testator's daughters respectively leaving lawful issue" the trustees were "to divide equally amongst the issue of each of my said daughters" the sum which he had directed to be set apart; in the present case the provision is thus expressed:—"In case such daughters or any of them shall die without leaving lawful issue, then my said trustees shall pay the sums held in trust for their behoof or convey the property in which such sums may be invested to such other person or persons as such daughters may respectively appoint by deed, to take effect at their death, and failing such deeds to my other children of whichever marriage equally among them, the lawful issue of such of my children as may have died receiving their parents' share as aforesaid." There are thus three features which distinguish the provisions in favour of Mr Graham's married daughters from those which were present in the settlement of Mr Fair—(first) Mrs Lang had an absolute power of appointment amongst her children; (second) in the event of her dying without leaving issue, she had an absolute right to convey the capital of her share by will to any person she might choose (although this power was recalled by a subsequent codicil); and (third) in the event of her failing to exercise this power there is a destination-over in favour of her brothers and sisters and their issue. In my opinion all these matters indicate that the testator did not intend to give a vested interest to the issue of his daughter as at his own death, but contemplated that their right should only emerge as at the date of their mother's death, which was the date at which he directed the money to be paid to her issue. On this construction one avoids attributing to the testator the entirely capricious intention of giving his daughter's issue an equal right of succeeding to her share provided a single member of the class survived the mother, whereas if no issue survived her none would take benefit from the bequest.

In my opinion the plain intention of the testator was to give no vested interest to any of his grandchildren or their issue unless they survived his own daughter. On no other footing can I understand the right conferred upon the daughter, in that event, of leaving the share which she liferented to any person she pleased although she had had issue who predeceased her. Reading the instrument as a whole, as we are bound to do, to ascertain the real intention of the testator—see *Bowman* v. *Bowman*, 1 F. (H.L.) 69—I cannot doubt that the testator here did not intend that any share should vest in his daughter's issue until the arrival of the term when the capital became payable, namely, the death of the liferentrix. I do not think it ever entered the testator's mind that the children of his daughter should be able to deal with their respective interests during their mother's lifetime; or that he intended to give them this right subject, first, to their all being divested if none of the issue survived the mother, and second, to the absolute power to defeat any one or more of them which he conferred upon her. This double contingency which would have made the expectancies worthless from a commercial point of view was not present in *Hickling's* case.

The argument for the second parties further involved the proposition that the decision in the case of *Binnie's Trustees*, 1910 S.C. 735, was inconsistent with the House of Lords decision in *Hickling's Trustees*, and was therefore ill decided. If there was a plain inconsistency and the decision of the present case depended on our choosing between the two it would probably be our duty to appoint this case to be argued before a larger tribunal. There is in my opinion, however, no inconsistency, for there was a destination-over in Mr Binnie's settlement which there was not in the settlement of Mr Fair; and it was on the absence of this circumstance that Lord Shand, who gave the leading opinion in *Hickling's* case, strongly founded. In any event, however, I think there are elements present in Mr Graham's settlement which make the case *a fortiori* of the decision in *Binnie's* case. I am therefore of opinion that the first question should be answered in the negative.

The LORD JUSTICE-CLERK and LORD GUTHRIE concurred.

The Court answered the question in the negative.

Counsel for the First and Fourth Parties—Cree, K.C.—Henderson. Agents—Webster, Will, & Company, W.S.

Counsel for the Second Parties—Moncrieff, K.C.—Maconochie. Agents—Fraser, Stoddart, & Ballingall, W.S.

Counsel for the Third Parties—Sandeman, K.C.—Robertson. Agents—Mylne & Campbell, W.S.

Wednesday, May 31.

SECOND DIVISION.

BURRELL *v.* BURRELL'S TRUSTEES AND OTHERS.

Compensation—Concursus debiti et crediti—Decree for Expenses in Favour of Several Defenders and Legacy Due by One of the Defenders.

A complainer brought a suspension of a charge upon a decree for expenses in favour of the defenders in an action in which he had been pursuer. The decree was in favour of a large number of defenders including a trust. He sought suspension on the ground that the trust, who he averred were the real defenders, the others being merely nominal, were owing him a legacy of larger amount; or, failing that, suspension of the decree so far as the trust was interested.

Held that there was no *concursus debiti et crediti*, and note of suspension *refused*.

Henry Burrell, *complainer*, brought against George Burrell, shipowner, and another, the trustees of the late Mrs Isabella Guthrie or Burrell, *respondents*, a note of suspension of a charge to make payment of £183, 12s. 8d., being the taxed amount of expenses of process in decrees of 11th March 1914 and 11th March 1915, together with £1, 15s. dues of extract.

The complainer described the charge as being at the instance of the respondents, whereas it proceeded at the instance of (*a*) the said trustees, (*b*) William Burrell, shipowner, Glasgow, who was one of the trustees, as an individual, and Mrs C. Mitchell or Burrell, his wife, and (*c*) ten steamship companies in whose favour the decrees for expenses had gone out and who had been defenders in an action brought against them by the complainer (see 52 S.L.R. 312). The complainer however averred—"Stat. II . . . Explained that the respondents, who were the parties chiefly interested in the said action, assumed the entire control of the defence therein; that although defences were lodged nominally on behalf of all the defenders called, this was done on the instructions of the respondents alone; that during the whole course of the litigation they alone continued to be consulted by and gave instructions to the law-agents who conducted the defence; that no part of the expenses for which the decree has been extracted were incurred by the defenders other than the respondents, and that the latter alone are entitled to payment." It was admitted that under the trust the complainer had been left a legacy of £2500, and had only so far received £1250.

The complainer pleaded, *inter alia*—"(3) In any event, the respondents being indebted and resting-owing to the complainer in a sum largely in excess of the sums charged for, the charge complained of is nimious and oppressive, and should be suspended."

The respondents pleaded, *inter alia*—"(6) There being no *concursus debiti et crediti* compensation is inadmissible, and the note should therefore be refused."

On 7th December 1915 the Lord Ordinary (HUNTER) repelled the reasons of suspension and found the warrants and charge orderly proceeded.

The complainer reclaimed, and argued—The legacy due by the trustees to the complainer was a liquid debt which he was entitled to set off against their claim under this decree. A proof at least should be allowed of the complainer's averments that the respondents were the real defenders in the action, and that they alone had incurred the expenses. And, in any event, the complainer was entitled to set off his claim to the legacy against whatever part of the joint-right of the defenders in the decree was, in point of fact, in the trustees—*Harvey* v. *Muir*, 1843, 5 D. 1113; Bell's Prins., sec. 52.

Argued for the respondents—The demand for a proof was an attempt by parole evidence to get into the question of indebtedness and contradict the terms of the decree. The principle of compensation did not apply where the debt to be set off was due by one of several creditors—Lindley on Partnership (8th ed.), p. 350; Bell's Comm. ii, 553. There was in such case no *concursus debiti et crediti*. The Court referred to *Fowler* v. *Brown*, 53 S.L.R. 416.

LORD JUSTICE-CLERK—[*After pointing out that the charge was described as being given only by Mrs Burrell's trustees, whereas it was given at the instance of the other parties also, and that this was sufficient ground for refusing the note*]—I am averse, however, after the careful argument we have had, from dealing with this case merely on what may be called technicalities. The Lord Ordinary seems to have proceeded upon the view that there was no proper *concursus* between the two debts. Apparently there is no authority in Scotland dealing with the question before us, namely, whether a plea of compensation is applicable where on the one hand there is a joint debt and on the other an individual debt. It is, of course, well settled in Scots law that a debt due by the individual partners of a firm cannot be set off against a debt due to the firm; but that affords little help here, seeing that the firm is recognised