Now, in considering that Report, this Division expressed entire approval of the practice of the Auditor. That being so, I cannot think that the fees here fixed by the Auditor are unusually low, but, on the contrary, reasonable and fair.

As to the payment to the engineers, there is more difficulty; but it is my impression that this Court has held that the Act of Sederunt regulating jury practice in regard to scientific witnesses is also applicable to proofs before the Lord Ordinary. If that is so, then the absence of the Lord Ordinary's certificate is fatal to the contention of Mr Smith. Before determining anything judicially in this matter, however, I should like to know if I am right in supposing that there has been any such decision, and if there has not, what has been the practice followed.

As to the charge for the attendance of these engineers as witnesses, they were witnesses to fact, and could therefore have been compelled to attend and give that evidence, and so cannot be looked upon as experts, who cannot be compelled to attend. I therefore think that we should not interfere with the allowance of the Auditor in this respect.

If your Lordships are of the same opinion, we will allow the point as to payment of the engineers for qualifying to give evidence to stand over.

The other Judges concurred.

The case was adjourned until Thursday, the 14th May, in order that information might be obtained as to the applicability of the Act of Sederunt of 10th July 1844 to proofs before the Lord Ordinary.

The defender accordingly on that day produced the following Memorandum by the Auditor of Court:—

"MEMORANDUM by Auditor of Court as to Payment of Skilled Witnesses examined in Proofs.

"The Act of Sederunt of 10th July 1844, regulating the allowances to witnesses in jury trials, provides, *inter alia*, that when it is necessary to employ scientific persons to make investigations previous to trial in order to qualify them to give evidence, then fair and reasonable charges for so qualifying, in addition to the ordinary allowance, shall be sustained, "provided that the Judge shall certify that it was a fit case for such additional allowance." This rule has been uniformly applied by the Auditor to witnesses in proofs for a considerable time past, and, so far as he is aware, without appeal to the Court in a single case. It has been so applied in consequence of a judgment of the First Division of the Court (brought under the Auditor's notice at the time it was pronounced, but apparently not reported) to the effect that, in respect of allowance to witnesses for qualifying, proofs were not in a different position from jury trials. The Auditor regrets that he cannot fix the date of the decree referred to, but, to the best of his recollection, it was in 1871 or 1872. Prior to that decision, the practice of the Judges in the Outer-House had varied, some of their Lordships certifying scientific witnesses in proofs as in jury trials, and others leaving it to the Auditor to deal with the additional allowances claimed in proofs.

(Signed) "EDMUND BAXTER.
14th May 1874."

The Court repelled the objections stated for the pursuer, and approved of the Auditor's Report.

Counsel for the Pursuer — Campbell Smith. Agent—Thomas Spalding, S.S.C.

Counsel for the Defender—Asher. Agent—Macandrew.

Thursday, May 14.

SECOND DIVISION.

SPECIAL CASE—D. CURROR, S.S.C. (HENDERSON'S FACTOR), AND OTHERS.

Construction—Settlement—Annuity—Division.

Terms of settlement under which *held* (1) that the period of division of residue fixed by the truster could not be anticipated by a discharge of annuities burdening the estate, these annuities being alimentary; (2) that any surplus revenue arising year by year over and above the sum requisite to meet the annuities might be divided as it arose.

The parties to this Special Case were,—of the first part, David Curror, S.S.C. judicial factor on the trust-estate of the deceased John Henderson, builder, Edinburgh, and, of the second part, the liars and residuary legatees under the trust-disposition and codicil of the said John Henderson, dated 28th May 1857. The facts as stated on record were—The testator was survived by his two daughters mentioned in the said trust-disposition and settlement, viz., Mrs Margaret Henderson or Brown and Mrs Catherine Henderson or Nisbet, and by his daughter-in-law, also therein mentioned, viz., Mrs Caroline Graham or Henderson, the relict of the testator's deceased son John Henderson, all of whom are still alive. All of the testator's grandchildren mentioned in the said trust-disposition and settlement survived him, viz., (1) his said son John's children, John Henderson and Walter Henderson; (2) the said Margaret Henderson or Brown's children, Robert Brown (since deceased), Mrs Margaret Brown or Thomas Christina Brown (since deceased), Mrs Hellenore Brown or M'Gregor, Miss Lousia Brown, John Henderson Brown (since deceased), and Miss Mary Catherine Brown; and (3) Miss Margaret Wilhelmina Nisbet, daughter of the said Mrs Catherine Henderson or Nisbet, Miss Agnes Nisbet, who was born on the 11th August 1859, after the execution of the said trust-disposition and settlement and codicil, also survived the testator. The said Robert Brown died, without issue and testate, on or about 18th September 1869. The said Christina Brown died, without issue and intestate, on or about 21st November 1865. The said John Henderson Brown died, without issue and intestate, on or about 6th July 1865. There were thus eight of the testator's grandchildren who at the expiry of the period of ten years after the testator's decease were alive, as they still are. The said Margaret Wilhelmina Nisbet and Agnes Nisbet are minors, and are both above twelve years of age. The other grandchildren have all attained majority.

On the 4th May 1860, the said David Curror was appointed by the Lords of Council and Session judicial factor on the said trust-estate, in consequence of the trustees nominated in the said

trust-disposition and settlement having declined to act. In terms of the first purpose of the trust, he paid the truster's debts, &c.; and in terms of the second purpose, he, during the period of ten years from and after the testator's decease, annually applied the free income or proceeds of the residue of the trust-estate in manner provided by the said second purpose. The said period of ten years expired on the 11th March 1870, and in terms of the third purpose of the deed it became necessary to set apart and invest as much of the capital of the said estate as would yield a free annuity of £75 sterling to each of the truster's daughters, and an annuity of £10 sterling to the said Caroline Graham or Henderson, his daughter-in-law. The residue of the estate not required for such investment fell to be divided in terms of the said third purpose. On the 19th July 1870, a Special Case was presented to the First Division of the Court, setting forth the above-mentioned particulars, and the claims of the parties interested, the value of the whole trust-estate, and the estimated sums required to yield the amount of the said annuities The judgment of the Court was to the effect that the said surplus estate was to be divided among the eight grandchildren of the testator then in life, equally, share and share alike. In terms of this decision, the judicial factor, after deducting the sum of £4933, 6s. 8d.; and a farther sum of £300, to be appropriated as a fund, yielding annually the amount required to meet the said annuities, and the expenses of management, divided the balance or residue of the trust-estate, being the difference between £8300 and the sum so retained, among the eight grandchildren of the truster, equally, share and share alike. He still retains the said two sums, amounting together to £5233, 6s. 8d., for the purpose of meeting the three annuities and expenses of management. But in as much as the sum retained was calculated with reference to an investment in the public funds, yielding a little over 3 per cent., while, in point of fact, the greater part of the estate is invested at 4½ and 5 per cent., the sum in the judicial factor's hands is at present considerably in excess of what is required for these purposes. There is also a small sum of accumulated interest in the hands of the judicial factor. In the event of the Court answering the first question in the affirmative, the parties hereto consent and agree that the sum which should have been retained to meet said annuities, and which falls to be divided in terms of the fourth purpose of the said settlement, shall be held to have been £4500, and shall be divided into tenths; and that the balance of the said sum of £5233, 6s. 8d., and any accumulations of interest in the hands of the factor, shall be divided in terms of the said judgment of the First Division.

The consenting parties of the second part—viz., Mrs Margaret Henderson or Brown, Mrs Catherine Henderson or Nisbet, the said George Nisbet her husband, and Mrs Caroline Graham or Henderson, have executed a deed of renunciation and discharge of the annuities payable to the annuitants in favour of the other parties of the second part, containing a declaration that such renunciation and discharge shall operate as a purification of the rights of the beneficiaries under the said trust-deed, and have the effect of vesting in them their shares of the trust-estate as if the three annuitants were naturally dead.

The second, third and fourth purposes of the trust were as follows:—"*Second*, I direct my said trustees to hold and retain the residue of my whole heritable and moveable, real and personal, estate, for the period of ten years from and after my decease, and during that time annually to divide the free income or proceeds arising therefrom into three equal shares, and to pay one of these shares to each of my daughters, Margaret Henderson or Brown, wife of Robert Brown, architect in Edinburgh, and Catherine Henderson or Nisbet, wife of George Nisbet, farmer, Tranent, half-yearly at two terms of the year—Martinmas and Whitsunday—in equal portions, commencing at the first term of Whitsunday or Martinmas immediately after my death; and with regard to the remaining third share of said free annual income or proceeds, I direct my said trustees to pay therefrom to Caroline Graham or Henderson, relict of my eldest son John Henderson, architect in Edinburgh, now deceased, a free annuity of £10 sterling, payable half-yearly at two terms of the year, Whitsunday and Martinmas, in equal portions, commencing at the first term of Whitsunday or Martinmas that shall happen immediately after my decease, but so long only as she remains unmarried; declaring that if the said Caroline Graham or Henderson shall enter into a second marriage, said annuity shall cease and determine: And I further direct my said trustees, out of said third share of income, to pay to John Henderson, eldest son of the said Caroline Graham or Henderson, an annuity of £15 sterling until he attains 21 years of age; and to pay to Walter Henderson, younger son of the said Caroline Graham or Henderson, an annuity of £20 sterling until he attains 21 years of age, said annuities to my said two grandsons John and Walter Henderson being paid to them half-yearly at the terms of Martinmas and Whitsunday, in equal portions, commencing at the first term of Martinmas or Whitsunday that shall happen immediately after my decease, or, in the option of my said trustees, said annuities to be expended for behoof of the said John and Walter Henderson in such manner as to my said trustees shall seem beneficial and expedient, of which they shall be sole judges; and with regard to the balance or surplus of the said third share of income, after satisfying the said annuities to the said Caroline Graham or Henderson and her two children before named, I direct my said trustees to accumulate and invest the same for behoof of the parties who shall, at the period of division hereinafter specified, become entitled to the fee of the residue of my estate, in virtue of these presents; and if either of my said daughters shall die before the expiry of the said ten years, leaving lawful issue of her body, I direct my said trustees to hold and accumulate the third share of the income of my estates effeiring to such deceased daughter for behoof of her said issue until the said ten years expire, with power to my said trustees to apply the whole or any part of such third share of said income for the maintenance and education of the lawful issue of such of my said daughters as shall decease, in a suitable manner, if my said trustees shall consider it expedient, of which they are to be the sole judges: *Third*, Upon the expiry of said ten years after my decease, if both or either of my said daughters are then in life, I direct my said trustees to set apart and invest as much of the capital of my said estate as will yield a free annuity of

£75 sterling to each of my said daughters during all the days of their lives, payable half-yearly at Martinmas and Whitsunday in equal portions, and as will further yield the foresaid annuity of £10 sterling herein provided to the said Caroline Graham or Henderson during all the days of her lifetime, so long as she remains unmarried: And I appoint the residue of my said estate to be divided amongst the said John and Walter Henderson, being the only children of my deceased son John Henderson, Robert, Margaret, Christina, Helenore, Louisa, John Henderson, and Mary Catherine Brown, being the seven children presently in life of my said daughter Margaret Henderson or Brown, and Margaret Wilhelmina Nisbet, child of my said daughter Catherine Henderson or Nisbet, and amongst any other children who may hereafter, before the expiry of the said period of ten years after my decease. be procreated of the bodies of my said two daughters Margaret Henderson or Brown and Catherine Henderson or Nisbet, or either of them, or amongst such of my whole grandchildren hereinbefore specially named, or to be procreated as aforesaid, as shall be in life at the expiry of the said period of ten years after my death, and that equally, share and share alike, said shares to be immediately paid over to such of my said grandchildren as shall then have attained 21 years complete; and the shares of such of them as shall be in minority to be consigned in bank or invested for their behoof until they attain majority; but in the meantime my said trustees may pay to them, or expend for their behoof, the income of the shares of such of said grandchildren until they severally attain 21 years: Declaring that in all cases the children or issue of any of my grandchildren deceasing shall take equally, share and share alike, the portion of said residue of my means and estate which their parent would have taken if in life: *Fourth*, In the event of my said daughters, or either of them, being in life at the expiry of the said period of ten years after my death, in which case a portion of my said estate is to be set apart and invested in order to yield to each of them the foresaid annuities of £75 sterling, as before provided, I hereby direct that, upon the death of the survivor of my said daughters, the fee or capital sums set apart for said annuities shall be divided equally amongst my whole grandchildren before specified—that is, the children of my son, the said deceased John Henderson, and of my daughters, the said Margaret Henderson or Brown and Catherine Henderson or Nisbet, who may be then in life, share and share alike, and paid over to such of my said grandchildren as shall have attained majority; and in the event of any of them being then in minority, I appoint their shares to be invested or consigned in bank until they so arrive at 21 years of age, in the same manner as above provided with reference to the division herein appointed to be made of my said funds and estate upon the expiry of ten years immediately after my death: Declaring that in the event of both of my said daughters being in life at the expiry of the said period of ten years, the sum set apart and invested to meet the annuity of £75 to her who shall thereafter first decease, shall not be divided until her surviving sister also die, as above specified, but shall be held, and the interest thereon accumulated by my said trustees from the date of the death of my said first deceasing daughter, aye and until the said period of division hereby appointed to take place at the death of my surviving daughter: And further declaring that no right shall be held to have vested in any of my said grandchildren until they are respectively entitled to demand payment of their shares of my means and estate above provided to them: Which provisions in favour of my said children and my whole grandchildren, and also the annuity to the said Caroline Graham or Henderson, are hereby declared to be strictly alimentary provisions to them respectively, and shall not be assignable by them nor affectable by arrestment, adjudication, or other diligence of creditors, nor be subject to the *jus mariti*, nor the diligence of the creditors of any of the husbands of my said daughters, nor of the husbands which any of my female grandchildren may marry, but shall be payable to my said daughters and my whole grandchildren on their own receipts allenarly; and in case of any of my said daughters predeceasing their husbands, such husbands shall have no right to interfere in any way concerning the administration of the trust affairs, nor with the shares of the annual proceeds of my estate effeiring to the children of their deceased spouses, which my trustees shall pay or lay out for behoof of said children themselves: And I hereby declare that the provisions above written, conceived in favour of my said daughters, shall be accepted of by them in full of all legitim, portion-natural, bairns' part of gear, executry, or others whatsoever, which they, or either of them, can by law ask or demand by and through my decease in any manner of way."

The questions submitted for the opinion of the Court were:—" (1) Whether the residue of the said John Henderson's trust-estate, now under the management of the first party, as judicial factor, is, in consequence of the renunciation and discharge of the annuities chargeable thereon, now divisible among the principal parties of the second part, and whether they are thus entitled to immediate payment of their respective shares of the capital in the proportions specified in the said trust-settlement and codicil? (2) In the event of the foregoing question being answered in the negative,—Whether the principal parties of the second part are entitled to claim any, and what part of the said residue, in terms of the third purpose of the trust-settlement, in respect that the sum retained by the judicial factor is more than is actually required for the purpose of providing the said annuities? (3) Whether the surplus means or revenue, if any, falls to be divided yearly among the eight grandchildren who were found entitled to participate in each division, or whether the said surplus falls to be accumulated and divided with the residue?"

At advising—

LORD JUSTCE-CLERK—I think this case very clear as regards the annuity to surviving annuitant. The alimentary character of the annuity is conclusive and we cannot accelerate the period of division. In the case of deceased annuitants, I am also against the contention of Mr M'Laren, not so much on the question of vesting, which is doubtful, but I think it clear that ulterior interest may arise before the period of division, and there are two periods of division laid down to protect the interests of the annuitants. I cannot think the postponement made without an object. The question as to excess comes to be, Is the surplus now divisible? and while I do not see my way to give the beneficiaries

benefit from the capital sum, I think any excess over and above the amount necessary to meet the annuity may be divided.

LORD BENHOLME—I can scarcely accede to distribution of the surplus, as it makes a great complication in the trust. I think the reasonable view is that the testator, by stipulating that there was to be no second division until both annuitants died, indicated his intention that no division of surplus should take place whatever the amount of funds in hand. I am for answering all the questions in the negative.

LORD NEAVES—I have no doubt on the leading question. On the other, I agree with your Lordship in the chair.

In 1870 there was to be a partial division of the fund, retaining sufficient funds to meet the annuity. I think that then there was a vesting in everything not absolutely necessary to meet the annuity. I do not see, on the one hand, that we can force the factor to make the very cheapest investment, but I do not see, on the other, why any sum unnecessary for that purpose, from year to year left in his hands, should not be divided among the parties in right in 1870.

LORD ORMIDALE—I agree that the first question should be answered in the negative. On the second and third there is a difficulty in fixing the precise sum to be divided. On the one hand, the factor may only divide such a sum as will leave sufficient always to secure the annuity; but I think the parties of the second part are entitled legally to everything not absolutely necessary to secure the annuity. There is no specific sum specified as to be set apart and invested for their annuity, but it is "a portion."

The Court pronounced the following interlocutor:—

"Having heard counsel on the special case, the Court are of opinion and find that the residue of John Henderson's trust-estate, now under the management of the first party as judicial factor, is not, in consequence of the renunciation and discharge of the annuities chargeable thereon, now divisible among the principal parties of the second part.

"That the principal parties of the second part are entitled to receive from the judicial factor, and that he is entitled to pay over to them, any surplus revenue which may arise, year by year, from the funds invested for the purpose of securing the two annuities in question, over and above the amount required in each year to meet such annuities; but that they are not entitled to any part of the capital sum so invested, and that such payment shall be made to the said second parties *per capita*, as it would have been if the said sums had been divided at the first period of division; and decern accordingly."

Counsel for Judicial Factor—Marshall. Agent—E. Mill, S.S.C.

Counsel for Second Parties—John M'Laren and Macdonald. Agent—H. W. Cornillon, S.S.C.

Tnursday, May 14.

SECOND DIVISION.

[Lord Mure, Ordinary.

WATSON *v.* GRANT'S TRUSTEES.

Husband and Wife—Marriage Contract—Act 1621, *c.* 18.

A reasonable antenuptial contract, by which A conveyed to trustees her whole estate, *held* not reducible under the Act 1621, c. 18, at the instance of a creditor in debts contracted by the lady before marriage, in respect that the alienation had not been granted without a just, true, and necessary cause, or between conjunct and confident persons, and it was not stated that A was insolvent at the time of the execution of the deed.

The summons in this suit, at the instance of Alexander Watson, residing in Pittenweem, against the Trustees under the ante-nuptial contract between John Grant and Margaret Taylor, concluded for reduction of the contract. The pursuer stated that the defender, Mrs Grant, was his sister uterine, that he had advanced to her between 1853 and 1858, or thereby, various sums; that in 1866 she granted a personal bond for £468; that the marriage took place in 1871; that in 1873 the pursuer raised an adjudication and inhibition on the dependence against the defender; that the marriage contract trustees appeared as defenders and produced the contract, which was recorded on 4th July 1873, and pleaded that the property was vested in them for the purposes of the contract. These purposes were, *inter alia*, the providing an alimentary liferent to the spouses and the survivor of them, and at the death of the longest liver of them the division of the property among the lawful issue of the said John Grant by this or any other marriage, along with the lawful issue of the said Margaret Taylor by this or any subsequent marriage. At the date of the marriage Dr Grant was fifty years of age, and had three children, and Mrs Taylor or Grant was about forty-seven years old.

The pleas in law for pursuer were—"(1) The said conveyance and alienation of her whole heritable means and estate by the said Mrs Margaret Taylor or Grant to and in favour of the Trustees named in the said contract of marriage, for the uses and purposes therein specified, being to the hurt and prejudice of the pursuer, his just and lawful claims the pursuer is entitled to decree of reduction as concluded for. (2) The said conveyance and alienation being to conjunct and confident persons, without true, just, and necessary causes, and without a just price really paid, and granted after the contracting of lawful debts from true creditors (and in particular the pursuer), it is void and null under the Act 1621, cap. 18, and at common law, and should be reduced, in terms of the conclusions of the summons. (3) *Separatim*, the said conveyance and alienation falls to be reduced, in so far at least as the provisions therein conceived by the said Mrs Margaret Taylor or Grant to and for behoof of the said Dr Grant and children are excessive. (4) Generally, in the circumstances, the pursuer is entitled to decree of reduction as concluded for. (5) This action should be conjoined with the process of adjudication libelled."

The pleas in law for the defenders, the Trustees,