It is said that there is a distinction between a case in which a verdict is set aside as against evidence, and one in which a new trial is granted on the ground of misdirection. Although I do not perceive the distinction in a question of expenses, there is some warrant for saying that it has been recognised to certain limited effects. It is stated, as I have mentioned, by Mr Macfarlane as a recognised ground for reserving expenses instead of awarding them against the party who lost the first trial, that the first trial was lost through misdirection; and it is also indicated in some of the decisions (for instance in *Stewart* v. *Caledonian Railway Company*, 8 Macph. 486) that in the same case a party who has lost the first trial through misdirection may ultimately obtain the expenses of it if he proves successful in the second trial. But this distinction has never been acted on as a reason for awarding expenses to the party who was unsuccessful in the first trial before it has been ascertained by the result of the second trial that his case was from the first well founded. On the contrary, the practice has been to reserve expenses in such cases just as in cases in which the verdict has been set aside as against evidence. I may refer as a notable example to the well-known case of *Wilson* v. *Merry & Cuninghame*, 5 Macph. 807, affirmed in the House of Lords, 6 Macph. (H. of L.) 84.

This being the settled practice in jury causes, it is not necessary to justify it, and the practice as to awarding expenses in other cases cannot affect it. The leading object of the practice probably was to make it as difficult as possible to interfere with the verdict of a jury. There is this further consideration to support it, that though a party to a suit gets a verdict set aside on the ground of misdirection, it may quite well be that on a second trial (as happened in the second trial in *Gibson's* case) the second jury will come to the same result as the first, and the Court may in the end be satisfied that the case from the first was frivolous and unfounded.

As to the case of *Gibson*, I would only observe that if, as might be gathered from the note appended to the report, expenses were there awarded to the pursuers because in the opinion of some of the Court (from which I entirely dissented) the course adopted of withdrawing the case from the jury was incompetent, the case is not in point, because in this case there was nothing exceptional in the course followed.

If this is not the true explanation, I am humbly of opinion that the decision was inconsistent with the settled practice, and should not be followed.

The general question was certainly not argued, and there was no citation of authority.

I therefore have no hesitation in holding that the expenses should be reserved.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the bill of exceptions, Allow the first exception in said bill: Set aside the verdict and grant a new trial, reserving the question of expenses."

Counsel for the Pursuer — Hunter — Grainger - Stewart. Agent — William Green, S.S.C.

Counsel for the Defenders—Salvesen—A. S. D. Thomson. Agent — Alexander Wylie, S.S.C.

Friday, December 23.

SECOND DIVISION.

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

Marriage - Contract — Implement of Provision of Annuity to Wife—Purchase of Government Annuity.

A testator left his whole means and estate to trustees, *inter alia*, for implement of the provisions contained in his marriage-contract. By his marriage-contract he had bound himself and his representatives to pay to his widow a free alimentary annuity of £100, and he conveyed two properties in security of these provisions to his marriage - contract trustees, binding himself and his representatives, in the event of the subjects conveyed proving insufficient as a security for the annuity, to provide such further security as would with the foresaid subjects or the free proceeds thereof produce a sum equal to the value of an annuity of £100. The marriage-contract provided that the marriage-contract trustees should have power to discharge the security and to accept in lieu thereof such other security or securities as they might see fit, and change the same from time to time. The testator was survived by his wife. The properties ultimately conveyed in security of the annuity were sold and did not realise enough to secure the payment of the annuity. *Held* that the testamentary trustees would sufficiently implement the obligations in the deceased's marriage - contract by purchasing a Government annuity in name of the marriage - contract trustees, and that these trustees would be in safety in accepting such annuity.

Trust—Termination of Trust — Purchase of Annuity out of Residue to Enable Trust to be Wound up.

Held (*diss.* Lord Young) that testamentary trustees were not entitled, without the consent of all the beneficiaries, with a view to winding up the trust, to purchase an annuity out of the capital of the trust estate, in implement of an obligation undertaken in the testator's marriage - contract, and imposed upon his trustees, to provide an annuity to his widow (instead of paying the annuity out of the income of the trust), such application of capital not being an act of ordinary trust administration.

Robert Graham, wine and spirit merchant in Glasgow, died on 16th November 1890, leaving a trust-disposition and settlement dated 13th April 1882, whereby he assigned and disponed his whole means and estate to trustees for, *inter alia*, the following purposes — In the first place, For payment of debts; in the second place, For implement of the provisions contained in the antenuptial contract of marriage between him and Mary Crawford or Dunbar (afterwards Graham), widow of John Dunbar, dated 31st May 1881; In the fifth place, That the first parties might deliver to Mrs Graham, in the event of her surviving him, such articles of furniture and plenishing as she might select, but not exceeding £200 in value, or, in her option, that they might pay her £200 in lieu thereof; In the sixth place, That the first parties might pay to Mrs Graham, in the event of her surviving him, the sum of £2000, or, in her option, and in lieu thereof, a share of the residue of his estate equal to that of his children; and, in the last place, he directed the first parties to hold and convey the residue of his means and estate and the income thereof for behoof of and equally to and amongst his children, Jessie Graham or Scott, Matthew Graham, Robert Dalgleish Graham, James Graham, Margaret Dalgleish Graham, and Annie Wilson Graham, and any other child or children procreated of his body.

The testator also provided and declared that the provisions should be payable to his children, in the case of sons when they respectively attained the age of twenty-one years, and in the case of daughters when they respectively attained that age or were married, whichever of these events should first happen.

He also provided that if any of his said children predeceased him leaving issue, or having survived him, died before the term of payment leaving issue, their issue should be entitled, equally amongst them, to the share to which their parent would have been entitled if he or she had survived and reached majority, and failing issue their shares should be divided equally among the survivors of the residuary legatees jointly with the issue of any of them who might have predeceased leaving issue.

Under the antenuptial contract referred to, Mr Graham, in the event of his wife surviving him, obliged himself and his heirs, executors, and successors, all jointly and severally, to allow her the free liferent use of the whole household furniture and plenishing which should belong to him at the time of his death, or so much thereof as should in the opinion of the marriage-contract trustees furnish a house suitable to her circumstances. And further, in the event of his wife surviving him, he obliged himself and his foresaids, all jointly and severally, to pay to her a free alimentary annuity of £100 sterling during all the days and years of her life after his death, payable in advance in equal proportions at Whitsunday and Martinmas. And in security of these provisions Mr Graham disponed to the marriage-contract trustees two plots of ground belonging to him. In the event of these subjects, on a sale thereof, or on a valuation by a qualified party appointed by the marriage-contract trustees, proving insufficient as a security for the annuity, Mr Graham bound himself, and his heirs, executors, and successors, within one year from the date of the marriage-contract, to provide such further security as would with the foresaid subjects, or the free proceeds thereof, produce a sum equal in amount to the value of an annuity of £100 to his wife as at the expiry of the said year.

In the marriage-contract it was declared that the trustees should have and be entitled to the fullest immunities and powers, and in particular, without prejudice to the said generality, that they should be in no way bound to see that the subjects thereby vested in them, or which might thereafter be vested in them, were sufficient to secure the provisions thereby conceived in favour of Mrs Graham, nor be bound to take any concern with the maintaining and upholding of such subjects, or the insurance thereof against fire, and that they should have power to discharge the security thereby created, and to accept in lieu thereof such other security or securities as they should see fit, and change the same from time to time.

Mrs Graham by the antenuptial marriage-contract accepted these provisions in full of her legal rights.

Robert Graham was twice married.

The children above mentioned were all children of the first marriage, and there were no children of the second marriage. Mrs Graham survived her husband. At the date when this special case was presented she was still alive and forty-six years of age.

Jessie Graham or Scott predeceased her father, and was survived by three sons—Samuel Scott, John Scott junior, and Robert Scott, who were all still alive. The other residuary legatees above mentioned all survived their father, and were all still alive, with the possible exception of James Graham. All the residuary legatees were of full age with the exception of John Scott junior, who was twenty years of age, and Robert Scott, who was nineteen years of age. Their father John Scott was their curator-at-law. James Graham, who was one of the residuary legatees if he survived his father, left this country for Australia in 1882, and was now, if alive, about thirty years of age. It was uncertain whether he was alive or dead, and if dead, whether he died before or after his father, Alexander Moore junior, C.A., Glasgow, had been appointed by the Court as his factor *loco absentis*. Besides the properties disponed in security of Mrs Graham's annuity, Robert Graham had made over certain stocks to the marriage-contract trustees in further security. The residue of Robert Graham's estate, exclusive of the properties and stock held in security of the said annuity, amounted to about £11,800. The properties and stock referred to had been realised, and their value was about £1158, 3s. 4d., and the

annual income derived therefrom was £18 or thereby, being bank deposit interest thereon. The whole provisions of the marriage-contract in favour of Mrs Graham exigible up till the date of this case had been fulfilled, but certain questions had arisen with regard to the implement of the obligation to pay and secure the said annuity.

The residuary legatees other than James Graham had requested the testamentary trustees, with the view of bringing the trust of Robert Graham to an end and accelerating the division of the estate and saving expense of management, to purchase an annuity for Mrs Graham from Government or an insurance company, and had offered to give such formal consent as might be required. Mrs Graham was willing for her interest to accept such an annuity, and to give formal consent if required. It was stated in the case that such an annuity could be got from a first-class Scottish insurance company for £1740, 2s., and from Government for £1833, 15s.; and that if the first parties did not purchase an annuity they would require to retain estate of the value of about £3700 to secure the annuity. The first parties proposed to purchase such an annuity taken payable to the second parties as trustees, or in such other form as would make it incapable of alienation by the widow Mrs Graham, and to hand the same to the marriage-contract trustees in implement of the obligation undertaken by Robert Graham in his marriage-contract. The marriage-contract trustees did not dispute that the security would be sufficient, and were willing to accept the same as proper implement of the obligation undertaken by the marriage-contract if they legally could.

In these circumstances the present case was presented for the opinion and judgment of the Court.

The parties to the case were (1) the testamentary trustees, (2) the marriage-contract trustees, (3) Mrs Graham, the widow, (4) the residuary legatees other than James Graham, and (5) James Graham's factor *loco absentis*.

The first, third, and fourth parties maintained that the purchase of an annuity would be sufficient implement of the obligation undertaken in the marriage-contract, and that the second parties were bound to accept the same and discharge the securities presently held by them.

The fifth party maintained that the first parties had no power to sink any part of the capital of the estate in the purchase of an annuity, but were bound to maintain the same intact for the benefit of his ward, who was entitled to a share thereof as a residuary legatee.

The questions for the opinion and judgment of the Court were as follows:—"(1) Whether the first parties will sufficiently implement the obligations undertaken by the said Robert Graham under the marriage-contract by purchasing a Government annuity or an annuity from a first-class insurance company for Mrs Graham's life taken in such terms as to be alimentary, and not subject to the diligences of creditors or assignable by her? or (2) Whether the second parties are entitled and bound to obtain from the first parties such security over capital of the trust-estate held by the first parties as will, along with the security-subjects already in their hands, or the proceeds thereof, be sufficient to secure a free yearly annuity of £100 to Mrs Graham? (3) Whether under Mr Graham's trust-disposition and settlement the first parties, in a question with the beneficiaries of the fee of the trust-estate, are entitled, in the exercise of their discretion and as a piece of proper trust administration, to sink part of the estate in the purchase of an annuity and wind up the trust, or are bound to keep up the trust for the purpose of paying the annuity of £100 to Mrs Graham, giving to the second parties such additional security for payment thereof as may be necessary in terms of the said antenuptial contract of marriage?"

Argued for the first and fourth parties—The difficulty here arose in consequence of the decision in *White's Trustees* v. *Whyte*, June 1, 1877, 4 R. 786. But that case was distinguished from the present in respect (1) that here it was not proposed to hand over the annuity to the annuitant herself, but to the marriage-contract trustees in order that they might pay her the annuity term by term, and (2) that the testamentary trustees were not charged with the duty of paying the annuity or seeing it paid. All that the testamentary trustees were bound to do was to implement sufficiently the obligation in the marriage-contract. No trust was interposed so far as the testamentary deed was concerned for the protection of the annuity. The testamentary trustees were therefore entitled to wind up their trust provided they made satisfactory provision for the payment of the annuity by the marriage-contract trustees, and had their consent and the consent of the widow. Both the former and the latter were quite willing to consent if they were legally entitled to do so. They were so entitled. See *Standard Property Investment Company* v. *Cowe*, March 20, 1877, 4 R. 695; and *Reliance Mutual Life Assurance Society* v. *Halkett's Factor*, March 4, 1891, 18 R. 615. This case was also distinguished from *Ker's Trustees* v. *Ker*, December 13, 1895, 23 R. 317, in respect that the annuity was not to be given to the wife herself, and that here the estate conveyed in security of the annuity was not sufficient to provide for it. (2) As regards the opposition of the fifth party, it was to be borne in mind that this was not a question whether something requiring the consent of the beneficiaries could be done without the consent of one of them, but whether something which must be done in the course of the administration of the trust, whether the beneficiaries consented or not, could be legitimately done in this particular way.

Argued for the second and third parties—The third parties were not entitled to discharge their present claim upon the testamentary trust in return for an annuity to be purchased by the first parties:—*Ker's*

Trustees v. *Ker, cit.* See also *Tod* v. *Tod's Trustees*, March 18, 1871, 9 Macph. 728; and *Hughes* v. *Edwards*, July 25, 1892, 19 R., (H.L.) 33. There was no case in which trustees had been allowed to adopt such a course. What the marriage-contract trustees were entitled to was "such further security" as would produce the value of an annuity of £100.

Argued for the fifth party—The testamentary trustees were not entitled in obedience to such a direction as was given here, as a piece of ordinary trust administration, without the consent of all the residuary legatees, to spend part of the residue in the purchase of an annuity. If that were so, each residuary legatee was entitled to stand upon his rights, and if something could not be done without his consent, to consent or not as he chose. No one could say what the absent son would consider his interest, and the fifth party was not entitled to give his consent to such a proposal as the present. This refusal did not prevent some such arrangement being carried through, because an annuity could be purchased out of the shares falling to the other residuary legatees.

At advising—

Lord Justice-Clerk—The late Robert Graham took himself bound in his marriage-contract to pay his wife an annuity of £100 if she should survive him, and he made over certain property in security, and bound his heirs, executors, and successors to provide such further securities as might be necessary to produce the £100 to pay the annuity, which is declared to be alimentary. By his will he directed his trustees under it to hold his estate, *inter alia*, for implement of the obligation I have referred to. He further left the residue of his estate among his children.

All the children, or grandchildren coming in place of children, except one son who was abroad when last heard of several years ago, are desirous that the widow's annuity should be secured by the purchase of an annuity, they being willing to suffer the diminution of the amount of their shares in consideration of receiving immediate payment. The widow consents to the arrangement, and the trustees are willing to provide the marriage-contract trustees with an annuity secured on Government security, and the latter are willing to accept it as implement of the deceased's obligation.

Now, while I hold that the widow in such a case as this cannot by arrangement with other beneficiaries renounce an alimentary liferent in which she is protected by a marriage-contract trust, and that the trustees cannot validly accept and give effect to any such renunciation, I do not think that so far as her interests are concerned there can be any objection to the course proposed. If under the powers of the marriage-contract to realise securities and invest in others, a change is to be made in the securities, the security afforded by a Government annuity seems to be entirely unobjectionable, being a security of the highest class that it is possible to obtain. So far as a security is concerned, there is no ground for refusing sanction to the arrangement.

But another question remains. Can this purchase of an annuity, with consequent diminution of the capital of the trust estate under the settlement, thus reducing the amount of each share of residue, be carried out without all those interested in the residue being consenting parties. Here the consent of one party cannot be obtained directly. His address is unknown. There is no certainty that he is alive, but there is at the same time no presumption of his death. He is represented in this case by a factor *loco absentis*, and the factor holds that he cannot give any consent to what will cause a diminution of the share to which his ward may succeed. I am unable to hold that the Court can declare that the trustees and other beneficiaries can competently take any action which will cut down a beneficiary's rights without his consent. It may be a very wise arrangement. The widow may live so long that the benefit obtained from a full share may not be so valuable as the diminished sum to be at present obtained. But on the other hand if the widow were to die in a short time after the purchase of an annuity, the sum expended in the purchase of annuity would be practically lost to a considerable extent. I think that if there is a party interested in the residue, who is absent, and so does not consent, it is not competent to buy an annuity, unless those who do so secure to the non-consenting beneficiary the full payment of his share should he appear to claim it. It does not seem to me that this would be difficult. But whether difficult or not, I hold that the trustees cannot be authorised to take any action which will have the effect of diminishing the share to which the non-consenting beneficiary will be entitled to should he or his children be in a position to claim it on the lapse of the liferent.

Lord Young—It has not, I understand, been hitherto determined judicially whether it is within the power of testamentary trustees to purchase an annuity under any circumstances. Annuities are really insurances. Insurances for annuities are well-known matters of business, and there are circumstances very frequently in which the most sensible course is to provide for an obligation by insuring a life or by purchasing an annuity. The statement in the case that the required annuity could be purchased from Government shows how familiar they are in practice. The idea has now long ceased that it is improper to recognise insurances on a life because of the element of wager. The risk insured against in the case of an annuity is the long or short life of the annuitant.

In this case we are asked the question whether under its circumstances it is in the power of the trustees in their discretion, and as a piece of proper trust administration, to purchase an annuity. It is just as if it had been asked whether they could

insure a life. The circumstances, irrespective of any legal difficulty, would have seemed to me plain. There are two trusts here—a marriage-contract trust and a testamentary trust. There is nothing to be done under either now except to pay this widow, who is forty-six years old, an annuity of one hundred pounds. Her husband in the marriage-contract obliged himself, his heirs, executors, and successors, to pay it, and the testamentary trustees are to pay it, but as a security to her for implement of the obligation he also bound himself to put into the hands of the marriage trustees such a sum as would be equal in amount to the value of an annuity to her. But he anticipated that the security should be realised, as in fact the marriage trustees did realise it. They now have in their hands £1100 as the result of doing so. The marriage-contract contains this clause, which is important, that the trustees are to have the power to discharge the security and to accept in lieu thereof such other security or securities as they may see fit, and may change the same from time to time. I suppose that the testamentary trustees will, if the marriage trust be continued, have to pay to the marriage trustees as much more money as will make up sufficient security for the annuity. The two alternatives presented are, keeping up both trusts during the lifetime of the widow, or buying an annuity for her and terminating both trusts. I should have thought, as a matter of good sense, that taking a bond of annuity from Government (or indeed from an insurance office of good standing) for an annuity of £100 in such terms as to be alimentary, not subject to the diligence of creditors or assignable by the widow, would be the right course, and the widow is willing to accept of that.

An annuity would be purchased no doubt at the expense of the residuary legatees, but they are all agreed that that course is the best, except one, who is absent from the country. Now, what is his interest in the matter? The five others will have to provide, that is, to pay down, their shares so as to make £83, 6s. 8d., and this sixth man would have to provide £16, 13s. 4d. I see no objection to the course of the trustees buying out of the shares of residue of those who agree a bond of annuity of £83, 6s. 8d., and keeping for this sixth residuary legatee as much of his share as would provide £16, 13s. 4d. Now, it would take about £900 at 2 per cent. to make that sum of £16, 13s. 4d., and it appears to me somewhat ridiculous that the testamentary trust should be kept up on that sum while the widow lives. Out of it too would come the expense of having a factor *loco absentis*. Now, it is said that as the law stands the trust must be kept up during the widow's life, and that at some expense, because of the absence of one beneficiary out of what might have been a very large number, and thus the winding up might be postponed for a very long time. Now, I think that if the trustees had taken the course of winding up the trust after buying the annuity in the terms I have mentioned, they might very well have done so without incurring the expense of this case, though I do not blame them for incurring the expense of this case. I think they would have been safe against this absent man if he came home. The circumstances of other cases may be different, but in this case I see nothing whatever to suggest a reason why the Court should disapprove of it.

LORD TRAYNER—The late Mr Graham by antenuptial contract between him and the third party to this case obliged himself, and his heirs, executors, and successors, to pay to his wife in the event of her surviving him a free alimentary annuity of £100, in security of which he conveyed part of his estate to certain persons there named, "as trustees for carrying out the provisions" in favour of Mrs Graham. It was also declared that on the death of Mrs Graham the marriage-contract trustees should be bound to denude themselves and reconvey to Mr Graham or his foresaids the security subjects or discharge the same of the security created over them. Mr Graham did not set aside part of his estate to provide an annuity; he merely bound himself and his successors to pay it, and gave security for this being done, the subjects over which the security was created falling back unburdened into Mr Graham's general estate when the obligation, fulfilment of which they were conveyed to secure, was no longer enforceable. Mr Graham died in November 1890 survived by his widow and five children, and three grandchildren, the issue of a predeceasing daughter. By his trust-deed and settlement Mr Graham conveyed his whole estate to trustees (the first parties to the case) for the purpose, *inter alia*, "of implementing the provision contained in the antenuptial contract" to which I have referred. He left some legacies and directed that the residue of his estate should be divided among his children, the shares falling to sons to be paid on their attaining majority and to daughters on majority or marriage, and the issue of predeceasing children to take their parent's share. These shares were declared to vest as at the time of payment.

The only thing that stands in the way of this trust being now wound up and the residue divided is the payment of Mrs Graham's annuity, and the first and second questions put to us relate to this. With regard to these questions my opinion is that the first parties would sufficently implement the obligation undertaken by Mr Graham by purchasing and delivering to the second parties a Government annuity of £100 in the terms proposed, and that the second parties would be in safety to accept of such an annuity as in implement of Mr Graham's obligation. With such an annuity Mrs Graham's right would be quite as amply secured as if the testamentary trustees were to deliver to the marriage-contract trustees such a part of Mr Graham's estate as would insure payment of the annuity. The bond or other title to the annuity should, however, be taken in the name of the second parties, so that

payment of the annuity would be to them in the first instance, and through them to Mrs Graham. I should not approve of the annuity being from an insurance company. It might turn out to be valueless, and such a contingency (however remote) the second parties are bound to provide against.

A Government annuity is proposed to be bought by a payment out of the residue which belongs to Mr Graham's children. All the parties interested in the residue consent to such payment except one, James Graham. He is absent in Australia or elsewhere, is now if alive about thirty years of age, and has not been heard of for about five years. There is no presumption that he is dead; on the contrary, the presumption is that he is still alive. If he were present it is probable, perhaps likely, that he would concur with the others in the proposed purchase of the annuity in order that with the others he might obtain a present payment of the share of the residue, instead of waitting therefor until Mrs Graham's death. He is, however, represented in this case by a factor *loco absentis*, who in the interests of his ward objects to the purchase of an annuity out of residue as leading to a diminution of his ward's share of residue to an extent of something over £300. I think the factor was bound to take this objection in his ward's interest, and standing that objection I think the first parties are not entitled to take the residue, or any part of it which belongs to James Graham, for the purpose of purchasing the annuity. It is said that the proposed purchase is proper administration of the trust, and within the power of the trustees. I think otherwise. It can scarcely be called proper administration to take the share of one beneficiary and give it to another. That is what is proposed, to confer a right on Mrs Graham for which in part James Graham shall have to pay. If the parties cannot arrange so as to preserve (in the meantime at least) the share of the residue falling to James Graham undiminished, if and when he is entitled to call for it, the first parties must continue to hold the trust estate, pay the widow's annuity out of it, and hold the residue so far as necessary to secure the annuity for the parties entitled to it. I think the questions should be answered accordingly.

Lord Moncreiff—I agree with the majority of your Lordships. The first question which we have to decide is whether the trustees who are directed to pay an annuity to the truster's widow would be protected by the purchase of an annuity. So far as the widow's interest is concerned it could be protected sufficiently by an annuity of £100 taken in name of the trustees.

The next question which we have to decide is practically whether the trustees who are directed to pay an annuity to the truster's widow, but are not given power to purchase an annuity, are entitled in their discretion, and as an ordinary piece of trust administration, to sink part of the capital in an annuity without the consent and against the wishes of a residuary legatee who is entitled to a part of the capital of the fund. I know of no authority to the effect of that being an understood power. Primarily an annuity is payable out of income, and capital can only be trenched on if income fails. If part of the capital is applied to the purchase of an annuity, it is no longer available for division on the annuitant's death. No doubt if the expectation of the annuitant's life is satisfied the residuary legatee might in the end be no worse off than if the annuity had been paid out of income. But on the other hand the annuitant may die immediately, or soon after the annuity is bought, in which case the capital is sacrificed.

On these grounds therefore I think—although I quite see the expediency if possible of bringing this testamentary trust to a close—that we must find that the trustees have no power against the wishes of the factor *loco absentis* to purchase an annuity. I have only to add that I should think there were means by which any such absent person might be secured—I mean by agreement between the parties—but that is really a question for the parties to arrange among themselves. The question of law that has been put to us we must answer.

The Court pronounced the following interlocutor:—

"Answer the first question therein stated by declaring that the first parties will sufficiently implement the obligation undertaken by the deceased Robert Graham, under his antenuptial contract of marriage, by purchasing a Government annuity: Answer the first alternative of the third question therein stated in the negative: Find and declare accordingly, and decern."

Counsel for the First and Fourth Parties—Younger. Agents—J. & J. Ross, W.S.

Counsel for the Second and Third Parties—Sym. Agents—J. & J. Ross, W.S.

Counsel for the Fifth Party—Cullen. Agents—Wallace & Guthrie, W.S.

Saturday, December 24.

FIRST DIVISION

[Lord Pearson, Ordinary.

BROWN *v.* PORT SETON HARBOUR COMMISSIONERS.

Arrestment — Validity of Arrestment — Special Appropriation—Statutory Direction to Apply Revenues in a Certain Order.

By the terms of their incorporating Provisional Order, harbour commissioners were empowered to levy certain rates, tolls, and duties, and the order enacted that "the commissioners shall apply all money received by them" therefrom "for the purposes and in the order following, and not otherwise