March 1908, the reason then being that they learned M'Gillivray was making away with some of his effects, the proceeds of which were apparently not to be paid to them. In the circumstances I am unable to see that there was any obligation upon Harmer & Company to communicate with Mr Gibb. What was done was not equivalent to a distribution of the estate in bankruptcy, and the pursuers had no security which they realised. If they had held a security for the debt guaranteed, then on realisation the guarantor would be entitled to the equities thence arising. There is, however, no such case here. The principles, therefore, laid down by Blackburn, J., in *Ellis* v. *Emmanuel* have no application. I am therefore of opinion that this ground of defence fails.

The amount of the debt now remaining due according to the pursuer's evidence is £299, 17s. 2d. The defender says that the pursuers have not proved what sum, if any, is due to them by M'Gillivray. Mr Christie's argument was that it had been proved that cheques for upwards of £400 had been received during the period covered by the account, and that the pursuers had failed to prove the debit entries which these cheques were applied to extinguish. This point appears to me to be purely technical, and to be sufficiently met by the evidence of Mr Olley, the pursuers' manager, and of Mr Fowler, one of their bookkeepers. If the defender's counsel had intended to make a substantial point of this it would have been necessary to have carried the matter much further by an examination of the pursuers' ledgers.

Another point argued by the defender was that the interest debited against M'Gillivray on amounts not paid within the usual period of credit should be struck out as in a question with the guarantor. The Lord Ordinary has disposed of this matter adversely to the defender, and to what is said in his opinion I have nothing to add.

The remaining matter relates to the policy of insurance on M'Gillivray's life which was held by the pursuers, who, however, had neglected to perfect the security. It was conceded by the pursuers' counsel that in accounting with the defender they must be treated as if the security had been completed. The result of this is that the surrender value, which was stated to amount to some £116, is held by the pursuers as security for their whole debt of £299, 17s. 2d. The defender is entitled to the proportionate value of the policy which £200 bears to the total amount of the debt.

An interlocutor will be pronounced with a finding giving effect to this view, after which decree will be pronounced for the amount brought out.

LORD PRESIDENT—I concur.

LORD KINNEAR—I also agree.

LORD JOHNSTON was absent.

The Court pronounced this interlocutor—

"Recal said interlocutor: Find that under the guarantee sued upon the defender is bound to pay to the pursuers for goods supplied by them in the way of trade to John M'Gillivray up to the value of £200, under deduction of the proportion of the value of the policy of insurance on the life of John M'Gillivray held by the pursuers which £200 bears to the total amount of the debt due by the said John M'Gillivray to the pursuers: Remit to the Lord Ordinary to proceed as accords: Find the pursuers entitled to expenses in the Outer House, and to expenses modified to one half in the Inner House, and remit," &c.

Counsel for Pursuers (Reclaimers) — Munro, K.C. — Dallas. Agents — Auld & Macdonald, W.S.

Counsel for Defender (Respondent) — Constable, K.C. — J. R. Christie—J. B. Young. Agent—Charles Munro, S.S.C.

Saturday, July 22.

FIRST DIVISION.

[Sheriff Court at Glasgow.

WILKIE *v.* KING.

Trade Union—Trade Union Act 1871 (34 *and* 35 *Vict. cap.* 31), *sec.* 4—*Action for Refund of Accident Bonus Benefit Paid to Member—Competency.*

The rules of a trade union provided that any member permanently disabled by accident should receive an accident bonus benefit, which he should be obliged to refund in the event of his resuming work at his trade. It was further provided that at the time of receiving the benefit he should sign an agreement binding himself to refund.

Held (*diss.* Lord Johnston) that an action by a trade union to recover from a workman accident bonus benefit was competent and did not come within sec. 4 of the Trade Union Act of 1871.

Baker v. *Ingall*, [1911] 2 K.B. 132, *approved.*

The Trades Union Act 1871 (34 and 35 Vict. cap. 17) enacts—Section 3—"The purposes of any trade union shall not by reason merely that they are in restraint of trade be unlawful so as to render void or voidable any agreement or trust." Section 4—"Nothing in this Act shall enable any Court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely—1. Any agreement between members of a trade union as such concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business, employ, or be employed. 2. Any agreement for the payment by any person of any subscription or penalty to a trade union. 3. Any agreement for the application of the funds

of a trade union—(*a*) To provide benefits to members; or (*b*) to furnish contributions to any employer or workman not a member of such trade union in consideration of such employer or workman acting in conformity with the rules or resolutions of such trade union; or (*c*) to discharge any fine imposed upon any person by sentence of a court of justice. Or 4. Any agreement made between one trade union and another. Or (5) Any bond to secure the performance of any of the above-mentioned agreements. But nothing in this section shall be deemed to constitute any of the above-mentioned agreements unlawful."

Alexander Wilkie, Newcastle-on-Tyne, as General Secretary of and as representing the Trade Union entituled, prior to 1st January 1908, "The Associated Shipwrights' Society," and since said date "The Shipconstructive and Shipwrights' Association," having its registered offices at Newcastle-on-Tyne, *pursuer*, brought an action in the Sheriff Court at Glasgow against Alexander King, shipwright, Saltcoats, *defender*, in which he claimed repayment of the sum of £100 paid by the pursuer to the defender on 6th September 1905, the repayment being claimed in virtue of a memorandum of agreement between the parties of the above-mentioned date.

The memorandum of agreement was, *inter alia*, in the following terms:—"Whereas by the 45th rule of the Associated Shipwrights' Society (hereinafter called the 'Society') it is provided amongst other things that any free member (meaning thereby a member of the Society) in benefit and in full compliance with rule at the time of receiving injury by accident which permanently disables him from following his employment . . . shall receive the sum of one hundred pounds. Members resuming work at the trade . . . shall be required to refund the amount received, and, if necessary, proceedings shall be taken to recover the same. Members at the time of receiving this benefit must sign an agreement that if they at any time resume work at the trade they will return the money thus received under such circumstances. . . . And whereas the sum of £100 has been paid to Alexander King by the Society in pursuance of the 45th rule of the said Society, on condition of his executing the agreement hereinafter contained. . . . Now these presents witness that in further pursuance of the said rule, and in consideration of the premises, the said Alexander King . . . hereby agrees with the said Alexander Wilkie, being the Society's respresentative. . . . That in the case the said Alexander King shall at any time hereafter resume work as a shipwright the said Alexander King . . . shall forthwith repay to the Society the said sum of £100 so paid to him as aforesaid. . . ."

The 45th rule of the Society above referred to was in the following terms:—"1. Any member of this Association in benefit and in full compliance with rule at the time of receiving injury by accident which permanently disables him from following his employment . . . shall receive the accident bonus benefit on a basis as hereinafter given to be raised by levy throughout the whole Association. . . . Members resuming work at the trade as foremen or workmen shall be required to refund the amount received, and if necessary proceedings shall be taken to recover the same. Members at the time of receiving this benefit must sign an agreement that if they at any time resume work at the trade they will return the money thus received."

The defender pleaded, *inter alia*—"(1) The action is irrelevant and incompetent. (2) No title to sue. (3) The agreement founded on being *ultra vires* of the pursuer, the defender should be assoilzied, with expenses."

On 9th August 1910 the Sheriff-Substitute (A. O. M. MACKENZIE) sustained the first plea-in-law for the defender and dismissed the action.

The pursuer appealed, and argued—Rule 45 showed (1) an agreement between the Union and the defender for the receipt of a benefit, and (2) a stipulation that if he resumed work as a shipwright he should be bound to repay £100. (1) Could not be enforced in law; (2) could, because it was not founded on the rules of the Society but on a special contract. Section 4 of the Trades Union Act 1871 (34 and 35 Vict. c. 31) had been framed for the purpose of eliminating from the statute those agreements which, though not *per se* illegal, the Legislature considered should not be enforced in courts of law, and the effect of decisions on the section was that this category was to be strictly construed. In construing the section great force had been laid on the word "directly"—*Wolfe* v. *Mathews*, 21 Ch. D. 194; *Rigby* v. *Connol*, 14 Ch. D. 482; *Cope* v. *Crossingham*, [1909] 2 Ch. 148; *Yorkshire Miners' Association* v. *Howden*, [1905] A.C. 256, *per* Lord Halsbury, p. 261, and in the Court of Appeal, [1903] 1 K.B. 308. The present action clearly did not fall under 4 (1). Neither was it an action for a subscription or a penalty in the sense of 4 (2). A subscription was a personal payment and a penalty was a fine. To bring it within 4 (3) (*a*) the respondents must make it an action for the purpose of directly enforcing the application of funds to provide a benefit to the member, and the present case did not fall within those terms. 4 (3) (*b*) and (*c*) and 4 (4) were clearly excluded, and in order to be under 4 (5) the case must fall under one of the preceding sections. What the Union founded on in the present case was not the rules but the condition in the agreement, which was a completely separate matter—*Wilson* v. *Connolly*, 1910, 27 T.L.R. 7 and 212; *Hyams* v. *Stuart King*, [1908] 2 K.B. 696. If the construction and effect of the rules was not the basis of the action, then the aid of the Courts might be invoked. The Union had not paid the £100 by any process of law, but on condition that the defender executed

a new agreement. They were therefore entitled to recover the money—*Baker* v. *Ingall*, [1911] 2 K.B. 132.

Argued for the respondents—The present action was covered by section 4 (3) and 4 (5) of the Act. The present was a written agreement and could not be considered apart from the rules. The Union were seeking to enforce an agreement under the rules, and not merely this written agreement—*M'Kernan* v. *United Operative Masons' Association*, February 6, 1874, 1 R. 453, 11 S.L.R. 219; *Shanks* v. *United Operative Masons' Association*, March 11, 1874, 1 R. 823, 11 S.L.R. 356; *Amalgamated Society of Railway Servants for Scotland* v. *Motherwell Branch of the Society*, June 4, 1880, 7 R. 867, 17 S.L.R. 607; *Aitken* v. *Associated Carpenters and Joiners of Scotland*, July 4, 1885, 12 R. 1206, *per* L. P., 1211, 22 S.L.R. 796; *Wolfe* v. *Mathews*, 1882, 21 Ch. D. 194. The effect of the Act was not limited to cases where the man was suing for a personal benefit—*Cope* v. *Crossingham*, [1909] 2 Ch. 148; *Yorkshire Miners' Association* v. *Howden*, [1905] A.C. 256. The latter case was the furthest that the Courts had gone in enforcing the rules of a trade union. *Baker* v. *Ingall* (*cit. sup.*) was against the dicta in *Cope* v. *Crossingham* (*cit. sup.*), and further, was distinguishable from the present case in that, apart from the separate obligation, there was no condition in the rules of the Union as there was here—*Strick* v. *Swansea Tinplate Company*, 1887, 36 Ch. D. 558. The present was also an agreement for payment of a subscription or penalty. "Directly enforcing" was implied when one party to the agreement sued the other for its performance.

At advising—

LORD PRESIDENT—In this case a trade union society sue a person of the name of King for the return of a sum of £100 which he had received, and which the pursuer avers is returnable in terms of the agreement which they made with him and which is printed before us. That agreement provides that the sum of £100 has been paid to him by the Society in right of a bonus which he may claim under the rules, but "that in the case the said Alexander King shall at any time hereafter resume work as a shipwright, the said Alexander King, his executors or administrators, shall forthwith repay to the Society the said sum of £100." They allege that King has resumed work as a shipwright, and sue for the £100.

Now King denies that he has in the sense of the agreement resumed work as a shipwright. But he also takes the plea of the action being incompetent, and the learned Sheriff-Substitute has sustained that plea. He has sustained the plea upon the ground that the action is struck at by the 4th section of the Trades Union Act of 1871.

I am unable to agree with that contention. I need hardly remind your Lordships that trades unions were judged by the decisions of the Court to be illegal associations in restraint of trade, and as such illegal associations were denied the assistance of the Courts in recovering under any contracts made by them. I need not go through the earlier history of the matter, but pass at once to the Act of 1871.

Now that Act by section 3 provided—"The purpose of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust." The effect of that section, I think, is not doubtful if it had stood alone. Then the trade union could have sued precisely like any other voluntary society. I am not of course speaking at the moment of technical matters of instance, but I mean that any voluntary society—be it society or partnership or whatever you call it—can sue upon the contracts which it makes. Trade unions could not, because they were illegal associations until the passing of the Act of 1871, but under this section they would have been entitled to sue precisely as anyone else sued if the matter had stopped there. But then comes the 4th section of the Act, which says—"Nothing in this Act shall enable any Court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely," and then come five heads, and at the end the section enacts—"But nothing in this section shall be deemed to constitute any of the above-mentioned agreements unlawful."

Now I think the effect of that is this, that while the 3rd section has entirely given a charter of freedom, so to speak, to the trade unions, they are hampered by certain actions being prohibited, but that it is for those who say that any particular action is prohibited to show that that action falls within one of the special heads of section 4. I think these have to be construed—I will not say critically—but according to the words there expressed.

I am of opinion that this action, which is an action upon an agreement, does not fall within any of the heads. The first is, "any agreement between members of a trade union as such concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business, employ or be employed." Obviously it is not within that. The second is, "any agreement for the payment by any person of any subscription or penalty to a trade union." Well, it is not that; it is not a subscription, and it is not a penalty. Then the third is—or to take the fourth first; the fourth is, "any agreement made between one trade union and another." It is not that. The fifth is, "any bond to secure performance of any of the above-mentioned agreements," which does not apply to this action any more than any of the other heads I have read.

Therefore the only one left is the third, and that is the one within which the Sheriff-Substitute thinks this action falls. The third head is, "any agreement for the application of the funds of a trade union (*a*) to provide benefits to members; or (*b*)

to furnish contributions to any employer or workman not a member of such trade union, in consideration of such employer or workman acting in conformity with the rules and resolutions of such trade union; or (*c*) to discharge any fine imposed upon any person by sentence of a Court of Justice." The present action is covered by neither head (*b*) nor head (*c*), and we are therefore limited to this first head (*a*), which relates to providing benefits to members.

Now I cannot myself come to the conclusion that by any ordinary method of construction we can hold that this is an action under an agreement to provide benefits for members. It is nothing of the sort. It is merely the recovery of a debt which, upon the terms of the agreement made, this man owes—assuming of course for the moment that the facts are against him. The ground upon which the learned Sheriff-Substitute has held otherwise—and in which I understand one of your Lordships concurs—is that it is really the counterpart of a rule of the Society. It is of course only under a rule of the Society that the workman is entitled to a payment at all; and the rule of the society provides *in gremio* that if he gets the payment he shall come under an obligation to return the money under certain circumstances. It is of course quite true that if the Society had refused to pay the £100, it is obvious that King could not have sued for it, because that would have been suing under an agreement for the application of the funds of a trade union to provide a benefit to members. But while that is so, it does not seem to me that it at all follows that if the Society chose to pay without compulsion, as it did, it was not within the power of the Society to pay money under a condition, and, if that condition is not fulfilled, to recover the money.

If this were not a trade union, there is no question that if money is paid to a man, and he at the same time binds himself to return it in a certain event, if that event happens he may be sued for the return of the money. Well, why should a trade union not have that remedy when it can sue an ordinary debtor; it can sue a tradesman or anything of that sort. All I think one needs to look at is not the action which is raised but the agreement which is being enforced. Does it fall within the expression of any one of those sub-sections of section 4? I think it clearly does not, and accordingly I am of opinion that the action lies.

I am fortified in my opinion by finding that precisely the same point has been decided in the case of *Baker* v. *Ingall*, [1911] 2 K.B. 132. That case of course is not at all binding upon this Court; it is a decision of a Divisional Court. But at anyrate it shows that the opinions of Mr Justice Phillimore and Mr Justice Bankes are the same as my own.

The result is that the appeal must be allowed, and that the case must go back to the Sheriff-Substitute, because of course we cannot tell here whether in fact the condition has been purified—that is to say, whether the man has resumed work in the sense of the agreement or not.

LORD KINNEAR—I am of the same opinion. I do not think it was seriously disputed, and at all events for the purposes of this decision I assume that the pursuer's trade union is legalised by the Act of 1871, and therefore that he must base his right and title to sue for this sum of money on the provisions of that statute. Now under the statute the agreement upon which the society originally paid the money was perfectly lawful, but the statute at the same time provided that an "agreement for the application of the funds of the trade union to provide benefits to members" should not be directly enforced by legal proceedings, nor found an action for damages before a Court in the case of its being broken.

I agree with your Lordship that that disabling provision must be construed exactly, and that we cannot extend the prohibition to entertain action to any case which is not clearly expressed in the terms of the enactment itself. The question therefore is whether this is an action for enforcing an agreement for the application of the funds of this trade union for the benefit of the defender. I am of opinion that it is not. I do not at all doubt that rule 45, in respect of which the defender obtained the sum of £100 paid to him by this trade union, does form a contract between the union and its members for the application of union funds to the benefit of members, and therefore any direct action upon that agreement would be struck at by the enactment in question. I should agree with the learned Sheriff-Substitute that if the defender cannot have an action to enforce payment, the same enactment strikes at an action upon the agreement by which the trade union should endeavour to enforce the counter obligations in its own favour, because a contract is mutual, and if an Act of Parliament says that it is not to be enforced by action the disability must attach to both parties. Neither is to have right to enforce the contract against the other. But then I think the conclusive answer is that this is not an action upon the agreement constituted by rule 45 of the trade union regulations at all. It is, according to the terms of the demand, an action for repayment of £100 "under and by virtue of a memorandum of agreement between the parties subscribed on the 6th September 1905." Now that is not an agreement for the application of the union's funds. It is an agreement by which, in consideration of the trade union having paid over £100 to the defender on a certain hypothesis—to wit, that he was totally disabled—he undertook to repay that should it turn out that he was not totally disabled.

The original agreement constituted by the rules of the Society is not in question. That agreement was performed. The union paid the money. The defender granted the receipt and undertook this agreement. The original agreement is exhausted, and upon its being completed a new and entirely

separate agreement is made between the parties, by which the defender binds himself to repay upon certain conditions.

It was suggested that this new agreement of necessity related back to the original contract, which was struck at by the Act, and that accordingly it was in some way vitiated as being a consequence of an agreement which was not enforcible at law. I am unable to follow that reasoning. The original agreement was perfectly lawful. That is provided by the express terms of the statute. Only it was to be in this very anomalous condition, that being lawful it yet could not be enforced at law. The second agreement was a lawful agreement following upon an execution of a previous lawful agreement, and if it is not struck at by the terms of the prohibitory clause there is no ground in law why it should not receive effect.

If I were doubtful as to the construction of the statute I should be disposed to defer to the decision of the King's Bench Division to which your Lordship referred. The case is not binding upon us, but it is a decision which is entitled to great respect, and I should for my own part hesitate before differing from a judgment of the Court in England in the interpretation of this statute. The statute means the same thing in both countries, and that there should be a divergence in the decisions of the two countries would be unfortunate. I agree that, however unfortunate, we should be bound to form and act upon our own opinion; but I think it is a very strong confirmation of the judgment your Lordship proposes that it is also the judgment of the English Court.

LORD JOHNSTON—The defender here has received a benefit of £100 from his Society on the assumption of permanent disablement, and he has signed an agreement to return it in the event of the disablement in the sequel proving not to be permanent. He declines on demand to refund, and an action has been raised by his Society to enforce the demand. We are not at present concerned with the question whether the event has occurred, for the defender pleads *in limine* that the Society cannot recover in a court of law.

There is no question that the Society is a trade union. I refer to the opinion of Lord Justice-Clerk Moncreiff in *M'Kernan's* case (1 R. 453) for the genesis and effect of the Trade Union Act of 1871, and adopt his conclusion "that it was the intention of the Legislature to arrive at this, that the taint of illegality in respect of the restraint of trade was to be entirely and absolutely removed, but that the question of enforcement in courts of law was to be matter of positive statutory enactment."

Accordingly the statute (section 3) provides that "the purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust." The agreement in question is therefore a valid agreement. But the statute goes on to provide (section 4)—"Nothing in this Act shall enable any court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, viz.— . . . . (3) any agreement for the application of the funds of a trade union (*a*) to provide benefits to members."

The question is, whether this action is a proceeding instituted with the object either of directly enforcing or of recovering damages for the breach of an agreement for the application of funds to provide benefits. The agreement here for the application of funds to provide benefits is constituted by the rules of the Society and the *rei interventus* following thereon. But so, it is as much an agreement for such application as if it had been reduced to writing between the Society and the individual member. Now an agreement of the description with which we have to deal has two sides to it. It is not a mere undertaking to pay a benefit, in which case it is enforced directly by the obligee suing for implement. It is a composite agreement, in that it contains an obligation to pay with a conditional obligation to refund, and an action by the obligor to enforce the condition is as much an action directed to enforce the agreement as is an action by the obligee to enforce the obligation. I am unable to say that the money having been paid, though under condition, the agreement was fulfilled, and that when it came to enforcing the condition a new departure was found to have been made by the reduction to writing of that part of the agreement which consisted of the undertaking to refund, which made it a new and separate agreement, and which therefore removed the conditional obligation, undertaken as part of the agreement for the application of the funds of the trade union, from the category of agreements for the application of such funds.

I think that this is made the more clear when one considers that the present action is really one for breach of the agreement regarded as a whole, the measure of damages being the amount which should have been refunded in terms of the condition, and that such action of damages is as much expressly covered by the disabling clause as an action for directly enforcing the agreement for payment.

I regret this result, as everyone must in the concrete example, because it may enable to a dishonest act on the part of a member of the Society, but this is only correlative to the substantive result, which may enable to a dishonest act on the part of the Society. But if the policy of the statute, for general and important reasons, permits of the latter, I see no reason why it should not equally permit of the former.

I am aware that the conclusion which I have reached is neither in accordance with the opinion of your Lordships nor with the decision of the Court of King's Bench in the directly parallel case of *Baker* v. *Ingall* (L.R. [1911] 2 K.B. 132), both of which I must regard with the greatest respect. I have therefore given that

opinion and the decision of the Court of King's Bench the most careful consideration.

But I regret that I feel myself compelled to dissent from the result arrived at by your Lordships and by Phillimore and Bankes, JJ., as I am unable so to divide the original agreement as your Lordships and those learned Judges do. I think, therefore, that the Sheriff has come to a right conclusion, and that the appeal should be dismissed.

LORD MACKENZIE—I agree with your Lordship in the chair and with Lord Kinnear, and I agree with the reasoning of the learned Judges who decided the case of *Baker* v. *Ingall.*

The Court sustained the appeal, recalled the interlocutor of the Sheriff-Substitute, repelled the first plea-in-law of the defender, and remitted the cause to the Sheriff-Substitute.

Counsel for Pursuers and Appellants—D.-F. Dickson, K.C.—T. B. Morison, K.C.—Paton. Agents — Gordon, Falconer, & Fairweather, W.S.

Counsel for Defender and Respondent—Crabb Watt, K.C.—Fenton. Agents—Simpson & Marwick, W.S.

Thursday, June 24, 1909.

FIRST DIVISION.

CRUM-EWING AND OTHERS (LORD AND LADY INVERCLYDE'S M.-C. TRUSTEES) *v.* LORD INVERCLYDE AND OTHERS.

Succession—Faculties and Powers—Power of Appointment—Invalid Exercise of Power—Restriction of Fiar's Interest to Liferent—Election—Approbate and Reprobate.

By his antenuptial marriage contract A assigned £18,000 to trustees for behoof of the children of the marriage in fee, in such shares and subject to such conditions and restrictions as he should appoint, with power to him to restrict the share of any of the children to a liferent and to settle the fee on their offspring.

By his trust-disposition and settlement A directed his testamentary trustees to hold the residue of his estate for behoof of his children in liferent and of their children *per stirpes* in fee, "in such proportions . . . and subject to such restrictions, limitations, and conditions" as the children might appoint. He further provided that the £18,000 was to be treated as falling under this purpose, and that the provisions of the settlement were to be in full of his children's right to legitim, and also in full of the provisions conceived in their favour in the marriage-contract.

One of A's children, B, having died without issue, a question arose as to his (B's) interest in his father's estate, and as to the validity of A's exercise of the power of appointment.

Held (1) that A had not validly exercised the power, in respect that while the marriage-contract allowed him to reduce a child's interest to a liferent for the purpose of giving the fee to his issue, he had in his settlement gone beyond that and empowered the child to restrict to a liferent the interest of his (the child's) issue and to confer a fee on the grandchildren; but (2) that B could not set aside the provisions of the settlement *quoad* the marriage-contract funds and at the same time avail himself of its provisions *quoad* the residue of the estate, but was bound to elect between them.

Alexander Crum-Ewing and others (the first Lord Inverclyde's marriage-contract trustees), *first parties;* the second Lord Inverclyde and others (the first Lord Inverclyde's testamentary trustees), *second parties;* the third Lord Inverclyde (the second son of the first Lord Inverclyde), his children, and his three sisters, *third parties;* Mary Baroness Inverclyde (widow of the second Lord Inverclyde) and others, *fourth parties;* Mary Baroness Inverclyde and the Merchants' House, Glasgow (the charity favoured under the will of the second Lord Inverclyde), *fifth parties;* and Mary Baroness Inverclyde, *sixth party,* presented a Special Case, in which they, *inter alia,* craved the Court to determine the interest of the second Lord Inverclyde and his representatives in his father's (the first Lord Inverclyde's) marriage-contract funds.

The following *narrative* is taken from the opinion (*infra*) of the Lord President—"The questions in this Special Case arise in respect of the marriage-contract and testamentary settlement of the first Lord Inverclyde, and upon a deed of directions executed by him and his deceased wife. The first Lord Inverclyde—at that time Mr John Burns—entered into an antenuptial marriage contract with Miss Emily Arbuthnot, afterwards Lady Inverclyde. By that marriage contract he bound himself to provide two sums of £13,000 and £5000 respectively, to be held by the trustees therein nominated 'in trust for the child or children to be born of the present marriage, who, if sons, shall attain the age of twenty-one years, and who, if daughters, shall attain that age or shall marry in minority with consent of their parents or surviving parent, if both or either of them shall be then living, or of a quorum of the said trustees if both parents shall then be dead, and that in such shares and proportions between or among the said children, if there shall be more than one, and subject to such conditions and restrictions as the said John Burns may appoint by any testamentary or other writing under his hand; it being hereby declared that he shall have power, if he see it proper or necessary, to restrict the share of any