entitled under the statute. Here there is no prejudice suffered either by the defenders or by the pursuer's employers. In my view, therefore, the word "recover" falls to be construed as implying unconditional payment, and does not apply to a case where the money is paid conditionally and falls to be repaid to the employer out of the damages that may be eventually awarded against the wrongdoer.

As parties desired to have the opinion of the Court on this question of law the evidence has not been printed, and we are therefore not in a position to dispose of the case as a whole. It will be open for the defenders to maintain that the findings in fact on which the Sheriffs have affirmed their liability are erroneous; and it will also be necessary that the damages should either be assessed by us or agreed on by the parties. All that we are in a position to do is to recal the findings of the Sheriff-Substitute that the pursuer is barred from recovering damages from the defenders, and that part of his interlocutor in which he sustains their eighth plea-in-law. In place thereof we must repel this plea-in-law and continue the cause. Parties can then enrol the case for further procedure.

LORD GUTHRIE—I am of the same opinion. I think the effect of the defenders' contention would really be to render nugatory the alteration which section 6 of the Act of 1906 made upon the corresponding section of the previous Act. For while Mr Fraser admitted that the workman might take a double set of proceedings, he maintained that he could not go on with both. If that were so, the result would be to throw the workman at a later stage into the same position as, under the old Act, he was at the beginning. He would be bound to elect his remedy before the whole question of liability was decided, which is just what section 6 of the 1906 Act was intended to prevent. If judgment in both sets of proceedings were given on the same day, he would naturally have to make his election then, but if liability is admitted by the employer and compensation received from him, the question is whether he is thereby barred from recovering damages from a third party. I think not. It is unnecessary to decide whether or not an express reservation of his rights is required. If it is, there is such a reservation in the present case.

LORD DUNDAS was sitting in the Extra Division.

The Court pronounced this interlocutor—

"Recal the said interlocutors in so far as they find that the pursuer is barred from pursuing this action, and in so far as they sustain the 8th plea-in-law for the defenders: Repel the said 8th plea-in-law and continue the cause."

Counsel for Pursuer (Appellant) — D. Anderson — Aitchison. Agents — Dove, Lockhart, & Smart, S.S.C.

Counsel for Defenders (Respondents)—Cooper, K.C.—M. P. Fraser. Agents—Clark & Macdonald, S.S.C.

Tuesday, December 19.

SECOND DIVISION.

(SINGLE BILLS.)

M'GREGOR'S TRUSTEES *v.* KIMBELL.

(Reported *ante* July 14, 1911, 48 S.L.R. 950, and 1911 S.C. 1196.)

Expenses—Process—Trustees—Special Case—Interlocutor Finding Parties Entitled to Expenses out of Fund—Expenses as between Agent and Client.

A special case was brought by testamentary trustees to determine questions regarding the disposal of accumulated funds in their hands which had fallen into intestacy, and an interlocutor was pronounced in terms of an agreement by the parties including the trustees, finding "the whole parties" entitled to their "expenses as the same may be taxed by the Auditor" out of the accumulated funds.

Held that the account of expenses incurred by the trustees must, in terms of the interlocutor, be taxed as between party and party and not as between agent and client.

A Special Case was presented to the Court by David Edward and another, trustees of the late James M'Gregor, *first parties*, Mrs Alice Jeffs or M'Gregor, now Kimbell, widow of the said James M'Gregor, and now wife of William Alfred Kimbell, *second party*, and others, to determine, *inter alia*, whether the second party was entitled to *jus relictæ* out of certain accumulated funds in the hands of the trustees, which had fallen into intestacy.

The Special Case stated, *inter alia*—"It has been agreed that the taxed expenses of the several parties to this case shall be paid out of the surplus accumulated funds referred to, so far as still in the hands of the first parties, subject to the sanction of the Court."

On July 14, 1911, the Court pronounced an interlocutor finding the second party entitled *jure relictæ* to one-half of the said accumulated funds (see *report ut supra*), and finding the whole parties "entitled to their expenses as the same may be taxed by the Auditor—to whom remit—out of the surplus accumulated funds in the hands of the first parties."

The second party thereafter lodged a note of objections to the Auditor's report on the first parties' account of expenses, in which she objected that the Auditor had taxed the account as between agent and client instead of as between party and party in terms of the interlocutor of 14th July 1911.

In the Single Bills the second party moved the Court to remit the account back to the Auditor to tax as between party and party, and argued—The agreement and the interlocutor used the word "expenses" without qualification. That meant expenses as between party and party—*Fletcher's Trustees* v. *Fletcher*, July

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

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

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

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

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

LORD DUNDAS was sitting in the First Division.

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

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

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

Thursday, December 21.

SECOND DIVISION.

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

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

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

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

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

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

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