fault upon the part of the defenders, or of those for whom they are responsible. That would have been the issue put to a jury, either to affirm or to negative it. I think that we should negative it, and assoilzie the defenders.

LORD CRAIGHILL and LORD RUTHERFURD CLARK concurred.

The Court pronounced this interlocutor—

"Find that the collision between the steamship "Horatio," belonging to the pursuers, and the hopper barge No. 4, belonging to the defenders, was not caused by fault of the defenders, or those for whom they are responsible: Therefore dismiss the appeal, and affirm the judgment of the Sheriff-Substitute appealed against: Find the defenders entitled to expenses in this Court," &c.

Counsel for the Appellant—D.-F. Mackintosh—C. S. Dickson. Agent—R. Bruce Cowan, W.S.

Counsel for the Respondents—Ure. Agents—Webster, Will, & Ritchie, S.S.C.

Thursday, March 8.

SECOND DIVISION.

CRUM EWING'S TRUSTEES *v.* BAYLY AND OTHERS.

Provisions to Children—Election—Marriage Contract Provision—Share of Residue.

A father, in the antenuptial marriage-contract of his daughter, to which he was a party, directed the trustees in whose name a policy of insurance on his life had been effected, to assign the policy to a partial extent to the marriage-contract trustees. He also became bound to pay regularly the premiums of insurance, and failing his doing so he and his executors were taken bound to pay to the marriage-contract trustees, at the first term after his death, a sum equivalent to the amount of the policy to be assigned. The policy was not assigned. Subsequently the father made a settlement under which the daughter was entitled to a share of residue of greater value than the sum to which her marriage-contract trustees were entitled under the policy. The settlement declared that the provisions therein made in favour of the testator's children should be in full satisfaction of all their legal rights, and also that the provision in favour of the daughter should be in full of all provisions in the marriage-contract in favour of her, her husband, or their issue, "and particularly in lieu and in place of all obligations in their or any of their favours so far as still unimplemented undertaken by me by the said antenuptial contract, all of which provisions shall, by acceptance of the provisions hereunder, be held to have been discharged." *Held* that an election must be made between the provision in the marriage-contract and that in the settlement.

Mr Humphry Ewing Crum Ewing of Strathleven died on 3rd July 1887 leaving three children, viz., Alexander Crum Ewing, his eldest son and heir-at-law; John Dick Crum Ewing, his second son; and Mrs Jane Coventry Crum Ewing or Bayly, wife of General John Bayly.

In 1847 Mr Crum Ewing had insured his life for £3000, and the policy was taken in the name of trustees. The trust on which the sums recovered under the policy were to be applied were not specified.

By a deed of declaration of trust dated in 1850, the trustees holding the policy of insurance declared that they held "the said sum of £3000 sterling, or such sum as might be due under the said policy at the death of the said Humphry Ewing Crum, in trust for the use and behoof of the said Alexander Crum, the said John Dick, Crum, and of Humphry Ewing Crum junior, all sons of the said Humphry Ewing Crum," and that in the respective proportions and subject to the declaration set forth in the said deed of declaration of trust. By a subsequent deed of declaration of trust, dated in 1877, the surviving acting trustees, in exercise of a power reserved to the trustees of the policy by the deed of declaration of trust above mentioned to dispose of and apply the funds receivable under the policy in such other way and for such other purposes as they should deem proper, declared that they held the policy and sum thereby assured, and all the benefits accruing thereon "for behoof of the said Humphry Ewing Crum Ewing, to de disposed of and applied as he may think proper and direct by assignation, deed of settlement, or otherwise."

By the antenuptial contract of marriage between General and Mrs Bayly, dated 4th July 1854, Mr Crum Ewing, on the narrative that he was desirous of securing upon his daughter in liferent, and upon her children in fee, certain sums, and on the narrative that he had effected the above-mentioned insurance upon his life, directed and authorised the trustees of the policy of insurance to "assign and transfer the said policy of insurance, to the extent of the sum of £2000 sterling thereof, and of the corresponding emoluments and profits which may have accrued or may accrue thereon, to the trustees hereby nominated and appointed under this contract, or their foresaids, to be held, said policy, to the extent of said sum of £2000, and corresponding emoluments and profits thereof, by the said trustees in trust for behoof of the said Miss Jane Coventry Ewing Crum, in liferent for her liferent use only, exclusive of the *jus mariti*, and the debts and deeds of the said John Bayly as aforesaid, and for behoof of the children of the marriage in fee . . . And in the meantime the said Humphrey Ewing Crum Ewing binds and obliges himself to keep the said policy of insurance in force, and to pay the annual premiums due thereon during his life, and that regularly as they become due, and failing his doing so, then he binds and obliges himself and his foresaids to make payment to the said trustees, for the purposes foresaid, of the said sum of £2000 at the first term of Whitsunday or Martinmas succeeding his death, with the lawful interest thereof from the said term until the same is paid." It was declared by the deed that this provision was accepted by the spouses in full of all legal rights the wife had in her father's estate. By the mar-

riage-contract the wife assigned to the trustees all the estate, heritable and moveable, then belonging or which should belong to her during the subsistence of the marriage, for the purposes therein specified. The trustees holding the policy of assurance never assigned or transferred to any extent the policy to the trustees under the contract of marriage, nor was the direction to assign the policy by Mr Crum Ewing contained in the contract of marriage ever formally intimated to the trustees holding the policy.

Mr Crum Ewing left a trust-disposition and settlement dated 8th April 1887, by which he directed that the residue of his estate, which amounted to over £100,000, should be divided into three parts—one-third share to go to Alexander Crum Ewing, one-third share to the widow and children of the deceased Humphry Ewing Crum Ewing junior, and one-third share to be held for behoof of Mrs Bayly in liferent, and her children in fee, and provided for the payment of the income to Mrs Bayly as an alimentary provision, and for the payment of an annuity to her husband if he survived her.

The settlement then provided—"And further, I do hereby specially provide and declare, without prejudice to any of the provisions before or after inserted, that the provisions hereinbefore conceived in favour of my children and their issue shall be in lieu and place of and in full satisfaction to them respectively of all legitim, bairns' part of gear, portion natural, executry and every other right or claim, legal or conventional, competent to them or any of them by and through my decease or otherwise against my estate in any manner of way. . . . And it is also specially provided and declared that the provision hereinbefore conceived in favour of the said Mrs Jane Coventry Crum or Bayly and her children shall be in full to her and them, and to the said John Bayly and their issue, of all provisions conceived by me in their or any of their favours by the antenuptial contract entered into between the said John Bayly and my said daughter, dated fourth July Eighteen hundred and fifty-four, and particularly in lieu and in place of all obligations in their or any of their favours so far as still unimplemented undertaken by me by the said antenuptial contract, all of which provisions shall, by acceptance of the provisions hereunder, be held to have been discharged."

On 21st October 1887 the trustees of the policy of insurance received payment of the amount due under it. The proportion to which General and Mrs Bayly were entitled under their antenuptial marriage contract, with profits, amounted to £3723, 17s. 3d. A question having arisen as to whether General and Mrs Bayly were entitled to receive this sum in addition to any payments made to them out of residue, this special case was presented to have that question determined.

The trustees of the policy of insurance were the *first parties*, General and Mrs Bayly's marriage-contract trustees were the *second parties*, General and Mrs Bayly, and their children were the *third parties*, and Mr Crum Ewing's testamentary trustees were the *fourth parties*.

The questions of law for the opinion of the Court were these—"Whether the second parties, the marriage-contract trustees of General and Mrs Bayly, are entitled to claim, for behoof of General and Mrs Bayly and their children, the sum of £3723, 17s. 3d., being the proportion of the proceeds of the said policy of insurance provided to Mrs Bayly and her children by her contract of marriage; and the third parties, General and Mrs Bayly and their children, also to claim one-third of the residue of Mr Humphry Ewing Crum Ewing's estate, provided in their favour by his trust-disposition and settlement? Or, Whether an election must be made between the two claims?"

Authorities—*Somervell* v. *Somervell*, 28th June 1884, 11 R. 1004; *Nimmo* v. *Common Agent in Ranking and Sale of Auchinblane*, 29th June 1841, 3 D. 1109.

At advising—

Lord Justice-Clerk—I have doubts whether this case can be called a case of election at all, although perhaps the name is of no great importance. The main fact is that the testator Mr Crum Ewing intended that his succession, which amounted to a very considerable sum, should be divided into three equal parts, and given to two of his surviving children, and the children of a deceased son. The question is whether there is a separate and specific obligation upon the testator to pay a sum of £2000 to the marriage-contract trustees, and whether that can be enjoyed along with a share of the residue of the estate. In my opinion the estate must be divided equally, and the proceeds of the policy are to go *in computo* of the share belonging to Mrs Bayly.

Lord Young—I am clearly of opinion that the residue of Mr Crum Ewing's estate must be divided equally among the surviving children, and I understood that that was what the trustees had done, and that they desired to have the sanction of the Court for so doing.

There is an obligation by Mr Crum Ewing in his daughter's marriage-contract which is worthy of attention. This obligation is introduced by the narrative that Mr Crum Ewing was desirous of securing to his daughter in liferent, and the children of the marriage in fee, certain sums. Then he narrates that he is the owner of a policy of insurance held by voluntary trustees for him, and he directs his testamentary trustees to transfer it to the extent of £2000 to his daughter's marriage-contract trustees, so that they may draw this sum from his estate after his death. That is to say, he directs his testamentary trustees to assign to the marriage-contract trustees to a partial extent the policy which they held, with an alternative clause by which he binds himself and his executors in default of assignation to pay to them £2000. That is the obligation he has taken upon himself, and he cannot escape from it except by getting the creditors in the obligation to abandon it by giving them something more valuable. In that sense it is a case of election, although no doubt the name is immaterial. If the trustees preferred to take the £2000 given to them in the marriage-contract, then I think there would be no answer to their demand. But then, the testator being still under that obligation, settles by a later deed his whole estate, so that the residue is to be divided among his three children, on the condition that if any one of them takes his share, he does so in lieu of any other provision that may have been formerly

made for him or her. In that way he escapes the obligation to pay either the sum in the policy or the alternative sum of £2000 to the marriage-contract trustees if they accept the provisions contained in his settlement. In fact, he says to them, "If you choose to take the third part of the residue of my estate, you may, but you can get nothing else." The trustees of course must elect to take the larger provision made for his daughter; it is their duty to do so, and therefore the conclusion is irresistible that the trustees are entitled to take one-third of the residue of the estate, and can claim no part of the policy assigned in the marriage-contract.

LORD CRAIGHILL and LORD RUTHERFURD CLARK concurred.

The Court pronounced this interlocutor—

"Answer in the negative the first of the questions therein stated, and answer the second question in the affirmative: Find and declare accordingly," &c.

Counsel for the First and Fourth Parties—Mackay—Jameson. Counsel for the Second and Third Parties—D.-F. Mackintosh—Graham Murray. Agents—Webster, Will, & Ritchie, S.S.C.

Friday, March 9.

SECOND DIVISION.

[Sheriff-Substitute, Ayr.

DUNCAN'S EXECUTORS *v.* DUNCAN.

Writ — Authentication — Will — Signature on Erasure—Onus of Proof.

The signature upon a will, written on a printed form, and *ex facie* probative, was ascertained after the testator's death to have been written on an erasure. This fact was not mentioned in the testing clause. The will was found in the repositories of the deceased, where he had kept it for nine years, and it was proved that he intended it to be effectual.

In a competition for the executorship of the deceased, the will was challenged on the ground that the existing signature on the will had not been adhibited in the presence of the witnesses. It was not disputed that the testator had on one occasion duly subscribed the deed before the witnesses. *Held* that the deed being *ex facie* duly attested and probative, the *onus* lay upon the person challenging it, and that this had not been discharged.

John Duncan, ship-carpenter, Saltcoats, died on the 22d of September 1885. In his repositories was found a settlement executed by him on the 1st of January 1876. By this deed he bequeathed to his wife Martha Barclay or Duncan, and her heirs and assignees, his whole estate, heritable and moveable, and nominated and appointed her as his sole executor and universal intromitter with his moveable means and estate. The testing clause of the deed was in these terms —"In witness whereof I have subscribed these presents, written (in so far as not printed) by Robert Barclay, ironmonger at Kilwinning, this 1st day of January 1876, before these witnesses, James Hendrie, ironfounder in Kilwinning, and John Henderson Peacock, grocer in Kilwinning. "James Hendrie, *witness.* "JOHN DUNCAN. "John Henderson Peacock, *witness.*"

The signature "John Duncan" was written on an erasure. The deed was on a lithographed form which the deceased had purchased in Glasgow.

The deceased left no issue, and was survived by his widow, and by his brother and next of kin Alexander Duncan. The latter died on 31st October 1886, and this petition was presented by his executors praying to be decerned executors-dative *qua* representatives of the next of kin of his deceased brother John Duncan. The widow Mrs Martha Barclay or Duncan claimed her husband's whole estate under the settlement above mentioned. The petitioners challenged the validity of the deed, averring (1) that it was vitiated *in essentialibus*, and was *ex facie* inept, in respect that the signature "John Duncan," alleged to be that of the deceased, was wholly written on an erasure; (2) that the witnesses did not see the deceased adhibit his alleged signature, and that he did not acknowledge the same to be his subscription in their presence.

The facts of the case appear from the opinions *infra*.

The petitioners pleaded—"(1) The petitioners being now the representatives and in right and place of the said Alexander Duncan, now deceased, in and to the moveable succession of the said deceased John Duncan, are entitled to be decerned his executors-dative as craved. (2) The deed founded on by the defenders being *ex facie* vitiated and invalid, the petitioners are entitled to have the same disregarded or set aside."

The defender pleaded—(1) The deed founded on by the defenders being *ex facie* valid and probative, must receive effect until it is reduced by an action in the Court of Session. (2) The action is irrelevant and incompetent in this Court, in respect that its object is to set aside the said deed. (3) The defender Mrs Martha Barclay or Duncan being the executor-nominate appointed under the said disposition and settlement of the said deceased John Duncan, and the petitioners having no right or title to the office, decree of absolvitor in this petition should be granted in the defender's favour, with expenses, and confirmation in favour of the defender, as executor-nominate foresaid, should be granted, as applied for by her."

The Sheriff-Substitute (PATERSON) on 9th June 1887 pronounced this interlocutor — "Before answer, allows to the defender Mrs Duncan a proof that the deed of settlement was subscribed by the granter or maker thereof, and by the witnesses by whom the deed bears to be attested; and to the pursuers a conjunct probation."

"*Note.*—The signature 'John Duncan' on the alleged settlement appears *ex facie* of the deed to be written or partly written upon erasure.

"The defender Mrs Duncan now asks a proof under the 39th section of the Conveyancing Act, 1874; and a nice and novel question arises as to whether a deed the granter's subscription to which is on erasure, is 'a deed, instrument, or writing subscribed by the granter or maker thereof, and bearing to be attested by two witnesses subscribing,' to which the provisions of that sec-