being liable in any of the costs of the trial. If we decide this case in the way proposed by Mr Moncrieff it would just be to establish such a principle. I can see no ground whatever for not deducting from the compensation the expenses which have been caused by the pursuer bringing this action instead of proceeding under the Act.

As to the expenses incurred since the trial, this is a novel question, and the discussion which has taken place has been necessary in order that the point might be cleared up. On the other hand the pursuer did not lead any evidence at the trial in support of his claim under the Workmen's Compensation Act as he might have done. I think the proper course will be to deduct from the award of compensation the expenses to which the defenders have been found entitled down to the date when the verdict was applied, and to allow no expenses to either party since that date.

LORD KYLLACHY—I entirely agree.

LORD LOW—I am of the same opinion. The Legislature in the Workmen's Compensation Act conferred on workmen who were injured a very valuable right in the way of giving them compensation, and if a workman who is injured chooses not to take compensation to which he is entitled under that Act, but brings an action at common law with the object of obtaining a larger sum, it seems reasonable he should do so at his own risk.

It would be intolerable if the defenders had both to bear the expenses of successfully defending an action, and also had to pay large sums in compensation under the Workmen's Compensation Act. It seems to me that is just the kind of case which the provisions of section 1, sub-section 4, of the Act were designed to meet. I entirely agree with your Lordships.

LORD STORMONTH DARLING was absent.

The Court pronounced this interlocutor:—

". . . Decern against the defenders for payment to the pursuer of compensation at the rate of twelve shillings per week from 31st December 1904, in terms of the Workmen's Compensation Act 1897, under deduction of the sum of One hundred and eighty-seven pounds twelve shillings and eleven pence decerned for by interlocutor of 20th March 1906: *Quoad ultra* find no expenses due to or by either party."

Counsel for Pursuer—M'Clure, K.C.—A. Moncrieff. Agents—Simpson & Marwick, W.S.

Counsel for Defenders—G. Watt, K.C.—Horne. Agents—W. & J. Burness, W.S.

Wednesday, June 27.

SECOND DIVISION.

[Sheriff Court at Glasgow.

COCHRAN & SON *v.* LECKIE'S TRUSTEE.

Contract—Bankruptcy—Ranking—Preference—Invoice—Receipt Note—Goods in Custody of Bankrupt—Clause Printed in Invoice or Receipt Note that "All Goods Held in Trust Covered by Insurance against Fire"—Claim on Sum Recovered by Trustee in Bankruptcy from Insurance Company.

A miller who was insured against fire received hay to be cut, and sent in return receipt notes or invoices with the following clause printed on them:—"All goods held in trust covered by insurance against fire." A fire having occurred, hay belonging to a customer was destroyed, and, the miller having become insolvent, the trustee on his sequestrated estate recovered from the insurance company the estimated loss by the fire.

Held (1) that the miller had undertaken to cover by insurance the risk which his customers ran of their goods being destroyed by fire while in his possession, and (2) that whether his customers' risks were or were not covered by the policies, the insurance company having paid, the customer was entitled to a ranking on the money recovered preferable to the general creditors.

Insurance—Fire Insurance—Goods in Custody of Insured—Policy Covering Property Held by Insured "in Trust or on Commission, for which he is Responsible."

A miller who received from customers hay to be cut, was insured against fire by policies "on stock-in-trade the property of the insured, or held by him in trust or on commission for which he is responsible."

Opinion per Lord Kyllachy that the policies might "quite well be read as constituting an insurance by the bankrupt, for himself and all others concerned, of the whole goods in his premises."

This was an appeal from the Sheriff Court at Glasgow brought by Alexander Mitchell, C.A., Glasgow, the trustee on the sequestrated estate of Malcolm John Knox Leckie, who carried on business as a grain crusher and miller at 69 Finnieston Street, Glasgow.

Leckie's chief business consisted of crushing grain of various kinds and chopping hay belonging to customers. James Cochran & Son, grain merchants, Glasgow, were his customers, and occasionally sent hay to him for the purpose of cutting. Each invoice or receipt note received by them from Leckie bore the words "All goods held in trust covered by insurance against fire." In form the invoices or receipt notes were similar to the following:—

"Grain Crushing and Forage Mills,
69 Finnieston Street,
Glasgow, 1905.

"Messrs James Cochran & Son.
To M. J. Knox Leckie.

"*All Goods held in Trust covered by Insurance against Fire.*

1905.				c.		
"Feby.	3.	G.	33 B/s Hay	29½,	10s.,	£0 14 9
	6.	,,	36 ,,	42½,	10s.,	1 1 3
						£1 16 0"

[This invoice is referred to subsequently as No. 6 of pro.] On the 11th February 1905 there was in Leckie's stores belonging to the appellants hay to the value of £19, 9s. 3d., for the purpose of being cut. This had been kept separate and distinct from the rest of the goods there. On that date a fire took place by which considerable damage by fire and water was occasioned, and the hay belonging to Cochran & Son was destroyed. Leckie was insured with the London & Lancashire Insurance Company by three policies:—(1) No 5070555, which insured on stock-in-trade the property of the insured, or held by him in trust or on commission, for which he is responsible, in his grain crushing mills, known and situate at 69 Finnieston Street —£500; (2) No. 4202639, which insured on stock-in-trade the property of the insured, or held by him in trust or on commission, for which he is responsible, in his grain crushing mills, known and situate at 69 Finnieston Street, Glasgow—£500; (3) No. 5070563, on office furniture, &c., £70, and gas engine, £30—£100. These three policies were issued in name of M. J. Knox Leckie, Finnieston Grain Mills, 69 Finnieston Street, Glasgow, grain crusher. Before a settlement was adjusted with the insurance company the appellants arrested the amount of their claim in the hands of the insurance company. Leckie having become insolvent, his estate was sequestrated on 22nd April 1905, and Alexander Mitchell, C.A., Glasgow, was appointed trustee. Under said policies the trustee recovered the sum of £363, 18s. 8d., allocated as follows:—(1) No. £168, 14s. 5d.; (2) No. £168, 14s. 5d.; (3) No. £26, 9s. 10d. This sum of £363, 18s. 8d. was included by the trustee in the trust estate.

On 1st May 1905 Cochran & Son lodged a claim in the sequestration for £19, 9s. 3d., as the value of their hay which had been destroyed in the store, and claimed "a preference for said sum in respect of contract of insurance and indemnity for goods held in trust." By a deliverance on 4th September 1905 the trustee rejected this claim to a preferable ranking on the estate, but admitted it to an ordinary ranking. Cochran & Son appealed to the Sheriff against this deliverance.

On 17th April 1906 the Sheriff-Substitute (MITCHELL) pronounced the following interlocutor:—"Having heard parties' procurators, for the reasons contained in the annexed note sustains the appeal, recals the deliverance appealed against, and ordains the respondent to rank the appellants preferably on the sum of £337, 8s. 10d. received by the respondent from the insurance company *pari passu* with any other appellants who can establish a similar right, and to pay them the amount thereof, with bank interest thereon. . . ."

Note.—"The parties' procurators at the bar renounced probation, and the circumstances are clearly set forth in the condescendence and answers, the question raised being a legal one on the interpretation of the invoice for hay-cutting produced by the appellants (No. 6 of process). It is admitted that there were a series of transactions in January and February 1905 (evidenced in the account lodged with the pursuers' affidavit), and even before that, and that all Mr Leckie's accounts or invoices had the same words printed on them, viz., 'All goods held in trust covered by insurance against fire.'

"The question is whether these constituted an offer on Mr Leckie's part, accepted by the customer through the hay, &c., being sent to him for cutting, that he was to insure for his customer, so that the customer would get the insurance money if there was a fire, or were only an intimation that Mr Leckie voluntarily took on or took over the risk of fire in respect of the goods, and insured that risk to cover his own personal liability thus undertaken.

"I am inclined to think that the words on the invoice and the course of dealing would be naturally understood by the customer as an agreement or contract that Mr Leckie was to do the insurance in room of, or as agent for, the customer, and that the benefit was to accrue to the customer just as if he had made the insurance himself. Obviously an insurance was desirable or necessary, and these words on the invoice seem to suggest that of two alternatives—insurance by each of many customers or by the single miller—the latter was proposed. The convenience of such a course would be obvious, and it would naturally be expected that the price paid for cutting would be fixed to cover the outlay. Trade might be or might be assumed to be more easily got if the miller took this work on for his customers. Again, the precise terms indicate the same result—the goods are held 'in trust,' and their fire risk is 'covered' surely as a trust risk, that is, on behalf of the truster.

"I think this is the natural reading, and that the subtle interpretation given by the respondent would not occur to anyone, viz., that it was only an intimation that the miller took over a risk that did not lie on him, and covered himself by insurance. Notice that the customer need not insure, because insurance was done for him, is what I think the customer would read out of the printed words, and is also what I take to be their natural meaning. Nothing is said about where the risk lay apart from agreement; and anyone reading the printed words would think the whole matter of insurance was covered by them and nothing less than the whole risk—not merely an eke to the miller's personal credit in taking over an unnecessary risk.

"If Mr Leckie meant one thing and the

customer read another meaning, I think Mr Leckie was to blame for so expressing himself, and that he would have to take the consequences, and so I think his trustee and creditors must take the consequences too. The case of *Dalgleish* v. *Buchanan*, 16 D. 332, cited for respondent, differs from the present case in the absence there of any contract or agreement to secure the trusted goods by insurance."

The trustee appealed to the Court of Session.

Counsel for the appellant pointed out that, strictly speaking, the respondents' claim to a preferable ranking in the sequestration was not in order, for where money was held in trust the proper procedure was by petition under section 104 of the Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79). This objection, however, they did not wish to press, but would argue as if the correct procedure had been followed.

Argued for the appellant—(1) Leckie never contracted with his customers to insure their goods so that the proceeds of the insurance policy would be directly available to them. At most he only contracted to insure his own rights and interests in his business premises, and any rights which arose from the conduct of his business. The real contract was one for cutting hay, and it was not qualified by the clause in the receipt note, which was mere advertisement—*Buchanan & Company* v. *Macdonald*, December 10, 1895, 23 R. 264, 33 S.L.R. 200. (2) Assuming that Leckie ought to have insured customers' goods, in point of fact he had not validly done so, and the Insurance Company need not have paid for his customers' losses—*North British and Mercantile Insurance Compauy* v. *Moffat and Another*, 1871, L.R., 7 C.P. 25. It was true the company had in error of law paid the money, but this was immaterial in a question with Cochran & Son, and the sum paid belonged to the sequestrated estate—*Dalgleish* v. *Buchanan*, January 17, 1854, 16 D. 332.

Counsel for the respondents were not called upon.

LORD KYLLACHY—I think the judgment of the Sheriff is quite right. In particular, I entirely agree with him as to the just construction of the note attached to the "invoice or receipt note" declaring that "all goods held in trust are covered by insurance against fire." These words as it seems to me have only one sensible meaning, viz., that the bankrupt, in respect of the charges made by him, undertakes to cover by insurance the risk which his customers ran of their goods being destroyed by fire while in his possession. Any other construction would, I think, make the clause futile. The risk to be covered was, I think, plainly the risk of the customers. And I think it is equally plain that the bankrupt was not himself to be the insurer, but was to effect the stipulated cover by policy of insurance in the usual way. That being so, I think it follows (because anything else would have been unlawful) that if the bankrupt took the policies in his own name he must be held to have done so on behalf of and for the benefit of his customers.

But then it is said that, even supposing the bankrupt undertook to take out on behalf of his customers a policy or policies which should cover their goods, he in point of fact did not do so, but took out a policy which covered only his own risk—that is to say, his own common law liability to his customers for damage by fire caused by his own negligence. It seems to me, I confess, that this is a construction of the policy which is at least hypercritical. I rather think the policy may quite well be read as constituting an insurance by the bankrupt for himself and all others concerned of the whole goods in his premises, whether his own goods or goods of which he was the custodier under trust or commission. But even if that construction were wrong it seems enough to say that it was the construction which the Insurance Company accepted, and on the footing of which they paid the amount in question to the trustee who is now in possession of the money. It seems to me that in these circumstances we are not bound to inquire further. The money having been paid by the Insurance Company on the footing that it was due in respect of the insurance of the respondents' goods, the notion that the trustee can retain it for the benefit of the general body of creditors is in my opinion out of the question.

LORD LOW—I am of the same opinion. I do not think that the meaning of the words printed on the document No. 6 of process is doubtful. Looking to the circumstances in which that document was issued, the words must mean that customers need not trouble themselves to insure against fire, because their goods were insured under policies taken out by the grain crusher. I do not see why that should not be an insurable risk. What was meant was either that the grain crusher undertook to be responsible to his customers for loss caused by accidental fire or to insure the customers' goods as agent for them. The insurance companies have accepted the view that the risk was insurable, and that the policies issued by them covered it, and they have paid the money. That being so, the trustee cannot retain the money so obtained and distribute it among the general creditors. It may be that it should never have been included in the bankrupt estate at all, but the same result will be arrived at if the customers are found entitled to it preferably to the other creditors.

LORD JUSTICE-CLERK—I agree. It is a most extraordinary contention that the trustee is not bound to pay over this insurance money. He ought never to have got the money himself. He did get it. The insurance company paid it at his request. He is not now entitled to keep it for behoof of the general creditors.

LORD STORMONTH DARLING was absent.

The Court dismissed the appeal and affirmed the interlocutor appealed against.

Counsel for the Appellant—T. B. Morison. Agent—F. J. Martin, W.S.

Counsel for the Respondents—W. Thomson. Agent—W. J. Haig Scott, S.S.C.

Saturday, July 7.

SECOND DIVISION.

MIDDLETON'S TRUSTEES *v.* MIDDLETON.

Succession—Faculties and Powers—Power of Appointment — Exercise — Validity — Power to Appoint to Fee—Appointment to Fee Subsequently Restricted to Liferent —Restriction Held pro non scripto—Introduction of Appointees not Objects of Power.

By her marriage contract a wife was empowered to apportion the fee of a sum of money among the children of the marriage "in such proportions, and with such restrictions, and on such terms, and payable at such periods" as she might declare in writing. There were two children, a son and daughter. By her will and codicil she appointed the whole sum to her son, with a declaration that instead of being paid to him it should be held by her testamentary trustees for his liferent use allenarly and his issue in fee, subject to such conditions and in such shares as he might appoint, and failing appointment, equally. There followed a destination-over in favour of the daughter or her issue in the event of the son dying without being survived by issue, as also powers to the trustees to make advances to the son out of capital, and to the son to provide a liferent to his wife if he married in case of her surviving him.

Held (1) that the provisions restricting the son's right to a liferent, and disposing otherwise of the fee, were *ultra vires* and wholly invalid, the suggestion being rejected that the valid could be eliminated from the invalid with the effect of giving a fee to the daughter and a liferent to the son, as figured by Lord M'Laren in *Neill's Trustees* v. *Neill*, March 7, 1902, 4 F. 636, 39 S.L.R. 426; (2) that they fell to be treated as *pro non scriptis*, the son taking the fee of the whole fund under the initial part of the appointment. *M'Donald* v. *M'Donald's Trustees*, June 17, 1875, 2 R. (H.L.) 125, 12 S.L.R. 635, *followed*.

By an antenuptial contract of marriage between John Archibald Middleton and Elizabeth Somervell, the latter conveyed her whole means and estate to trustees, the fourth purpose of the contract providing that the fee should be held and applied by the trustees, burdened with a liferent to the surviving spouse, for behoof of Elizabeth Somervell's lawful children, and the survivors and survivor of them, and the lawful issue of such of them as might decease leaving issue, "in such proportions, and with such restrictions, and on such terms, and payable at such periods as the said Elizabeth Somervell, whom failing the said John Archibald Middleton, may appoint by a writing under her or his hand, and failing such appointment, equally to and amongst the said children if more than one, or the survivors or survivor of them jointly with the lawful issue of such of them as may decease leaving issue (the division being *per stirpes*), payable, unless otherwise directed as aforesaid, at the first term of Whitsunday or Martinmas occurring after the death of the survivor of the said Elizabeth Somervell and John Archibald Middleton, and after the said child or children, being sons, shall attain majority, or being daughters shall attain majority or be married, whichever of these events shall first happen. . . ."

John Archibald Middleton died in 1897.

Mrs Elizabeth Somervell or Middleton died on 26th September 1904 survived by two children, the only offspring of the marriage, viz., Constance Henrietta Middleton or Robertson Aikman and George Graham Middleton, and leaving a trust-disposition and settlement by which she conveyed her whole means and estate to trustees. The daughter Constance had by antenuptial contract of marriage entered into in 1899 conveyed her whole means and estate to trustees.

By the third purpose of her trust-disposition Mrs Middleton directed that the means and estate over which she had power of appointment under her antenuptial contract of marriage should be divided and apportioned as follows, viz.—(*First*) To her daughter Constance Henrietta Middleton the sum of £1000 sterling, payable to her at the period provided by the contract of marriage; (*Second*) to her son George Graham Middleton the remaining sum of £4001 sterling. And with respect to the sum thereby apportioned to her son, Mrs Middleton provided "that instead of being paid over to him, the same shall be paid to and held by my trustees as and when the same becomes available and invested in their own names as trustees foresaid for the liferent alimentary use allenarly of my said son, and for behoof of his lawful issue in fee, in such shares and proportions, and subject to such conditions and limitations, including the restriction of the share of any child to a bare liferent, as my said son may appoint, and failing such appointment, equally among them, share and share alike: Declaring that should my said son die without being survived by a child or children or remoter issue, the share of residue falling to him in liferent and his issue in fee shall fall and accresce to my said daughter or her issue equally among them: And notwithstanding what is above written, I hereby authorise and empower my trustees to advance and pay to my said son by way of loan or otherwise, and for any purpose they may consider proper, such sum or sums out of the capital of the