"these presents," as the third parties desire us to do, and so to deprive it of all effect.

The next argument which was submitted to us on behalf of the same parties, and which seems to have been the only one present to their minds when this Special Case was framed, was that "the reservation of power to revoke, alter, or vary" the provisions in favour of the children "in the marriage contract was invalid, and must be held, *pro non scripto*, as being repugnant to the contract by which the children's right to legitim is expressly discharged." No authority was cited in favour of this proposition. It may be that if the power had been so exercised as to deprive the children of all right in their father's succession, the discharge of legitim contained in the contract would not have been effectual. It is still an open question whether legal rights of children in their parents' succession can be discharged by an antenuptial contract between the parents unless some provision is made in their favour, although if the reason for the rule in the ordinary case is correctly stated in the passage I have quoted from Lord Mackenzie no such distinction would be tenable. We are not, however, concerned with a case of that kind here, as Mr Simpson made generous provisions for his children, although he also thought fit to leave his sister-in-law an alimentary liferent of £1000. The antenuptial contract would have been a perfectly valid deed though it had contained no provisions in favour of children, and, as framed in this case, it would have operated as a valid testament so long as it was not revoked or altered. Indeed, there are other clauses in the deed which seem to show that Mr Simpson's true intention was merely to regulate his succession and not to come under any contractual obligations to his future wife as to its disposal. Thus the clause by which the whole estate is conveyed to the children is conceived in favour, not only of the children to be procreated of the intended marriage, but also of the children of any other marriage which George Simpson might contract, and there is also an obligation in favour of his own sister with regard to part of his heritable estate which was certainly not contractual. We are, however, not left without guidance as to the law, for in the case of *Fowler's Trustees* (25 R. 1034) it was decided that a clause in a marriage contract which had the effect of rendering it entirely nugatory was not invalid. That case was much stronger than the present, for it gave the wife an absolute power to recal or annul the trust at pleasure, while the clause in the present case is limited in its operation to the provisions in favour of the children. I have therefore come to the conclusion that we must answer the first and second questions in the affirmative. The other questions, which proceed on the assumption of our taking an opposite view, are of course superseded.

The LORD JUSTICE-CLERK concurred.

LORD GUTHRIE had not taken his seat in the Second Division when the case was heard.

The Court answered the first and second questions in the affirmative.

Counsel for First, Second, Fifth, and Sixth Parties — Blackburn, K.C. — Lord Kinross. Agents—Pearson, Robertson, & Finlay, W.S.

Counsel for Third Parties — Christie — Chree. Agents—Mackay & Hay, W.S.— Gordon, Falconer, & Fairweather, W.S.

Counsel for Fourth Party—J. Macdonald. Agent—A. W. Lowe, Solicitor.

Saturday, December 23.

FIRST DIVISION.

[Sheriff Court at Stirling.

GRAY *v.* CALEDONIAN RAILWAY COMPANY.

Railway—Reparation—Negligence—Spark from Engine.

A pursuer, as administrator-in-law of his children and as an individual, sued a railway company for damages for personal injuries to his six pupil children. He averred that they were waiting on a platform for a train; that the engine approached with steam shut off; that while passing along the platform steam was applied suddenly and in such volume that large quantities of soot and live cinders were driven out of the funnel; that a live cinder fell on the neck of one of his sons and severely burnt him; and that the soot and cinders caused nervous shock to the other children and spoilt the clothes they wore; that the engine driver ought not while passing along the platform to have applied steam with such suddenness and in such volume, and was negligent in so doing; and that the defenders or their servants were in fault in not having the funnel properly cleaned from time to time, and in not having a cage at the mouth of the funnel, or adopting other means of preventing live cinders and soot being emitted therefrom in large and dangerous quantities.

Held that there was no relevant averment of improper construction of the engine, but that there was a relevant averment of the improper use thereof.

Reparation—Process—Minor and Pupil—Parent and Child—Action by Parent as Tutor and Administrator-in-Law for Pupil Children for Damages for Personal Injuries to them.

Held that a father, suing as administrator-in-law for damages for personal injuries to several pupil children, should conclude for a separate sum for each and not for a slump sum.

Thomas Gray, miner, Stirling, as tutor and administrator-in-law for his six pupil

children and as an individual, *pursuer*, raised an action in the Sheriff Court at Stirling against the Caledonian Railway Company, *defenders*.

The claim of the pursuer was for payment of (1) £100 sterling (*a*) as damages for personal injuries and shock to the system sustained by his son John Gray on or about 22nd July 1911, and also (*b*) damages for shock to their systems sustained by the other five children; and (2) £5 sterling, being the value of the children's clothes destroyed and rendered useless and unwearable by cinders and soot.

The pursuer averred, *inter alia*—"(Cond. 2) On Saturday, 15th July 1911, the pursuer's wife Elizabeth Morrow or Gray, and their children Mary Gray, Grace Gray, John Gray, Thomas Gray, James Gray, and Elizabeth Gray, travelled from Stirling to Haywood by the defenders' railway, and had purchased third-class return tickets for the journey, the defenders thereby contracting to convey them safely from Stirling to Haywood and back to Stirling. On Saturday, 22nd July 1911, the said Elizabeth Morrow or Gray, with the said six children, left Haywood about four o'clock in the afternoon on their return journey to Stirling and arrived at Carstairs at 4·45. The defenders' train to convey them to Stirling was due on said date at Carstairs about six o'clock p.m. and steamed into the station at or about 6·10 p.m. The said Elizabeth Morrow or Gray and the said six children were standing on the platform at the station awaiting the arrival of the train. When the engine approached with steam shut off, the driver apparently found that he had not sufficient way on to bring it properly alongside the platform, and in consequence he had to apply steam in order to bring the train to its proper position at the platform, so that the engine was steaming when it passed that portion of the platform where the said Elizabeth Morrow or Gray and her children were standing. As it passed that point the engine was emitting dense smoke and steam, and live cinders and soot from the funnel of said engine fell on several people waiting on the platform, destroying their clothes and otherwise injuring them. (Cond. 3) One of the live cinders emitted from the funnel of said engine landed on the neck of the said John Gray, causing him severe pain, and leaving a scald about one inch in diameter, which will remain a permanent mark on his neck. He has been and still is under medical treatment in consequence of said burn, and has suffered and is still suffering considerable pain and discomfort therefrom. He has also suffered and still suffers as the result of said injury from severe shock to the nervous system. (Cond. 4) The cinders and soot emitted from said engine also fell on the said Mary Gray, Grace Gray, Elizabeth Gray, Thomas Gray, and James Gray, who as a result were greatly agitated and excited, and suffered and still suffer from shock to their nervous systems. The clothing which the said children were wearing at the time was destroyed and rendered useless and unfit to be worn again, in consequence of damage done to it by cinders and soot from said engine falling on same. . . . (Cond. 5) The said injuries to the pursuer's son John Gray, and to his other children Mary Gray, Grace Gray, Elizabeth Gray, Thomas Gray, and James Gray, and to the clothing of the said children, were caused by the fault and negligence of the defenders or those for whom they are responsible. It was the duty of the engine driver to prevent the engine emitting live cinders and soot when passing a platform on which he knew there were passengers awaiting said train who might be injured by them, and if he had exercised ordinary care and skill he could have prevented this. He ought to have shut off steam at a point which would have enabled him to control his engine by means of the brakes alone, or at all events which would have enabled him to stop the train at the required point without giving off dense volumes of smoke and steam when passing along said platform. Further, even if it were necessary for him in consequence of his misjudging the distance or from any other reason to apply steam when passing along said platform, it was his duty to apply it gradually and in small volume, so as to prevent doing injury to persons on the platform, but on the occasion in question the engine driver carelessly and unskilfully applied steam suddenly and in large volume, with the result of driving large quantities of soot and live cinders out of the funnel. This would not have happened had steam been applied gradually and in small volume. Further, it was the duty of the engine driver, under the defenders' rules for the regulation of their traffic, to so arrange the fire in the engine as to avoid the unnecessary emission of cinders and soot from the engine while passing said station. The emission of live cinders and soot in the circumstances condescended on was quite unnecessary, and the engine driver was in breach of the defenders' own rule, which is intended to ensure the safety and comfort of the public. Further, the defenders or their servants were in fault in not having the funnel properly cleaned from time to time and in not having a cage at the mouth of the funnel, or adopting other means of preventing live cinders and soot being emitted therefrom in large and dangerous quantities. The rules referred to are issued to defenders' servants, and the particular rule founded on ought to be within defenders' own knowledge. Defenders are called upon to produce all such rules issued by them. . . ."

The defenders pleaded, *inter alia*—"(1) The action is irrelevant and ought to be dismissed."

On 20th November 1911 the Sheriff-Substitute (MITCHELL) pronounced this interlocutor—"Having heard parties' procurators on defenders' first plea and made avizandum, repels said plea, and allows to both parties a proof of their averments."

Note.—"The averments of fault and negligence are contained principally in article 5

of the condescendence, aided by article 2, and comprise general averment of fault and negligence, and also statement of details which I think are sufficient for relevancy. The 'Rules' of the defenders, at least the one cited at the debate, 159, may not be directly in point, nor may the 'cage' referred to be a modern requirement, but the references are general. No demand was made for partial disallowance of proof in respect of them, and I allow proof of the record as it stands. In answer 4 defenders make a farther explanation which goes outside of anything stated by pursuer, but which I think does not make pursuer's case less relevant. I think the case cited for both parties—*Port-Glasgow and Newark Sailcloth Company* v. *Caledonian Railway Company*, 19 R. 608, affirmed H.L. 20 R. 35—which lays down the law authoritatively, recognises (after proof) the two spheres of possible negligence which are specified in the averments here—use of appliances and the nature of the appliances themselves. There may be a question how steam brings cinders through with it, but this is matter for proof."

On 23rd November 1911 the pursuer required the cause to be remitted to the First Division of the Court of Session for jury trial.

The defenders objected to the relevancy of the pursuer's averments.

Argued for the defenders—The action was irrelevant and should be dismissed. A railway company might be negligent if it did not provide proper plant, but there was here no relevant averment of improper construction of the engine. They referred to *Port-Glasgow and Newark Sailcloth Company* v. *Caledonian Railway Company*, March 15, 1892, 19 R. 608, 29 S.L.R. 577, *aff.* February 21, 1893, 20 R. (H.L.) 35, 30 S.L.R. 587.

[The LORD PRESIDENT pointed out that there was a serious fault in the case, namely, the suing for a slump sum for injuries to six children simply because they had the same administrator-in-law.]

Counsel for the pursuer stated that he did not object to the case being sent back to the Sheriff, and asked if the Court desired to hear him on the relevancy. The LORD PRESIDENT intimated that they did not.

LORD PRESIDENT—This is an action which has been remitted from the Sheriff Court at Stirling with a view to having it tried by jury. We have had an argument directed to the question of relevancy. I think the law is perfectly well settled in this class of case. Where injury is done owing to the noxious effect of a machine which is driven upon the company's property, in direct pursuance of statutory duties which make them drive that class of machine, there can be no claim of damages against them for doing what the statute tells them to do, and accordingly there can only be a claim of damages for injury for burns or anything of that sort resulting from sparks from an engine if you can show that there has been negligence on the part of the company. That negligence may be of one or two kinds. It may either be negligence in having an improperly constructed machine, or it may be negligence in the manner in which a properly constructed machine is used.

I am bound to say that I find no relevant averment of there being improper construction of this engine, and accordingly I think that the Sheriff-Substitute was wrong when he allowed a proof of the record as it stood. On the other hand, I think there is a relevant, though somewhat vague, averment of improper use of the machine, and I think upon that matter the case could not be turned out of Court without allowing inquiry. But I do not think that this case could have been sent to a jury. The learned counsel for the pursuer has very properly, I think, made that concession, but the reason of it I need to mention, because there is, I think, an absolute fault in the case as allowed which will have to be corrected when it goes back to the Sheriff Court, where I propose to send it, and the fault is this—the claim of the pursuer is a claim as tutor and administrator-in-law for his six pupil children, and he claims in a lump sum £100 sterling for injuries and shock sustained by their systems, as he puts it, by soot falling upon them out of this engine, and in the case of one of them by a cinder having lodged upon its neck.

Well, you cannot, I think, sue as an administrator-in-law for a lump sum for various children. You are bound to particularise what is the sum which you think you ought to recover for each child, because when recovered it is not a common sum. The father does not recover for himself, but recovers as administrator-in-law for his children. No doubt the father is entitled to use the money of his children for their upkeep, otherwise each sum recovered for each child would have to be put, so to speak, in a separate bank account.

The action as laid seems therefore to be improperly laid in this matter. If it had been properly laid, it would have been perfectly apparent, I think, to anyone that no child would be receiving more than £50, and consequently it would have been one of those cases which upon value alone, according to the rules we have laid down, would have been appropriate for the Sheriff Court and not for this Court.

Accordingly I think, upon the whole matter, the action should be re-remitted to the Sheriff with an instruction to him to allow an amendment of the pleading, which shall specify the amount sought to be recovered for each separate child, and also with an instruction to him that there is, in our view, no relevant averment of any improper construction of the engine.

LORD KINNEAR—I concur with your Lordship. I think the liability of the Railway Company in an action of this kind is quite clearly established by the law laid down in the case of the *Newark*

Sailcloth Company, and by the previous case of *Brand* v. *The Arrowsmith Railway Company*. And I agree with your Lordship's statement of the law, which is also correctly stated by the Sheriff-Substitute.

It follows, I think, that there is a relevant case upon the negligent driving of the defenders' engine in the particular circumstances here; but then I agree also that the pursuer cannot be allowed to sue for one lump sum in respect of six separate injuries to six different people. The question of the injury done to each child is a separate and distinct question from the injury done to the other children. And the pursuer makes that clear enough when he says that in one case he is suing for damages for personal injuries done, and in the other cases for damages for shock sustained to the system. Whatever the meaning of that may be, it is clear enough that each child has a separate case for separate injury done to itself, and the fact that the father, as administrator-in-law, is entitled to recover the damages for each of his children does not make the six children into one pursuer. Therefore the separation which I think the learned counsel admitted to be necessary will require to be made before the case goes further.

LORD JOHNSTON—I quite agree, and have nothing to add.

LORD MACKENZIE was absent.

The Court pronounced this interlocutor—

". . . Recal the interlocutor of the Sheriff-Substitute of 20th November 1911: Repel said objections" [to the relevancy] "except in so far as they relate to the construction of the engine: Find that there is no relevant averment of improper construction of the engine: *Quoad ultra* remit the case back to the Sheriff for proof, and instruct him to allow the pursuer to amend the record to show the amount sought to be recovered for each child, and to proceed with the cause."

Counsel for the Pursuer and Appellant—D. P. Fleming. Agent—Hugh Fraser, Solicitor.

Counsel for the Defenders and Respondents—Hon. W. Watson—Wark. Agents—Hope, Todd, & Kirk, W.S.

Thursday, December 21.

SECOND DIVISION.

SWAN'S TRUSTEES *v.* SWAN AND OTHERS.

Process — Special Case — Insane Party — Curator ad litem.

The Court appointed a *curator ad litem* to an insane party in a special case, and *held* that the case might competently proceed without the appointment of a *curator bonis*.

Succession — Settlement — Provision as to Accrescing Shares — Construction.

A testator by his will directed his trustees to divide the residue of his estate into equal shares, and to hold one share for each child and spouse in liferent and their issue in fee. He further provided that the share of any child dying without issue should "fall and accresce to my other children then surviving in liferent and to their respective issue in fee." One of his daughters, J., survived him and died unmarried. Three of her sisters had predeceased her leaving issue.

Held that the issue of those children of the testator who predeceased J. were not entitled to participate in the share that accresced on her death.

Succession — Vesting — Time of Payment — Express Clause as to Vesting.

A testator gave the liferent of his whole estate to his widow. He, moreover, directed his trustees to divide the residue of his estate into equal shares, and to hold one share for each child and spouse in liferent and their children in fee. He provided that the fee of his estates should not be paid to any of the fiars until they attained the age of twenty-five years. He further provided that the fee of his estates should not vest in any of his beneficiaries until the period of payment had arrived.

Held that vesting was postponed until the liferents of the respective shares had terminated, and until the respective fiars had attained the age of twenty-five years.

Matthew Swan died on 23rd November 1890 leaving a trust-disposition and settlement dated 9th March 1886, and codicil thereto dated 8th November 1888. The testator was survived by his wife Mrs Jean M'Intyre or Swan, who died on 2nd May 1910. He had eight children, viz., Robert, Jessie, Maggie, Agnes, Jeanie, Mary, John, and Matthew. Maggie and Jeanie predeceased the testator leaving issue. Agnes survived the testator and died leaving issue. Jessie survived Agnes and died unmarried. Robert, Mary, John, and Matthew were still alive and had issue.

Questions having arisen with regard to the construction of the settlement, a Special Case was brought for their determination. The first parties were the trustees acting under the trust-disposition and settlement and codicil. The second parties were the children of the testator who survived Jessie and their issue. The third parties were the surviving husbands and descendants of the deceased daughters Maggie, Agnes, and Jeanie. The fourth parties were the heirs *in mobilibus* of Jessie. The fifth parties were the whole children and grandchildren under twenty-five years of age of the testator's children. The sixth parties were the surviving children of Robert, Mary, John, and Matthew, and the children of Mary's deceased children. The seventh parties were the issue of Agnes and Jeanie. The eighth parties were the immediate issue of