counting to John Leighton's nearest in kin for their share of his estate, all the payments specified in the 13th and 14th articles of the Special Case, with interest thereon, fall to be deducted from their share: In regard to the fifth question, Find that the facts stated in the Special Case do not raise this question, and therefore refuse to answer the same: In answer to the sixth question, Find and declare that the item No. 2 of the heritable estate mentioned in the inventory and valuation, set out on pages 25 to 29 inclusive, does not form part of the estate falling under the conveyance in the said postnuptial contract: Find and declare that the item No. 3 of the heritable estate, mentioned in the said inventory and valuation, does form part of the estate falling under the conveyance in the said postnuptial contract: Remit the account or accounts of the expenses incurred by the parties to the Auditor to tax and report."

Counsel for First Party — Rhind. Agents — Andrew Fleming, S.S.C.

Counsel for Second and Third Parties—M'Laren —Pearson. Agent—David Speid, S.S.C.

Counsel for Fourth Party — Dean of Faculty (Watson)—Hunter. Agent—W. J. Shiress, S.S.C.

Counsel for Fifth Parties — Kinnear. Agents —Webster & Will, S.S.C.

Monday, January 24.

FIRST DIVISION.

TAYLOR AND OTHERS (PETITIONERS) *v.* ADAM'S TRUSTEES.

Trust—Removal of Trustees—Administration.

Circumstances in which *held* that the administration of a trust-estate, though in some respects disclosing mistakes and irregularities, did not afford ground for the removal of the trustees.

This was a petition at the instance of Mrs Ann Adam or Taylor and others, four of the beneficiaries under the trust-disposition and settlement of James Adam, merchant, Lossiemouth, and farmer at Oakenhead, near Elgin, who died in 1853. By that deed the truster appointed his wife Mrs Marjory Riach or Adam, John Adam, farmer at Eastertoun, since dead, William Adam, farmer at Bardon, William Grant, accountant in Elgin, and John Russell, tailor in Lossiemouth, and the survivors and survivor, acceptors and acceptor of them, to be his trustees and executors, and conveyed to them his whole estate, heritable and moveable, for *inter alia* the following purposes — *Second*, After selling and disposing of his estate, and converting the same into cash, the trustees and executors were to invest the whole of the free proceeds thereof on heritable or undoubted personal security in their own names, and pay over the free annual interest arising therefrom to the said Mrs Marjory Riach or Adam during all the days of her life. *Third*, After his widow's death, one half of the residue to be paid over to any person to be named by her, and the other half to the truster's brothers and sisters now alive, equally among them, share and share alike. *Fourth*, The truster authorised and empowered his trustees and their foresaids, when and so often as the same should be necessary, to assume and nominate other suitable trustees to act along with them in the trust, so that the same might be carried on in a proper manner and brought to a satisfactory conclusion. *Fifth*, There was inserted the usual clause in favour of the trustees, exempting them from responsibility for omissions, &c.

The petition was at the instance of three of the children of John Adam, a deceased brother of the truster's, and of a son of a deceased sister, and there was further a minute of concurrence from several other beneficiaries.

The truster had six brothers and sisters, all of whom or their families were interested in the residue of the estate.

The petition prayed the Court to remove the trustees from their office, and to appoint a judicial factor upon the estate, and the statement of facts upon which the petitioners founded was, *inter alia*, as follows:—The truster had before his death carried on an extensive business as spirit merchant and general dealer at Lossiemouth, and he was also tenant of a farm near that. His estate was partly heritable, partly moveable; the former was given up in the inventory as amounting to £2695, 11s. 4d., and the latter consisted of a dwelling-house and shop at Lossiemouth, and fish-curing premises there. The lease of the farm of which the truster was tenant was for nineteen years from Whitsunday 1842 for part of the lands, and for ten and fourteen years for other parts. The petitioners averred generally that though the trustees had entered into possession of the estate and had realised it, they could not, after repeated application, ascertain the amount of it, and that all other information was denied them.

The truster's widow, both before and after a second marriage, into which she entered with a person named Grant, had, contrary to the directions of the deed, carried on the business of grocer and spirit merchant in the premises previously occupied by her first husband; and her co-trustees, it was averred, had sold her by private bargain the house and shop in which it was carried on, although she was at the time a trustee. The business and stock-in-trade had also, it was stated, become hers by private sale, at a nominal price, and advances had been made out of the trust-funds, without sufficient security, to her second husband.

In 1873, a considerable period after the death of John Adam and William Grant, two of the original trustees, a deed of assumption was executed by which Robert Smith, then bank-agent in Lossiemouth, afterwards in Peterhead, and James Adam and Alexander Adam, both sons of and engaged in farm work with William Adam, who, it was averred, was the sole managing trustee, were assumed as new trustees. Smith, immediately on his appointment, removed to Peterhead, and took no part in the management of the estate, and the assumption, it was stated, was effected by William Adam for a purpose adverse to the trust, and was not a *bona fide* assumption by the other trustees. Before his death William

Grant had been in the management, and for some time thereafter a clerk of his, named Milne, had retained charge, but had afterwards absconded, and in that way, it was explained, a considerable part of both the capital and income of the estate had been lost.

The trustees, the petitioners stated, had refused to give an account of their intromissions, or of the investment of the trust-funds, or of their account with the bank. They eventually informed them that £2165, 6s. 8d., which constituted the greater part of the estate, was deposited in bank, but the petitioners averred that this course had been taken to satisfy their inquiries, and that it had previously been lent by the trustees to some of their own number. The petitioners further averred that William and James Adam had appropriated the trust-funds to their own uses at different times, and if they granted any documents of debt, these remained in their own hands, and they alone virtually had the control of the estate in their power.

None of the funds were or ever had been invested on heritable security, or on that of personal property, as the truster had directed; portions were held upon promissory-note, and upon bills which it was averred were granted on account of the borrowers' private connections with William Adam the trustee; and the rest was deposited in bank.

The petitioners averred that, notwithstanding their remonstrances, nothing had been done by the trustees, and submitted that as their vested interests were thereby being injured, it was necessary that the trustees should be removed from their office to prevent further loss.

The trustees lodged answers, in which they stated that the free residue of the estate had amounted to about £1745, and that the capital sum now available for division was £3129, 4s. 7½d.; that they, with the assistance of the truster's widow, had carried on her husband's business for more than a year after her death; that the stock in the shop was partly sold off, and partly disposed of to the widow after valuation; that the shop and dwelling-house passed into her hands after valuation by an architect; and that it was the father of two of the petitioners who carried through the sale.

The farm, the trustees explained, was carried on till the end of the lease, and a displenishing sale thereafter carried out. Mr Grant, an accountant of high standing in Elgin, had been entrusted by his co-trustees with the management of the trust till his death in 1867, after which Mr Milne, a clerk of Grant's, continued to conduct it. In 1871 the management was taken out of his hands, and his accounts docquetted and a discharge granted him. It was explained that the estate had suffered no loss through Milne. William Adam's two sons and Smith were assumed as trustees in 1873 with the entire approval of all the trustees. James Adam was especially a good man of business, and after being appointed a trustee took the more active management of the trust before it was given over to Messrs Forsyth & Stewart, solicitors in Elgin, in whose hands it now was. The truster's widow, now Mrs Grant, as liferentrix of the estate, was quite satisfied with the management, as also all the other beneficiaries, of whom there were a large number, with the exception of the petitioners, and the trustees were always willing to give to the petitioners the information which they were entitled to get. The accounts were always open to inspection, and with reference to the loans of trust-funds to trustees, it was explained that they were granted during Mr Grant's management and in ignorance of their illegality; at the same time the securities were good. The sum on deposit-receipt remained so at the desire of the liferentrix, who alone had any interest in the profits of the money.

A correspondence between William Adam, one of the petitioners, and James Adam, the trustee, and latterly between their agents, was produced, the purport of which sufficiently appears from the opinion delivered.

The respondent's counsel were not called on.

At advising—

Lord President—I am for refusing the prayer of this petition, but at the same time I must not be understood as entirely exonerating these trustees from all blame, because they have no doubt committed mistakes and irregularities in the management of the trust. It is not at all wonderful that it should be so, as we see that there is no man of business among their number. There is no law-agent, nor has one been employed; they are all farmers or shopkeepers, and they have had their own work to attend to. It may be said that some one who was cognisant with the administration of the law of trusts should have been employed, but I confess I can appreciate the reason for this not being done, as the estate was small, and it was not in the circumstances thought advisable to incur this expense. After making up the accounts of the estate in 1871, when the business was taken out of Mr Milne's hands, and finding that no loss had been incurred, it was not wonderful that the trustees should consider that there was no necessity for more vigilance than had already been exercised.

In dealing with the truster's widow, who was also herself a trustee, with a view to benefit her and to carry out the truster's views, the trustees sold her the good-will of her husband's business. That was an expedient course, but it was at the same time illegal; yet I cannot doubt that it was done in perfect good faith, and I cannot hold that it is a ground for the removal of the trustees for breach of trust.

The correspondence between the parties manifests a certain degree of unwillingness to disclose to William Adam the affairs connected with the management of the estate. He was a clerk in Edinburgh, and a son of a deceased brother of the truster, who was also a trustee. I am not surprised that he did not obtain all the information he desired from James Adam, and we see that when the management of the estate was put into the hands of Messrs Forsyth & Stewart, matters assumed a different aspect, and all the information was given which William Adam was entitled to demand. In a letter which his agent wrote to Messrs Forsyth and Stewart there occurs this passage:—"If the trustees are to be guided in their management by you as their agents, those of the beneficiaries whom I represent have the utmost confidence that you will put the whole into legal shape;" and in their answer Messrs Forsyth & Grant write:—"We have now been

instructed by the trustees to state that in future this estate is to be managed by us." If Mr Adam had acted in the spirit of his agent's letter, he would have been content to leave the management where it was, and I confess I think the rest of the correspondence which follows is quite satisfactory, and there does not seem to me to be sufficient ground for the presentation of this petition.

Some observations have been made upon the subject of the deposit-receipts which are now lying in bank. To have this large sum lying there at small interest is not a prudent course, but it is quite a secure one, and under the deed it is the widow who is entitled to the liferent interest of the estate, and it is she who is the sufferer. Under Forsyth and Stewart's management I have no doubt this arrangement will be altered, but I do not think it is for the Court to direct the trustees what they should do, seeing that that would not be for the benefit of the beneficiaries, inasmuch as the trustees would then be relieved of their responsibility.

LORD DEAS, LORD ARDMILLAN, and LORD MURE concurred.

The Court refused the prayer of the petition.

Counsel for Petitioners — M'Laren—Pearson. Agent—J. Duncan Smith, S.S.C.

Counsel for Respondents—Asher—Mackintosh. Agents—Boyd, Macdonald, & Lowson, S.S.C.

Friday, February 4.

FIRST DIVISION.

[Lord Craighill.

FRANCESCO DALL' ORSO *v.* MASON & CO.

Ship—Charter-party—Lay-days—Demurrage.

It was agreed by charter-party that a ship should "with all convenient speed sail and proceed to a loading berth in Leith Docks, as ordered, and then load in 10 working days, as customary, a full and complete cargo," &c. The vessel entered the docks on 16th April, but application having been made for a crane berth, the loading was not commenced until 3rd May, when the vessel got her turn at the crane. The loading was completed within ten days of the vessel getting into the crane berth. It appeared that a berth at which vessels were loaded by hand, could easily have been obtained. — *Held*, in an action for demurrage on the charter party, that the lay days commenced at the time when the vessel got into the dock, and not when she got to the crane berth.

This was an action for demurrage by the owner of the vessel "Presidente Washington" against the charterers thereof. The terms of the charter-party were that the vessel called the "Presidente Washington" should, with all convenient speed sail and proceed to a loading berth in Leith Docks, as ordered, and there load in ten working days, as customary, a full and complete cargo of steam coals." The vessel proceeded to Leith and discharged her cargo. She finished discharging on 14th April. On 15th all was made ready for receiving cargo, and on the 16th notice was given to the charterers that she was ready and lying in the dock. On the 13th April the defenders had entered the vessel's name in the harbour books for a turn for loading at a crane berth, but as a number of ships had been previously entered for their turn, she did not get under the crane until 3d May, and the loading was finished on 12th May. The question was, when the lay days began to run.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 12th July* 1875.—The Lord Ordinary having heard parties' procurators on the closed record, proof, and productions, and having considered the debate and whole process—In the first place, finds as matter of law that, according to the sound construction of the charter-party sued on, No. 6 of process, by which it was contracted that the vessel called the 'Presidente Washington' should, 'with all convenient speed, sail and proceed to a loading berth in Leith Docks, as ordered, and there load, in ten working days, as customary, a full and complete cargo of steam coals,' the lay-day did not begin to run till the ship had reached the loading berth chosen, and to which she was ordered by the defenders, the charterers: In the second place, finds, as matters of fact—(1) That the said vessel was ready to take in the stipulated cargo on 16th April last, and of this intimation was given by the master to the defenders; (2) That there are crane berths, and also other berths at which vessels are loaded by hand, at Leith Docks; but though coal is frequently loaded, and gas-coal is almost always loaded, at these other berths, by much the greater part of the coals shipped at Leith are loaded at crane berths; (3) That though the "Presidente Washington" was, as aforesaid, ready to take in cargo on 16th April, and though on 13th April, in anticipation of this, the defenders entered the vessel's name in the harbour books, that she might obtain from the harbour authorities a turn for loading under the crane, she, in consequence of the number of vessels which had previously been entered for their turn, did not get under the crane till 3d May; and (4) That upon that day a part of her cargo was taken in, and, notwithstanding interruptions in the course of loading, her loading was completed on 12th May, which was within ten days from the day on which she entered her loading berth: Therefore sustains the defences, assoilzies the defenders from the conclusions of the summons, and decerns: Finds the defenders entitled to expenses, of which allows an account to be given in, and remits that account when lodged to the Auditor for his taxation and report.

"*Note.*—The meaning of that clause of the charter-party quoted in the foregoing interlocutor is really the only thing which is in controversy. If the pursuer's reading is to be taken, the defenders do not dispute that the demurrage claimed is due; and, on the other hand, should that of the defenders be adopted, the pursuers admit that the claim must be disallowed.

"The pursuers' reading is this—They say that