161st sections of the Bankruptcy Act. There being no provision made by that Act for the necessary expense of such proceedings in Court, the accountant presented a memorial to the Lord Advocate, submitting that a prosecution should be raised at the public expense. This memorial was laid before the law officers of the Crown, who, on 11th February 1870, advised the accountant as follows:—'We are of opinion that in present circumstances it is not expedient and proper that any proceedings should be taken at the public expense. But the accountant in bankruptcy will, we believe, hold it to be his duty to report the circumstances of the case to the Court.' The accountant considers it to be his duty to report the circumstances of the case to the Court."

BURNET for petitioner.

THOMS in answer.

At advising—

LORD PRESIDENT—The trustee resists the application to lodge the inventory and accounts and documents that it is his duty to lodge; and there are various other allegations made and proved against him. I think it is therefore our duty to remove him from his office, even though it be bad for the creditors. But I wish it to be understood that I think we should do so because of the report by the Accountant in Bankruptcy, and not on the ground of the petition presented to us by the bankrupt's son. I entirely reserve my opinion on the competency of doing so in such a case. But in the meantime I think this trustee should be removed, and the creditors desired to meet to elect another.

LORD DEAS—I adopt the statements your Lordship has made, and the conclusion your Lordship has arrived at. I say nothing as to the competency of the petition.

LORD ARDMILLAN—I have nothing to add.

LORD KINLOCH—Except for the interposition of the Accountant in Bankruptcy, I think we could not have taken action in this case; for I entertain no doubt that the petition of Mr Robert Lang is incompetent. The petition is for removal of the trustee in George Lang's sequestration, and the petitioner is not a creditor in the sequestration. I do not say that it may not be competent for a party interested, as the petitioner represents himself to be, in the residue of a sequestrated estate, to complain to the Court of any acts of the trustee by which his interests are prejudiced. But the present is not an application of this sort. It is a prayer for removal of the trustee for misconduct in office; and to this effect a petition at the instance of one not a creditor seems to me clearly incompetent. By the 74th section of the statute it was made requisite that one-fourth in value of the creditors should concur in the application.

But the report of the Accountant in Bankruptcy both entitles, and, as I think, calls on us, to take notice of the conduct of the trustee. I cannot dissent from the proposal to remove him from his office. Besides direct breaches of the statute, his conduct, as a whole, has been marked by great neglect of duty. The sequestration has endured for sixteen years. For a great many years back the simple duty of the trustee has been to sell a small heritable property to the best advantage, divide the price, and pay over any surplus to the bankrupt's heir. The trustee has done nothing except to go on incurring a law agent's account to the extent, it is said, of upwards of £600. It is impossible for the Court to allow such an one to continue in the management of the estate.

The trustee was found liable in expenses to the petitioner from the date of the Accountant's report being lodged.

Agent for Petitioner—John Walls, S.S.C.

Agents for Trustee—Lindsay & Paterson, W.S.

Friday, March 18.

SECOND DIVISION.

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

Trust—Division of Estate—Equal Shares—Grandchildren—Intention—Casus improvisus. A party who had two sons, by his settlement divided his estate between them. There were various provisions in the trust-deed, under which the grandchildren were to participate equally in their fathers' shares of the estate. The deed provided that, in the event of the first deceaser of the two sons dying without leaving lawful issue, the trustees were to hold his share for the survivor and his issue, according to the equal shares appointed by the deed. The truster died, leaving two sons. One died in 1856, leaving seven children, and the other in 1865, without issue. The deed did not provide for the event which happened, that the second deceaser died without issue. *Held*, in a question with the children of the first deceaser, that the shares of the estate which would have gone in equal shares to the children of the second deceaser, if he had had any, went in the same way to the children of the first.

This was a process of multiplepoinding brought by the trustees of the late James Aberdein, merchant in Dundee, for the purpose of distributing his estate. The question arose upon the construction of the deceased's settlement, which, after providing annuities to his two sons, James and John, provided as follows:—

"*Ninthly*, Declaring if either of the said James Aberdein or John Aberdein shall die leaving lawful issue, then and immediately after that event my said trustees shall get the whole property, heritable and moveable, under their management, in virtue thereof, valued and appraised by two men, and shall either sell the half of the said property and subjects, as shall be thus ascertained, or borrow money to the amount of half the value of said property and subjects, and burden the said whole heritable property with the same; and my said trustees shall hold the moneys thus received in trust and for behoof of the child or children of such deceaser, and divide the same equally between or amongst them, share and share alike, if there shall be more than one, each to receive his or her share as they shall respectively attain the age of twenty-one years complete; and in the event of the death of any of said children, the share of the deceaser or deceasers to be divided among the survivors if more than one, or if only one, to be paid to such one on its attaining majority as aforesaid; but if there be but one, then the whole of said moneys shall be paid to such child on its attaining the age of twenty-one

years complete, it being understood and declared that my said trustees shall divide the annual profits of said moneys to the said child or children until they shall respectively receive their proportions of the sums as above directed. *Tenthly*, Declaring also, that in the event of the said James Aberdein and John Aberdein both dying leaving lawful issue, then and in that case my said trustees shall, immediately after the death of the last survivor, sell and dispose of the remainder or half of the said trust-estate, the other half having been previously set apart for the heirs of the first deceaser, as before directed, and that either by public roup or private bargain, as they may think proper, and shall hold the free produce of the said trust-estate for the use of the child or children of the last survivor of my said two sons, and shall divide the same between or amongst the child or children of the said last deceaser, in the same way and manner as is provided for the children of the first deceaser; and farther declaring, that in the event of the first deceaser of my said two sons dying without lawful issue, his share and interest in the said trust property shall be held by my said trustees and applied by them for the use and behoof of the survivor, my said two sons, or his issue as aforesaid. *Eleventhly*, In the event of both the said James Aberdein and John Aberdein dying without lawful issue, or failing such issue, then and in that case my said trustees shall immediately thereafter dispose of the whole trust-estate under their management, either by public roup or private bargain, as they may think fit; and my said trust-estate being thus converted into cash, I appoint my said trustees, after paying all necessary and proper expense attending the execution of the present trust, to pay to the treasurer for the time being of the Dundee Female Society, for the uses and purposes of that Society, the sum of £100 sterling, and to divide the residue and remainder of the said proceeds as follows, viz.:—One-fourth to the treasurer for the time being of the Gaelic School Society," &c.

Mr Aberdein was survived by his two sons, both of whom, however, are now dead. John died in 1856, leaving seven children; James died in 1865 without issue. The present competition arose among the children of John, and related to the share which would have fallen to the children of James had he left children. The property was almost entirely heritage, and John's eldest son claimed the whole of the shares in question as the heir-at law of the testator, on the footing that the trust-deed made no provision for the particular case which had occurred—viz., by the *second* deceaser of the two brothers dying without issue. The younger children, on the other hand, claimed that the whole property should be equally divided, contending that although the contingency which had occurred had not been expressly provided for, it had been so by implication.

The Lord Ordinary (JERVISWOODE) pronounced the following interlocutor:—"The Lord Ordinary having heard parties and considered the debate, with the record in the competition, productions, and whole process, Finds that the trust-deed and settlement executed by the deceased James Aberdein, and under which the real raisers and pursuers are trustees, is so framed as, under its terms, to operate in the matter of the succession of the truster a conversion of his estate, so far as the same was heritable in his own person, into moveable estate; so that, as respects the said matter of succession, the same, whether consisting in point of fact of heritage or of moveables, must be treated and dealt with in point of law as moveable; and, with reference to the preceding finding, sustains the first plea in law stated on behalf of the claimants Jane Aberdein and William Aberdein, and of Eliza, Jemima, and Oswald Aberdein respectively: Repels the first plea in law for the claimant John Aberdein; and, before further answer, appoints the cause to be enrolled that parties may be heard as to the application of the present interlocutor, in the matter of ranking the several and specific claims of the parties, claimants in the competition; reserving meantime the matter of expenses.

"*Note.*—Nothing is in law more true than that the Court cannot make a will for one who, though he may with a settled intention to do so have made the attempt, has failed in the execution of his purpose. But when the attempt has been made, it is the duty of the Court to endeavour by all fair modes of interpretation to arrive at and to construe the true meaning of the writing; and the cases are few in which this cannot, with such accuracy as the law requires, be accomplished. Here the Lord Ordinary is not perhaps driven to consider or to deal with an extreme case of this class; but however that may be, his own opinion in regard to the true intention of the truster, the deceased James Aberdein, is now given effect to and embodied in the present interlocutor. The Lord Ordinary has not dealt specifically with the claims for the parties, but he assumes that, when the questions of law which have been raised and are now disposed of, so far as respects the Lord Ordinary's judgment, are finally settled, their application will not give rise to further serious question."

The eldest son reclaimed.

FRASER and KINNEAR for him.

BIRNIE and MACKINTOSH for Younger Children.

The Court, while regarding the case as one of difficulty, were of opinion that there was sufficient evidence of the testator's intention to divide his property equally among his grandchildren. The grounds of judgment, as stated by the Lord Justice-Clerk, were shortly these—(1) It was clear that the truster intended to dispose of his whole property; (2) The residuary bequests were to take effect only in the event of both sons dying without issue; (3) In no part of the deed was there any indication that one grandchild shall receive more than another.

Agents for Eldest Son—Murray, Beith & Murray, W.S.

Agents for Younger Children—James Webster, S.S.C., and N. M. Campbell, S.S.C.

HIGH COURT OF JUSTICIARY.

Monday, March 14.

LORD ADVOCATE *v.* ROBERTSON.

(Before LORD JUSTICE-CLERK and LORD NEAVES.)

Indictment—Relevancy—Slandering a Judge—Common Law—Act 1504*—Desuetude—Specification—Privileged Communication.* An indictment charged a panel with the crime of slandering a Judge in reference to his official conduct or capacity at common law, and also with the