scription by the blind. On the contrary, to facilitate such subscription was the Legislature's intent.

Accordingly, my opinion is that the Lord Ordinary's judgment is right.

In repelling the 4th plea in law for the pursuers, —a plea founded on the alleged express nullity of this deed—I think the Lord Ordinary has pronounced a decision in accordance with legal principle and precedent; and there is no other question before us, for if that 4th plea is repelled the action of removing falls to be dismissed.

Lord Mure—I am of the same opinion as your Lordships. Had this docquet been under the old law, in a case where only one notary was required, I should have thought it a good one, because it expressly bears that it was read over to the granter and that she gave authority. In addition, I find that Mr Bell says that where parties cannot write, their deeds may be subscribed for them by notaries "duly authorised so to do." Therefore it is the authority which all the authorities consider essentially necessary. The question here is, whether the late statute has made any essential change. Sec. 41 seems to me to make it necessary that the fact of the deed having been read over by the granter should be stated in the docquet, and that is the only additional requisite prescribed, and so I think that this docquet contains all that sec. 41 enacts, and all that the old law required.

The Court adhered.

Counsel for Pursuers — Fraser — J. A. Reid. Agents—Philip, Laing, & Monro, W.S.

Counsel for Defender — Morrison. Agent — R. H. Arthur, S.S.C.

Friday, January 21.

FIRST DIVISION.

SPECIAL CASE—GEORGE FERRIER (LEIGHTON'S TRUSTEE) AND OTHERS.

Succession—Trust—Fee and Liferent—Vesting.

By post-nuptial settlement a husband and wife disponed each of them to the other, in case of his or her surviving, the whole estate, heritable and moveable, belonging or due, or which should belong or be due to them or either of them at the dissolution of their marriage by the death of either of them, and they appointed the longest liver of them to be sole executor of the first deceaser. After the death of the longest liver the property was to go to trustees, who were to divide it into two equal shares, one of which was to go to the legatees or next-of-kin of the husband, and the other to the legatees or next-of-kin of the wife. The deed also contained the following clause — "And such longest liver of them shall liferent the whole estate, heritable and moveable, that shall belong or be due to either of the parties, or in communion betwixt them at the death of either of them (excepting always their wearing apparel as aforesaid), and shall have the full and entire administration and management thereof during his or her life, with power to sell, use, and dispose thereof for onerous causes, at pleasure, without the interference or control of the legatees or relations of either party during his or her life, but such longest liver shall not have power gratuitously to gift or dispose of the said estate to the prejudice of the legatees or nearest of kin of the first deceaser."—*Held* (1) that the wife, who survived, had not the fee, but only the liferent of her husband's share of the estate; (2) that she was not entitled to dispose of her husband's share by ante-nuptial contract with a second husband, that being a gratuitous disposal; and (3) that the right of the first husband's next-of-kin, failing legatees, vested at his death.

The questions in this case arose on the construction of a post-nuptial contract of marriage entered into between the late Mr and Mrs Leighton, by which they "mutually and reciprocally give, grant, assign, and dispone each of them to the other, in case of his or her survivancy, all and sundry lands, heritages, tenements, tacks, adjudications, heritable bonds, and other heritable estate whatsoever, and all and sundry goods, gear, debts, sums of money, and other moveable estate whatsoever, belonging or due, or which shall belong or be due, to them or either of them at the dissolution of their marriage by the death of either of them, with the whole writs, evidents, vouchers, and instructions of the same, (excepting however from this conveyance the wearing apparel of both parties); and they name and appoint the longest liver of them to be sole executor of the first deceaser, with full power to give up inventories, confirm the same, and to do everything that any executor can do by law, but always with and under the conditions and provisions after specified, with and under which they surrogate and substitute the survivor of them, after the death of the first deceaser, in their full right and place of the premises; but declaring always, as it is hereby specially provided and declared, that the conveyance above written is granted for the uses and purposes, and with and under the conditions and provisions underwritten, viz. for payment, in the first place, of the death bed and funeral expenses, and the just and lawful debts of the first deceaser. *Secondly*, the longest liver of the said John Leighton and Elizabeth Leighton shall, as soon as may be conveniently after the death of the first deceaser, make up an inventory and valuation of the whole estate and effects, heritable and moveable, falling under the conveyance above written, deducting therefrom the whole debts, expenses, and charges of every description falling thereupon, and shall deliver a duplicate of such inventory subscribed by him or her to one or other of the trustees after named, to be kept by him for the use of the nearest in kin or legatees of the first deceaser, and such longest liver of them shall life-rent the whole estate, heritable and moveable, that shall belong or be due to either of the parties, or in communion betwixt them at the death of either of them (excepting always their wearing apparel as aforesaid), and shall have the full and entire ad-

ministration and management thereof during his or her life, with power to sell, use, and dispose thereof for onerous causes, at pleasure, without the interference or control of the legatees or relations of either party during his or her life, but such longest liver shall not have power gratuitously to gift or dispose of the said estate to the prejudice of the legatees or nearest of kin of the first deceaser. *Thirdly*, After the death of the longest liver of the said parties, the said estate and effects shall devolve and belong to George Ferrier, tenant in Scotstown, Alexander Leighton, tenant in Drumcairn, and James Stewart, tenant in Ballhal, land the acceptor or acceptors, survivors or survivor, of them, in trust, for the uses, ends, and purposes following, and said trustees shall divide the same into two equal shares, after deduction therefrom of the funeral expenses of such longest liver, and of the whole debts and expenses chargeable upon said estate, including the expense of executing the trust hereby created, and one just and equal share thereof shall belong and be paid or conveyed to any person or persons, legatee or legatees, to be named or appointed by or for the purposes to be mentioned in any deed or writing that may be executed by the said John Leighton, or failing his executing such, the same shall be paid or conveyed to his nearest-in-kin, equally share and share alike, whether they be males or females, or the said property be heritable or moveable, and the other just and equal share thereof shall belong and be paid or conveyed to any person or persons, legatee or legatees, to be named or appointed by or for the purposes to be mentioned in any deed or writing that may be executed by said Elizabeth Leighton, or failing her executing such, the same shall be paid orc onveyed to her nearest-in-kin, equally share and share alike."

The *Fifth* purpose of the deed was — "In dividing said estate into shares, said trustees shall not include any of the interest, rents, or profits accruing thereon during the life of the longest liver of the said John Leighton and Elizabeth Leighton, nor any estate, property, or effects which may have been acquired by the longest liver of said parties subsequently to the death of the first deceaser of them, but only such effects as are included in the inventory appointed to be made up by the longest liver of them aforesaid, and where the *ipsa corpora* of the property contained in said inventory shall be still in existence and in the hands of the survivor of the parties at his or her death, then the said trustees shall take possession thereof, and sell, dispose of, or otherwise recover the same, but where the *ipsa corpora* of such estate or effects are not in the hands of such survivor at his or her death, then the value thereof, as shown by and contained in the foresaid inventory, shall be accounted for by the representatives of such survivor to the said trustees, and they shall recover such values accordingly, and no more, as the true amount and value of such property; but in case the longest liver of the parties shall neglect to make up such inventory and valuation, then the whole property and estate left by him or her after his or her death shall be held to have belonged to the parties at the dissolution of their marriage, and be taken possession of and divided by the said trustees as above directed."

Mrs Leighton survived her husband and married a second time, her husband being Mr David Craig, writer in Brechin, and they entered into an ante-nuptial contract of marriage, whereby they mutually and reciprocally assigned and disponed each of them to the other, in case of his or her surviving, the whole estate, heritable and moveable, belonging or due, or which should belong or be due, to them or either of them at the dissolution of said intended marriage by the death of either; and they appointed the longest liver of them to be sole executor of the first deceaser. By the said ante-nuptial contract it was provided, in the third place, that after the death of the longest liver of the spouses the estate thereby conveyed should devolve and belong to certain persons as trustees, of whom the second party of this Special Case was the sole accepting survivor.

After the death of Mr and Mrs Craig this Special Case was brought by—"(1) George Ferrier, sometime tenant in Scotston, now residing in Montrose, as sole surviving trustee under the post-nuptial contract between the late John Leighton, merchant in Brechin, and the late Mrs Elizabeth Cuthill or Leighton, afterwards Craig, dated 15th August 1833; (2) The said George Ferrier, as sole surviving trustee under the ante-nuptial contract of marriage between the late David Craig, writer in Brechin, and the said Mrs Elizabeth Cuthill or Leighton or Craig, dated 27th February 1843; (3) The said George Ferrier John Don, some time agent for the City of Glasgow Bank in Brechin, now residing there, and George Henderson, nurseryman in Brechin, accepting and acting trustees under the trust-disposition and settlement of the said Mrs Elizabeth Cuthill or Leighton or Craig, dated 25th August 1871, and James Craig, solicitor in Brechin; (4) William Angus, merchant in Brechin, general disponee and universal legatory under the disposition and settlement of the late Helen Leighton, merchant in Brechin, dated 18th March 1847; and (5) Robert Leighton, residing in New Rattray, Blairgowrie, and George Davis Leighton, residing in Brechin, the surviving next-of-kin of the said deceased John Leighton as at the death of the said Mrs Elizabeth Cuthill or Leighton or Craig."

The following questions were submitted for the opinion and judgment of the Court:—"(1) Did the ante-nuptial contract of marriage between Mr and Mrs Craig effectually convey the fee of that one-half or share of the estate and effects falling under the conveyance in the post-nuptial contract between Mr and Mrs Leighton, which was destined, in the events therein stated, to the legatees or nearest-in-kin of John Leighton, and exclude the liability of Mrs Craig or her representatives to account to the nearest-in-kin of John Leighton for said half or share?—If this question should be answered in the negative, the opinion and judgment of the Court was further requested upon the following additional queries, viz.:—(2) Is the fourth party entitled to the fee of the share falling to the nearest-in-kin of John Leighton under the said post-nuptial contract? Or (3) Are the fifth parties entitled to the fee of the said share? (4) In accounting to John Leighton's nearest-in-kin for their share of his estate, do all the payments specified in the thirteenth and fourteenth articles hereof, with

interest thereon, fall to be deducted from their share, or any, and which of them? (5) Is the property which was acquired by Mrs Leighton or Craig subsequently to John Leighton's death, liable to be applied, so far as necessary, towards making up the sum to which John Leighton's nearest-in-kin are entitled under the said post-nuptial contract and the said inventory and valuation? (6) Do the items two and three of the heritable estate mentioned in the said inventory and valuation form part of the estate falling under the conveyance in the post-nuptial contract?"

The payments referred to in question Four were certain payments made by Mrs Leighton or Craig to the next-of-kin of John Leighton. Item two of the heritable estate, referred to in question Six, was certain house property, the title to which was to John Leighton and his wife, and the longest liver of them, and to the heirs and assignees whomsoever of the longest liver of them. Item three of the heritable estate, also mentioned in question Six, was a sum secured to Mrs Leighton by the settlement of her father over subjects belonging to her brother, and conveyed by her to her deceased husband in case of his survivance.

Argued for the first party—No unlimited power of disposal was given to Mrs Leighton by the post-nuptial contract; her power was little more than a power to change investments.

Authorities—*Ramsay* v. *Beveridge*, March 3, 1854, 16 D. 764; *Kerr* v. *Ure*, June 28, 1873, 11 Macph. 780.

Argued for the second and third parties—Mrs Craig had a fee and power of disposal, and by her ante-nuptial contract she disposed of the estate. The fifth purpose of the post-nuptial contract was intended to provide for the case of investments. There was no real distinction between the present case and the cases of *Lord* v. *Colvin* and *Dick* v. *Gillies*. Where the destination was to a party's own heirs, there was only one period at which they could be ascertained, viz., his own death; but when the destination was to the heirs of A, there was the choice of two periods, A's death or the testator's. The word "use," in the second purpose, meant something more than liferent, for that had been already given in express words. The husband's intention was that his wife should use or spend the money in any way which was for her own advantage and comfort, only she was not to give it away gratuitously, without benefit to herself. The fifth purpose was a qualification and limitation, not of the trust to Mrs Leighton, but of that which would come into operation at her death, viz., that to George Ferrier.

Authorities—*Pearson* v. *Corrie*, June 28, 1825, 4 S. 120; *Stone's Trs.* v. *Gray*, May 29, 1874, 1 Ret. 953. *Lord* v. *Colvin*, March 18, 1848, 23 D. 111; July 15, 1863, 3 Macp. 1083; *Dick* v. *Gillies*, July 4, 1828, 6 S. 1065.

Argued for the fourth party—Mrs Leighton was a trustee under the post-nuptial contract. In order to raise up a trust it was not necessary that there should be a distinct conveyance in trust. She held two characters; she was first appointed trustee, and later on was appointed liferentrix, and as trustee she held for her own benefit as liferentrix. On a sound construction of the post-nuptial contract, a trust was created in the surviving spouse, and the trust in favour of Ferrier was a continuation of that trust. The beneficial interest vested *a morte testatoris*, and in the case of the death of a beneficiary before the surviving spouse, his executor would have a vested right to his succession. Next-of-kin were here the heirs *in mobilibus*, and there was nothing in the deed to show that those heirs were not to be ascertained as usual at the death of the testator.

Authorities—*Mein* v. *Taylor*, Feb. 23, 1830, 4 W. and S. 22; *Scott* v. *Penicuick*, June 12, 1855, 17 D. 840; *Connell* v. *Grierson*, Feb. 14, 1867, 5 Macph. 379.

Argued for fifth party—Next-of-kin meant next-of-kin as ascertained at the death of the wife.

Authorities—*Lord* v. *Colvin*, March 18, 1848, 23 D. 111; July 15, 1865, 3 Macph. 1083; *Dick* v. *Gillies*, July 4, 1828, 6 S. 1065.

At advising—

Lord President—The questions raised in this Special Case are concerning the construction of a post-nuptial contract of marriage entered into by the late Mr and Mrs Leighton, and dated August 15, 1833. It appears that Mrs Leighton survived her husband and married again, and the first question we have to consider is, whether by her ante-nuptial contract of marriage with her second husband, Mr Craig, she effectually conveyed the estate which was settled on her by the former contract, and the decision of that question depends on whether she had the fee of that estate and the power of disposing of it. Now, the answer to that involves a consideration of the whole clauses of the post-nuptial contract—(*His Lordship here read the clauses quoted above*).

Now, looking at the second provision of the deed alone, its general purpose is quite intelligible. They are to enjoy the property together during their joint lives; then on the death of one of them the longest heir is to have the sole enjoyment of it; and after the death of the longest liver the estate is to go to three trustees, who are to divide it into two just and equal shares, and give the one share to the legatees, whom failing the next-of-kin of the husband, and the other shares to the legatees, whom failing to the next-of-kin of the wife.

It was contended originally that the longest liver was to have the absolute fee of the estate, and so that the right of the legatee or next-of-kin was a mere right of substitution, but ultimately that position was rather abandoned, and Mrs Leighton's right to dispose of her husband's share was rested on this, that her right as liferenter was combined with a power of disposal. That depends on the construction to be put on the words at the end of the second purpose. They are as follows:—"And such longest liver of them shall life-rent the whole estate, heritable and moveable, that shall belong or be due to either of the parties, or in communion betwixt them at the death of either of them (excepting always their wearing apparel as aforesaid), and shall have the full and entire administration and management thereof during his or her life, with power to sell, use, and dispose thereof, for onerous causes, at pleasure, without the interference or control of the legatees or relations of either party during his or her life, but such longest

liver shall not have power gratuitously to gift or dispose of the said estate to the legatees or nearest of kin to the prejudice of the first deceaser." Now, it appears to me that this is not a power of disposal entitling the longest liver to dispose of the estate for every onerous cause, which, however onerous in a question with the disposer, was still a conveyance to the prejudice of the next-of-kin. I think the power of disposal is given for the purposes of management only, and is auxiliary to the purposes of management. Then it is provided further that the longest liver is not to have the power of disposing gratuitously of the estate. Now, under the first part of the clause the longest liver would have power to sell the estate, but not except for a sufficient price, for that would be gratuitous in a question with the legatee or next-of-kin. It was very ingeniously argued that Mrs Leighton, on her second marriage, did dispose of the estate for onerous causes, because she did so by marriage-contract, and at the same time the counsel for the next-of-kin had to admit that if she had sold the estate she might have done so, but the money would have been a *surrogatum* for the estate. Apparently, then, the only thing she could do to their prejudice was to settle it by marriage-contract. That would be a most extraordinary thing to maintain, for it would be to say in effect, the only power which her first husband gave her over his estate was to give it to her second husband. I think the fair construction is, that in order to give the longest liver full power of management, the power of onerous disposal was given, while the power of gratuitous disposal was forbidden, and I think that to give the estate away by marriage-contract is gratuitous.

If any doubt remained upon that point, it would be removed by an examination of the other parts of the deed. The first duty of the longest liver is to make up an inventory, of which a duplicate is to be given to the trustees for the benefit of the legatees and the next-of-kin, and that shows that the legatees and next-of-kin are supposed to have an interest in the estate; and when you read the fifth purpose the matter is still clearer. It is as follows—(*His Lordship here read the clause.*) Now nothing can be clearer than that the intention and purpose of the inventory was to furnish means for ascertaining at the death of the longest liver the condition of the estate at the death of the first deceaser, and the longest liver is bound to make good that valuation out of the estate left to such longest liver, and further, if the duty of making up the inventory be neglected, then the presumption is to be that the whole estate belonged to the spouses at the dissolution of the marriage. I think Mrs Leighton had no power to dispose of the estate by antenuptial contract, and that disposes of the first question. The second and third questions may be taken together and resolve themselves into this alternative, whether the next-of-kin of the husband, as ascertained at his death, or at his widow's death, are to take? That depends on the construction of one clause. The direction to the trustees is to divide the estate into two equal shares, and one just and equal share thereof shall belong and be paid or conveyed to any person or persons, legatee or legatees, to be named or appointed by or for the purposes to be mentioned in any deed or writing that may be executed by said John Leighton, or failing his executing such, the same shall be paid or conveyed to his nearest in kin, equally share and share alike, whether they be males or females, or the said property be heritable or moveable, and the other just and equal share thereof shall belong and be paid or conveyed to any person or persons, legatee or legatees, to be named or appointed by or for the purposes to be mentioned in any deed or writing that may be executed by the said Elizabeth Leighton, or failing her executing such, the same shall be paid or conveyed to her nearest of kin equally share and share alike. I think this entirely a question of construction, and so the references in the argument to the cases of *Lord* v. *Colvin* and others is out of place. They can only apply in a case of intestate succession. Now, what do the parties mean by saying that one-half shall be given to the nearest of kin failing legatees of each spouse? I think these words must be taken in their ordinary sense; as meaning the heirs *in mobilibus* of each spouse. Now his heirs *in mobilibus* are those who stand to the husband in the position of next-of-kin at his death. This view receives strong confirmation when we look at the clause. The direction is not to give to the next-of-kin in the first place, but to any person or persons, legatee or legatees, to be named or appointed by or for the purposes to be mentioned in any deed or writing that may be executed by said John Leighton. Now, suppose the deed had been executed, naming legatees without any further destination, what would have been the result? It is quite clear that, the right of the surviving spouse being a mere right of liferent, the legatees must have taken a vested interest at the husband's death; there can be no doubt of that at all. Well, then, if the next-of-kin are to take such a right, they are conditional institutes failing legatees. But it seems to me that when a conditional institute takes under a condition which has to be purified, he takes what would have vested in the party first called had the condition not been purified. If it be once held that the next-of-kin take as conditional institutes, and so take a vested interest at the husband's death, they must be ascertained as at that date.

The fourth question is—"(4) In accounting to John Leighton's nearest in kin for their share of his estate, do all the payments specified in the thirteenth and fourteenth articles hereof, with interest thereon, fall to be deducted from their share, or any, and which of them?" That must be answered in the affirmative. The payments were made by Mrs Leighton to the parties whom we have just found to be entitled to one-half of the estate, and they were payments in advance of their shares. We have no facts stated sufficient to raise the fifth question, and the result of the sixth is that the second item in the inventory does, and the third does not, fall under the conveyance in the post-nuptial contract.

Lord Deas — By this deed of settlement the parties disponed their whole estate to the survivor of them, but I think it was not intended to give the survivor the fee of the estate, but, on the contrary, if the husband predeceased, the wife had a mere power of management by selling and so on. Then, by the following clause the

power given to the party first deceasing, to bequeath one-half of the estate, was a mere power which might or might not be exercised, and which, not being exercised, had no effect on the succession to the first deceaser. The result is, that the husband's share goes to his next-of-kin as ascertained at his death, or, according to the contention of one of the parties, as at the death of the wife who survived him. That part of the deed raises a most important question of a general kind, which, as far as I know, has never been previously decided. In the case of *Lord* v. *Colvin* I did not differ from the result which was arrived at by the rest of your Lordships. There was one point on which I thought that the very question had been raised and decided in a way different from the view taken by the majority of the Judges here. It was a decision by the other Division, and I thought that before we answered the question submitted to us by the Court of Chancery we ought to consult the other Division. On that matter, and that alone, I did not join in the opinion of the majority. But the same opinion having been given in two successive cases between the same parties—and I have no doubt given effect to by the Court of Chancery—I feel bound by the opinion so given as fixing the law of Scotland. Assuming that to be so, that in such a case the succession is *ab intestato*, and holding that the succession went to the next-of-kin as ascertained at the death of the testator, I do not think it applies to the present question. It is quite a different thing when the succession falls to be regulated *provisione hominis*, and when it is regulated *provisione juris*. Here it is the former, and I think it necessarily follows that we must look at the deed to see when the succession vested. It was at the death of the husband; and so the succession goes to his next-of-kin as ascertained at his death. There was no destination in the case of *Lord* v. *Colvin* to anyone, if the parties specially named failed, but here there is a destination to the testator's next of kin; there is here just what was wanting in *Lord* v. *Colvin*. Power, no doubt, was given to the first deceaser to dispose of one-half of the estate as he or she pleased, but that power was not exercised, and the only way that the power operates is that it leaves the destination simply in favour of the next-of-kin. I do not draw any inference from what might have happened if he had exercised his power; the whole case turns on the fact that he has not done so. The whole difference between the case of *Lord* v. *Colvin* is, that there there was no destination over, and here there is.

On the other questions I have nothing to add except that I agree with your Lordship.

Lord Ardmillan—I have no hesitation in answering the first question in the negative. Mrs Leighton was in my opinion not the fiar, and not entitled to convey to her second husband Mr Craig the fee of the share of the estate conveyed by the post-nuptial contract with her first husband Mr Leighton, and destined to his next-of-kin. I think, first, that she had not the fee; and secondly, that, not having the fee, she had not the power to convey the estate to her second husband. The ante-nuptial marriage-contract with Mr Craig was in one sense onerous, but viewed as an exercise of a power in the previous contract —a power not to be exercised to the prejudice of the next-of-kin of Mr Leighton—it was a gratuitous act, and I think not within the power of disposal. It would be very singular if such disposal by gift to her second husband were the intention of her first husband; and I agree with your Lordship that that is not the meaning of this deed. On the second question, I concur in the opinion that the fourth party, who, I understand, represents the nearest of kin at the death of Mr Leighton, is entitled to succeed; and that the fifth party, representing the nearest-of-kin at the death of Mrs Leighton, afterwards Mrs Craig, is not so entitled.

The decisions quoted, such as *Lord* v. *Colvin*, relating to intestate succession, do not in my opinion apply to this case, which is a case not of intestate succession, but of testate succession depending on the construction of a deed.

On the question of construction of the deed before us, I concur with your Lordship in the chair. The period for ascertaining the next-of-kin must, I think, be the same in the two cases; the one where the legatee was named, and the other where the condition was purified; and there being no nomination of legatees, the next-of-kin succeed. As matter of fact, no such nomination of legatees was made, but the power to make it must affect the question of construction.

On the other questions I have nothing to add except the expression of my concurrence.

Lord Mure—I am of the same opinion as your Lordships, and have nothing to add. I think it is clear that the first question must be answered in the negative. As to the second question, viz., the period when the next-of-kin are to be looked for, I do not think that *Lord* v. *Colvin* has any very close application. Here we must go by the terms of the deed, and I think the nearest-of-kin in the view of the parties were the nearest-of-kin at the death of John Leighton, and I think they mean his heirs *in mobilibus*, who must be ascertained at the death of the party. The other clauses make it still clearer. The provision that the survivor shall make up an inventory shows clearly that the parties meant are the next-of-kin at the time when the inventory was made up, that is, at Mr Leighton's death.

The Court pronounced the following interlocutor:—

> "In answer to the first question, Find and declare that the ante-nuptial contract of marriage between Mr and Mrs Craig did not effectually convey the fee of that one-half or share of the estate and effects falling under the conveyance in the post-nuptial contract between Mr and Mrs Leighton, which was destined, in the events therein stated, to the legatees or nearest-in-kin of John Leighton, and did not exclude the liability of Mrs Craig or her representatives to account to the nearest-in-kin of John Leighton for said half or share: In answer to the second question, Find and declare that the fourth party is entitled to the fee of the share falling to the nearest-in-kin of John Leighton, under the said post-nuptial contract: In answer to the third question, Find and declare that the fifth parties are not entitled toth fee of the said share: In answer to the fourth question, Find and declare that in ac-

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