which is specially and strenuously challenged, namely, the payment of a sum of money as a debt due to the father of the deceased. It is important to observe that while the petitioner complains that the trustee's administration has resulted in a small annual sum only being available for the testator's children, at the same time she does not present any case to justify us in condemning the trustee for refusing to make advances for the children out of the capital of the estate. Up to the present the children have received from their father's estate and from another source about £60 per annum, and considering their tender age and moderate requirements it is not possible to condemn the trustee for exercising his discretion in the way he has done.

I pass on to observe that it does not appear to be part of the petitioner's argument that there is any substantial case of danger to the extant estate. Nothing is said about the circumstances or the general conduct of the trustee to cause any feeling of alarm as to the safety of the estate now in his hands. The only question therefore is, whether his action in paying the alleged debt was such that for the safety of the estate we should remove him or appoint a judicial factor? It is very important in a matter such as the payment of debt, that the petitioner does not go the length of asserting that the trustee acted fraudulently, or was party to a trumped up claim by the father of the deceased, whom it is suggested he might prefer to his nieces. The importance of such an averment would be so great, that in view of the fact that the petitioner has abstained from making it we must treat the case on the footing that she was not in a position to make it. The question therefore comes to be, whether the lax or too easy conduct of the trustee in making the payment complained of is a sufficient ground for removing him from the office of trustee. Taking the case in that light, it is certainly not the kind of case described by Lord President Inglis in the case of *Gilchrist's Trustees*, where he says—"In order to justify us in adopting so extreme a measure as the removal of a trustee, there must be something more than mere irregularity or illegality. We are not in the habit of removing trustees unless there has been a decided malversation of office." I do not think that on the story of the petitioner, especially as instructed and enlightened by the documents which have been founded on, there is any case of the kind described by Lord President Inglis. It may be the case that the debt was insufficiently instructed, and that the trustee lost part of the trust estate by too easily admitting the validity of the claim, but that is not enough to justify us in removing him from his office.

The alternative is that we should sequestrate the estate and appoint a judicial factor. That is a question which must be determined upon a consideration of the estate, and it is obvious that if we decided to grant sequestration the ratio of our judgment would be that an action might immediately be raised by the factor either to recover from the deceased's father the amount paid to him, or to force the trustee to pay that amount back to the trust estate. On the facts before us I am not going to say whether, if such an action were raised and came to be tried, our decision would be one way or the other. I can quite see that there are grounds on which the question might be canvassed whether there was legal evidence of the alleged debt, but the question we have to decide is whether we are to pledge the remaining £300 of the estate in a litigation for recovery of that portion which has been paid away, for if that were not done the sequestration would be nugatory. I do not think we should take that course, and I am moved largely to this conclusion by the fact that our decision does not in any way prejudice the question whether these children, when they come of age, may not, if so advised, try to get the money back. In short, we say nothing as to the propriety or otherwise of the payment in question.

I am therefore in favour of refusing the petition in both its branches, and I may repeat that in so doing we in no way prejudice the merits of the question regarding the payment made to the deceased's father.

LORDS ADAM, M'LAREN, and KINNEAR concurred.

The Court refused the petition.

Counsel for the Petitioner — Clyde. Agent—James Ayton, S.S.C.

Counsel for the Respondent — Shaw — Graham Stewart. Agents — Curror, Cowper, & Curror, W.S.

Thursday, October 26.

SECOND DIVISION.

BLAIR *v.* THE CALEDONIAN RAILWAY COMPANY.

Expenses—Fees to Counsel—Jury Trial—Discretion of Auditor.

In an account of expenses of a jury trial for damages for personal injury which lasted one day at the sittings, the Auditor reduced the fee of senior counsel from £21 to £13, 13s., and of junior counsel from £15, 15s. to £8, 8s.

Objections were lodged, on the ground that the Auditor had reduced counsel's fee below the sums which had been fixed to be the proper fees by decisions of the Court.

The Court *refused* to interfere with the Auditor's discretion.

This was an action for damages for personal injury. The case was tried at the July sittings 1893. The verdict was in favour of the pursuer. The defenders were found liable in expenses. When the case

came before the Court on the pursuer's account of expenses, the pursuer objected thereto, on the ground that the Auditor had reduced the fees of senior counsel from £21 to £13, 13s., and of junior counsel from £15, 15s. to £8, 8s.

He argued—A series of decisions fixed the proper fees to be paid to counsel for an ordinary jury trial, and the Auditor had no discretion in reducing them except in exceptional circumstances, which did not arise here. If the Auditor had affixed a note to the account stating on what ground he had reduced the fees, his position would have been more intelligible. He had not done so, but had arbitrarily reduced the fees without stating any ground. The Court ought to restore the fees as originally given—*Cooper & Wood* v. *North British Railway Company*, December 19, 1863, 2 Macph. 346; *Campbell* v. *Ord & Maddison*, November 5, 1873, 1 R. 149; *Black* v. *Mason*, March 18, 1881, 8 R. 666.

At advising—

LORD JUSTICE-CLERK — The Auditor is an officer of Court, and necessarily he has before him the decisions of the Court in cases of this kind, and having these decisions before him, he considers whether any particular fee ought to be charged in a particular case. I should have been surprised if any decision had laid down that it was part of the Auditor's duty to give any particular fee in any particular class of cases, because in each case he must consider the whole circumstances of the case. The Auditor has considered the circumstances of this case, and thought that these circumstances justified him in cutting down this fee. Unless in very strong and exceptional circumstances I should not be inclined to interfere with the Auditor's discretion as to what a particular fee ought to be in any particular case.

LORD YOUNG—I admit I am surprised at this objection. Since I have sat in this Division we have always refused to interfere with the discretion of the Auditor in taxing these accounts of expenses. Not on the ground that we could not interfere, but on the footing that under no ordinary circumstances would we interfere with his discretion. It may be possible to imagine some case in which we would, but I think it would be only a fancy case. It is obvious—and most of us know it from experience—that the fees sent to counsel vary in different cases and for different reasons. We have now got as Auditor a gentleman who has had longer experience in such matters as this than anyone else, and whose good sense we all know, and it would require a very strong and exceptional case to make me interfere with his decision in any particular case. Here we have no ground for interference stated at all except it be this, that the Court ought to lay down a general table of fees for the guidance of the Auditor, and that we ought to revise his decisions in each case. That is not the kind of work for which the Court is fitted. I think we ought to dismiss these objections.

LORD RUTHERFURD CLARK—I think we ought not to interfere with the discretion of the Auditor in this case.

The Court repelled the objections and approved of the Auditor's report.

Counsel for the Pursuer—Salvesen. Agent —W. B. Rainnie, S.S.C.

Counsel for the Defenders — Guthrie. Agents—Hope, Mann, & Kirk, W.S.

Tuesday, October 31.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

ELIOTT'S TRUSTEES *v.* ELIOTT.

Trust—Powers of Trustees—Lease—Construction—Reduction.

A testator by his trust-disposition and settlement empowered his trustees to let the mansion-house of W. from year to year, or, if they should think fit, to permit the heir of entail entitled to succeed to his lands under a deed of entail which he had executed, to possess the mansion-house rent free, but only for such space as they should think proper.

The trustees subsequently granted a "lease," whereby, on the narrative of the powers conferred upon them by the testator, they let the mansion-house to the heir of entail for the space of one year from the term of Whitsunday 1879, "but renewable from year to year as after mentioned." It was further provided that in the event of the said heir "not giving notice to the trustees six months before the term of Whitsunday" in any year "of his intention to remove from the subjects let at said term . . . this lease shall be held to be renewed for another year."

In an action at the instance of the trustees, the Court *held* (1) that by the terms of the "lease" the trustees divested themselves of all power to terminate the heir of entail's occupancy of the mansion-house; and (2) that in doing so they had exceeded the powers given them by the testator, and therefore reduced the lease, and *ordained* the heir of entail to remove.

Sir William Francis Eliott of Stobs and Wells died on 3rd September 1864, leaving a trust-disposition dated 14th October 1863, whereby on the narrative that he had executed an entail of Wells on the same date, and that it was his purpose that his debts should be paid out of the rents of his lands as they accrued, and out of his moveable estate, and that when the heirs of entail should be put in possession of his said lands they should be so free of any burden or obligation in respect of his debts, he conveyed and made over to trustees the lands and estate of Wells, and his whole other estate, heritable and moveable. By