not to be held as converting it into a mere penalty clause, for the Courts must construe a contract according to the presumed intention of the contracting parties. The case lays down no new law, but professedly follows the decision in the *Clydebank Engineering Co.* (7 F. (H.L.) 77), to which we were referred in the course of the argument. It does not support to any extent the view that when an action is laid on breach of contract the damages are to be held as limited to the amount stipulated in a proper penalty clause.

The LORD JUSTICE-CLERK and LORD GUTHRIE concurred.

LORD DUNDAS, who was present at the advising, gave no opinion, not having heard the case.

The Court recalled the interlocutor of the Sheriff-Substitute and remitted the cause to him to allow parties a proof of their respective averments.

Counsel for the Pursuer (Respondent)—Morison, K.C.—Guild. Agents—Dalgleish, Dobbie, & Co., S.S.C.

Counsel for the Defender (Appellant)—Horne, K.C. — D. Anderson. Agent — A. C. D. Vert, S.S.C.

Wednesday, July 10.

FIRST DIVISION.

NOBLE AND OTHERS (NOBLE'S TRUSTEES), PETITIONERS.

Trust—Nobile Officium—Administration—Powers of Trustees—Application of Sum of Money out of Trust Estate in Meliorating Heritable Subjects Forming Part of the Estate—Long Lease of Same.

Part of a trust estate consisted of certain heritable subjects which were let on lease. The tenant intimated to the trustees that if they desired at the termination of the lease to continue his tenancy they would require to make certain meliorations on the subjects and renew the lease of them for a period of twenty-one years. The trustees being of opinion that it would be in the interests of all the beneficiaries in the estate that the present tenant should be retained, presented a petition to the Court of Session, in the exercise of its *nobile officium*, for power to uplift and apply a sum of money out of the trust estate in making the necessary meliorations on the subjects, and for power to grant a lease of them for twenty-one years.

Held that whether the trustees ought so to uplift and apply a sum of money out of the trust estate, and to grant a lease of the subjects for twenty-one years, were matters of administration which it was for the trustees to determine, and with regard to which the Court could not give advice.

Matthew Carstairs Noble, merchant, Jedburgh, and others, the trustees acting under the trust-disposition and settlement of the deceased Robert Noble, sometime merchant in Jedburgh, presented a petition to the Court for authority (1) to uplift from the capital of the trust estate a sum of money, and to apply it in altering and adding to the buildings on certain heritable subjects forming part of the trust estate, and (2) to grant a lease of these subjects for twenty-one years.

Robert Noble died on 24th June 1902, leaving a trust-disposition and settlement dated 28th April 1897, and relative codicils, all registered in the Books of Council and Session on the 28th June 1902, whereby he conveyed his whole estate, heritable and moveable, to certain trustees for the purposes therein mentioned. The truster, after providing for payment of his debts and funeral expenses, and making certain legacies and bequests of minor importance, directed that the residue of his estate should be held for his seven children in liferent and for their issue, and the issue of a daughter who had predeceased him, in fee. Certain of the children were given a larger share of residue than others, and the trustees were given power to advance to any of the children part, or even the whole, of the capital of the share of residue held for them in liferent.

The *trust* provided that "my trustees and executors shall be entitled to the fullest powers and exemptions usually conferred in similar cases according to the most liberal interpretation: And particularly I authorise and empower them to submit to arbitration or settle by the advice of counsel all disputed claims competent to or against the said trust subjects and estate or among the parties interested therein; to compound and take part for the whole of any disputed debts or claims; to lend out the whole or any part of the trust funds and estate on heritable security . . . or to invest the same . . . in the purchase of heritable property, feu-duties, ground annuals, or other heritages, and from time to time to alter and renew the securities as may be necessary or as may seem to them expedient; to hold the investments, whether heritable or moveable, in which the trust funds and estate may be invested at the time of my decease so long as it may seem to them expedient."

The *petition* stated, *inter alia*—"The capital value of the heritable and moveable estate at 31st December 1910 (the date of the last trust account) was £12,553, 14s. . . .

"Part of the heritable estate left by Mr Noble consists of the property No. 51 High Street and Smith's Wynd, Jedburgh, comprising the front tenement No. 51 High Street, three storeys in height, and outhouses and courtyard at back, and piece of ground at rear of these and extending to Queen Street, which street runs parallel to High Street. The tenement of buildings contains on the ground floor a large shop used and fitted as the Post Office of Jedburgh. The outhouses and courtyard also

form part of the post office premises. The piece of ground behind the courtyard is occupied as a tradesman's storeyard. The first flat of the tenement is occupied as a dwelling-house and the second flat consists of two dwelling-houses. The dwelling-houses enter from Smith's Wynd. The buildings were erected about the year 1891, and the whole property (which was acquired by Mr Noble in 1895 at the price of £1500) was valued in 1906 at £1575 by Messrs Cousin, Ormiston, & Taylor, architects, Edinburgh.

"At the date of Mr Noble's entry the ground floor or post office portion was let on lease for twenty years from Whitsunday 1892 to Mrs Margaret Black or Sinclair now M'Leod, postmistress, Jedburgh, with breaks in favour of either party at ten and fifteen years on six months' notice, and at a rent of £40 per annum, now increased to £46, 9s. 2d. by interest on certain alterations and additions. This lease is still current and expires Whitsunday 1912. Although the postmistress is the nominal tenant, the real tenant is the Postmaster-General. The dwelling-houses on the upper flats are let on annual tenancy, and the ground behind extending to Queen Street is at present let on condition that the tenant removes when desired.

"The following is the present rental:—

No. 51 High Street, Jedburgh, post office	£46	9	2
No. Smith's Wynd, dwelling-house on first flat, tenant Mrs Margaret M'Leod . .	18	0	0
No. Smith's Wynd, tenant John Scott	9	0	0
No. Smith's Wynd, tenant John Brown	9	0	0
No. Smith's Wynd, shed and ground behind post office, tenant James Purdie . .	6	0	0
	£88	9	2

The property is held burgage.

"In view of the transfer of the telephone system to the Post Office in 1912 it was intimated to the petitioners by the Postmaster-General that larger premises would be required as soon as possible for the working of the post office business at Jedburgh, and that if it was desired to continue the Postmaster-General as tenant on the expiration of the present lease it would be necessary that the petitioners submit terms of lease of extended and altered premises to meet the requirements of the post office service. The petitioners being of opinion that in the interest not only of the liferent beneficiaries, but also of the persons having an interest in the capital of the trust estate, terms of renewal of tenancy should be arranged with the Postmaster-General, opened negotiations through the Surveyor's Department, General Post Office, Edinburgh, in the course of which there was submitted to the petitioners by the surveyor a rough sketch plan of alterations on the existing premises and of additional buildings proposed to be erected on the ground at back of the present post office premises.

"The petitioners thereupon remitted to Mr J. M. Johnston, architect, Leith, to visit the property and prepare plans and specifications and to adjust the details thereof with the surveyor, and thereafter to report to the petitioners with an estimate of the cost of the proposed alterations and additions.

"On 26th September, 15th November, and 12th December 1910, Mr Johnston reported to the petitioners with plans and specifications of works prepared to the requirements of the post office surveyor, and with an estimate of cost amounting to £1000.

"Concurrently with the preparation of the plans and estimate, the trustees' law agents had tentatively adjusted with the post office surveyor terms of lease which would probably be acceptable to the Postmaster-General.

"The plans and specification and estimate having been submitted by the surveyor to the Postmaster-General, the petitioners were requested to submit terms of lease for the Postmaster-General's consideration.

"The petitioners accordingly submitted to the Postmaster-General an offer of lease, dated 15th April 1911, of the altered and extended premises for twenty-one years from the term of Whitsunday 1912 at a rent of £96, made up of £40, the original rent in the present lease of the post office premises, and £6, the rent of the ground behind, and £50, being 5 per cent. on £1000, the estimated cost of the alterations and new works, the Postmaster-General to have the option on six months' notice before any term of Whitsunday to take into the premises let the dwelling-house on the first flat at the then current rent. This offer was, however, made expressly subject to approval by the Dean of Guild Court of the plans and alterations and new buildings, and to such variations on the plans as might be required by that Court or as might be found necessary to avoid encroachment on rights of adjoining proprietors, and in particular the offer was stated to be conditional on authority being granted to the petitioners by your Lordships (1) to make the alterations and extensions and apply the trust funds in payment of the cost thereof; and (2) to enter into the lease. The surveyor has by letter, dated 8th August 1911, intimated to the petitioners that their offer has been accepted, and he requested that the petitioners take such steps as might be necessary for the confirmation of the offer by your Lordships. . . .

"The alterations and additions to the existing buildings consist of internal rearrangement of the existing premises by partitions and screens, and involve the removal of the back wall of the building and the removal of the out-buildings on the ground floor and the insertion of steel beams to carry the superstructure, and the erection of new buildings on the back ground to form sorting-room, retiring rooms, and lavatories. . . .

"The petitioners consider it advisable in the interest of the liferent beneficiaries and to preserve the capital value of this

property that the retention of the Postmaster-General as tenant of the premises for a term of years should be secured. The petitioners are further of opinion that the work shown on the plans is the minimum necessary to meet the Postmaster-General's requirements, and that the cost has been stated at a moderate figure. The petitioners are also of opinion that the rent which the Postmaster-General offers is a full rent, and that as the Postmaster-General is prepared to accept a lease for the term of twenty-one years it would be advisable to thus secure a good tenant for a substantial period. The petitioners are accordingly desirous of employing a portion of the capital of the trust in defraying the cost of these additions and alterations, and of entering into a lease on the terms and for the period stated. No express power is conferred upon the petitioners by the trust-disposition and settlement and codicil to expend capital of the trust estate in the erection of buildings, or to enter into a lease of twenty-one years. The petitioners, however, conceive that the powers asked are not inconsistent with the intention of the trust and would be most expedient for the execution thereof, and they are accordingly under the necessity of applying to your Lordships for the requisite powers."

The *prayer* of the petition was "to grant warrant to and authorise the petitioners (1) to uplift from the portion of the capital of the said trust estate in which the said post office property is included. . . . a sum of £1000 or such other sum as to your Lordships shall seem proper, and to apply and expend said sum of £1000, or such other sum as your Lordships may authorise the petitioners to uplift, in defraying the cost of the alterations and additions above referred to; and (2) to grant a lease of the altered and extended premises to the Postmaster-General for the period and for the rent and on the conditions above stated . . . "

On 16th January 1912 the Court remitted to Mr G. F. Dalziel, W.S., to inquire into the facts and circumstances set forth in the petition, and to report.

On 22nd June 1912 the reporter lodged his *report* which, *inter alia*, stated—"The estimated cost of the proposed alterations and additions amounts to £1000, but the powers of administration conferred upon the trustees by the said trust-disposition do not expressly authorise the petitioners to expend any part of the capital of the trust estate in altering or making additions to any heritable property held by them, though the trustees are expressly authorised to invest the trust funds, *inter alia*, in the purchase of heritable property.

"It may be urged that there is no real difference between the application of money in the purchase of heritable property and the application of money in altering and adding to heritable property. It may also be urged that the petitioners are entitled to carry out their proposals without judicial sanction on the ground that, even if they are not expressly authorised to expend the trust funds in the manner proposed, they are entitled to act in a manner which they in the exercise of their discretion consider necessary in order to preserve the trust estate from loss. This view is supported by the decision in the case of *Armstrong* v. *Wilson's Trustees*, December 22, 1904, 7 F. 353, 42 S.L.R. 286, to which the reporter humbly refers your Lordships. In that case the Court held that trustees who without express authority had expended trust funds in rebuilding and improving heritable subjects belonging to the estate, which eventually sold for less than the sum expended upon them, had not acted imprudently or negligently, and that loss had not been caused by their fault. The circumstances in that case were somewhat special but in many respects similar to the circumstances of this case. If your Lordships should consider that the course which the petitioners propose to adopt is not *ultra vires*, the application may be considered unnecessary. The petitioners, however, consider that they might lay themselves open to a charge of having acted *ultra vires* if they proceed in the manner proposed without judicial sanction, and the present application has been presented craving your Lordships, in the exercise of the *nobile officium* of the Court, to authorise the petitioners (1) to uplift from the capital of the 'general estate' a sum of £1000 or such other sum as your Lordships may approve, and to apply the same in defraying the cost of the alterations and additions before referred to; and (2) to grant a lease of the altered and extended premises to the Postmaster-General for the period of twenty-one years for the rent and on the conditions specified in the petition.

"Having thus briefly stated the general purpose of this application, it may be convenient if the reporter now proceeds to deal *seriatim* with the various points to which he considers your Lordships' attention should be directed.

"The reporter has already adverted to the view that the application may perhaps be considered unnecessary, and he may next direct your Lordships' attention to the question of the competency of this petition. It will be observed that the petition is not founded on the Trusts Acts, and the petitioners rely entirely on their appeal to the *nobile officium* of the Court. The reporter is not able to refer your Lordships to any case in which the exercise of the *nobile officium* has been allowed or refused under circumstances similar to those of the present case, nor is he aware of any authority which clearly indicates the kind of circumstances which are necessary to render competent an application by trustees for the exercise of the *nobile officium*. He may, however, refer to the case of *Berwick and Others* (*Walker's Trustees*), November 13, 1874, 2 R. p. 90, 12 S.L.R. 58. In that case the petitioners asked for authority to accept the renunciation of the lease of a farm of which they were proprietors, and the application

was refused as incompetent. The Lord President (Inglis) in course of his judgment said—'The powers of trustees are defined by the trust deed, and the Court will give no higher power. The trustees are not entitled to come to the Court for advice. If they have not the power given them by the deed it is not competent for us to give it them. I think, therefore, that the petition should be dismissed as incompetent.' The other Judges concurred, and Lord Deas added the following—'I see no reason whatever to doubt that the petitioners take a judicious view of what is for the interests of the trust estate. But it is for them to exercise their own discretion in that matter. If they do so rightly they will be safe. But it is a pure question of management, in which we cannot aid them, and I think we must refuse the petition as incompetent.'

In an earlier case, viz., *Kinloch*, December 8, 1859, 22 D. 174, trustees appealed to the *nobile officium* for authority to borrow money to enable them to rebuild certain house property belonging to the trust, which was in a ruinous and untenantable condition. That petition also was refused on the ground that the powers of the trustees were regulated by the trust deed under which they acted, and that the Court would not add to the powers so conferred upon the trustees. It may be noted, however, that this case was decided before the passing of the Trust Act of 1867, which enables trustees in certain circumstances to obtain power to borrow by application to the Court.

"The result of the decisions in these two cases appears to the reporter to be that an appeal to the *nobile officium* is not competent when the power which the Court is asked to confer relates to a simple act of management which is either a matter for the discretion of the trustees or outwith their powers. If that be so, it seems to the reporter that an appeal by trustees to the *nobile officium* for special powers is only competent when, on account of special or unforeseen circumstances, the powers sought to be obtained are required in order to enable the trustees to carry out the general purpose and intention of the truster, not absolutely in accordance with his directions but in the manner best calculated to give effect to his intentions.

"There is, however, a more recent case which bears some resemblance to the present application, and where the power was granted by the Court, and on which the present petitioners rely — viz., *Stenhouse and Another* (*Wardlaw's Trustees*), November 5, 1902, 10 S.L.T. (No. 229.), p. 349. In that case a considerable portion of the trust estate (which was held for the three pupil children of the truster) consisted of heritable estate which the trustees were, *inter alia*, entitled to feu. The trust deed did not confer upon the trustees power to invest the trust estate in the purchase of heritable property, but the trustees were desirous of buying a piece of ground in order to provide an entrance to other land belonging to the trust estate, which would thus be made available for feuing purposes. A petition was accordingly presented to the Inner House for authority to purchase heritage, and the Court (Second Division) remitted 'to the Lord Ordinary on the Bills to dispose of the petition.' The reason of the remit to the Lord Ordinary apparently was to enable the petition to be proceeded with in vacation. The Lord Ordinary, after a remit to a man of skill and a man of business, granted the prayer of the petition.

"The reporter has had an opportunity of perusing a copy of the petition in that case, and he finds that it does not state in terms that it was an appeal to the *nobile officium*, but that it was not presented under the Trusts Act, which do not provide for the case of trustees wishing to purchase heritage. The report of the case does not disclose whether the question of the competency of the petition was considered by the Court, and the application seems to have been granted on the ground that the proposed purchase was expedient for the execution of the trust and not inconsistent with the purposes thereof. It appears to the reporter that if that application is regarded as an appeal to the *nobile officium*, the decision conflicts with the principle laid down in the case of *Berwick* before referred to.

"The reporter may also refer to the case of *Scott Moncrieff and Others* (*Lindsay's Trustees*), 1911 S.C. 584, 48 S.L.R. 470, upon which the petitioners also rely. In that case the trustees were directed to accumulate the income of the trust estate for the purpose of erecting and maintaining a public library, &c. When the application was presented to your Lordships the trustees had already a considerable sum of accumulated income in hand, but not sufficient to meet the cost of the proposed library. The trustees were not entitled under the trust-disposition to encroach on capital, and they were doubtful whether they were entitled to continue to accumulate income in view of the terms of the Thellusson Act. The purpose of the application was to obtain your Lordships' authority to apply part of the capital of the trust estate, along with the accumulations of income, in the immediate erection of the library, on the ground, *inter alia*, that the income from the capital remaining after uplifting the proposed sum would be sufficient to provide for the annual upkeep, &c., of the library, so that there was no real purpose to be served in continuing the accumulation of income even if they were entitled to do so. The petition also contained a crave for authority to erect a certain hall which the testator did not seem to have contemplated should be erected, but the trustees in course of the proceedings withdrew that part of their application, and your Lordships, after expressing the opinion that the Thellusson Act did not debar the trustees from continuing to accumulate income, authorised them to apply a modified sum from capital in the manner they desired. The question of the competency of the application was

not brought prominently before your Lordships. The present reporter was reporter in that case also, and it did not occur to him that there was any doubt as to the competency of the application, because in the first place the object of the trust was to confer a public benefit, and in such cases the Court appears to exercise its *nobile officium* in a wider manner than in the case of a private trust; and, in the second place, the power to encroach on capital which the trustees desired to obtain was a distinct deviation from the truster's direction to accumulate income to provide funds for the erection of a library, &c., and did not as in the case of *Berwick* relate to an act of management occurring in the ordinary course of administration of the trust estate.

"The foregoing remarks apply primarily to the first part of this application, viz., the crave for authority to expend capital. As regards the second part, viz., the crave for authority to grant a lease of the altered premises for twenty-one years—the reporter is unable to refer your Lordships to any case where the *nobile officium* of the Court has been invoked to enable trustees to grant a lease of short or long duration, and a lease for twenty-one years does not appear to the reporter to be a 'long lease,' which trustees are entitled to grant, with the authority of the Court, as provided in section 3 (2) of the Trusts (Scotland) Act 1867. The reporter may also point out that in terms of section 2 (3) of the said Act trustees are authorised to grant leases for twenty-one years in the case of agricultural lands and for thirty-one years in the case of minerals, but no statutory powers to grant a lease of urban subjects is thereby conferred on trustees. The trust-disposition does not expressly authorise the trustees to grant leases of the heritable property of the trust, but they have an implied power to grant leases for an ordinary and reasonable term. If, therefore, a lease of these premises for twenty-one years can be regarded as a lease for 'an ordinary and reasonable term,' the trustees could grant the proposed lease in favour of the Postmaster-General without any authority from your Lordships, and in that event this part of the application would be unnecessary. Whether or not a lease for twenty-one years may be regarded as being for 'an ordinary and reasonable term' seems to be a matter depending entirely on circumstances. The reporter is inclined to think that in ordinary circumstances a lease for so long a period is not of ordinary duration in the case of urban subjects, which are usually let for much shorter periods, but in exceptional cases it might be considered reasonable.

"If the proposed lease is to be regarded as for an extraordinary period, the question of competency already referred to will arise also with regard to it.

"The reporter has nothing further to add with regard to the question of the competency of the application. . . ."

At the hearing on 6th July 1912 counsel for the petitioners, in asking the Court to grant the prayer of the petition, argued that the proposals of the petitioners were expedient for the execution of the trust, but that the trustees had not power to carry them into effect. The present petition did not fall within the decision of the Court in the petition of *Berwick and Others* (*Walker's Trustees*), November 13, 1874, 2 R. 90, 12 S.L.R. 58. It was identical with *Stenhouse and Another* (*Wardlaw's Trustees*), November 5, 1902, 10 S.L.T. 349, and *Scott Moncrieff and Others* (*Lindsay's Trustees*), 1911 S.C. 584, 48 S.L.R. 470.

At advising—

LORD KINNEAR—This is a petition presented by trustees for power to uplift a certain sum of money of the capital of the trust estate and apply it in a particular way, and also for power to grant a lease. It is important to observe that it is not a petition under the Trusts Acts, or under or in virtue of any statutory power, but an appeal to the *nobile officium* of the Court.

Now it appears to me, upon consideration of the petitioners' statement and Mr Dalziel's report, that the question which the trustees have to decide, and which they very naturally consider somewhat difficult, are questions of administration and nothing else. The trustees say that part of the trust estate consisted of heritable property in Jedburgh, a certain tenement of houses and yards, which appertain to the various tenants, one of whom is the postmistress, which really means the Postmaster-General. Then they say that the current lease has expired at Whitsunday 1912, and the question which they have to consider is whether they will agree to certain terms for granting a new lease to the Postmaster-General. The difficulties are two. In the first place, that in order to obtain a satisfactory tenant they must spend a sum of, I think, £1000 upon alterations and additions to the premises; and, in the second place, the lease which the Postmaster-General will accept must be a lease for twenty-one years. The trustees ask the Court for power to enable them to carry out this transaction by authorising the expenditure of capital and authorising the lease.

I am unable to see that the Court can authorise these things to be done by virtue of the *nobile officium*. The questions are merely questions of administration. The difficulty in which the trustees are placed is obvious enough, because if they spend a considerable sum of capital in order to obtain a tenant, it may or may not be probable that at the end of the lease the capital value of the subjects will remain as it is now at the date of the expenditure being incurred. But that is just one of the questions which occur in ordinary administration of a trust estate, because the real difficulty arises from the conflicting interests of beneficiaries. The trustees must make as much of the property as they can in the meantime for the benefit of the liferenters, and they must keep the capital intact, as far as they can, for the ultimate benefit of the fiars. It is a question of management.

But then they say they have no power, because they cannot advance this money without the authority of the Court. I am disposed to say for myself, although I am afraid that it is going a little beyond what I think is the strict business of the Court in matters of this kind, that I do not see any serious difficulty about their power to grant the lease if it is reasonably prudent and expedient to do so. They find the premises in question as part of the trust estate; they are empowered to hold the heritable property in that condition during the trust, and the only profitable use they can make of it for the benefit of the estate is obviously to let it. Further, I am not aware of any limitation upon the power to let, if there be any power to maintain and let a heritable property at all, which should prevent the trustees from letting the subjects in question for twenty-one years if they could not get a tenant for a shorter lease. Now I am impressed very much with the difficulty of spending money in order to put the subjects into lettable condition, because the power to lease, if it is to be effective, carries with it as far as necessary the power to spend money on the subjects so as to put them into a condition in which they will be accepted by a tenant. The mere question of amount may raise a question of discretion and perhaps a question of difficulty, but it is a question of administration to be determined by the conditions of the deed with reference to the circumstances of the estate, and it is a question for the trustees and not for the Court. In these circumstances it appears to me that the proper course for the Court to take is that which is, I think, authoritatively fixed by the judgment of this Division in the case of *Berwick*, November 13, 1874, 2 R. 90, 12 S.L.R. 58, where the Lord President, in a petition for authority by testamentary trustees to accept a renunciation of a lease, says this—"It is important to notice this is not a case under the Trusts Acts. The powers of the trustees are defined by the trust deed, and the Court will give no higher powers. The trustees are not entitled to come to the Court for advice. If they have not the power given them by the deed it is not competent for us to give it to them. I think, therefore, that the petition should be dismissed." And then he adds that if they had the powers they did not require to come to the Court to obtain any further authority; and I rather think that when the Lord President said they were not to come to the Court for advice, he meant that the Court was not to give advice even as to the extent and effect of the power. Lord Deas says, in concurring with the Lord President—"I see no reason whatever to doubt that the petitioners took a judicious view of what is for the interests of the trust estate. But it is for them to exercise their own discretion in the matter. If they do so rightly they will be safe. But it is a pure question of management in which we cannot aid them, and I think we must refuse the petition as incompetent."

The reporter, in a very full and satisfactory report, called our attention to a subsequent case in which a somewhat different course was followed—the case of *Stenhouse and Another* (*Wardlaw's Trustees*), November 5, 1902, 10 S.L.T. 349—which I have carefully considered, and I agree with the reporter that it is not quite in accordance with the view stated in the case which I have cited. But one must observe upon it, that it was a proceeding in the Outer House, and, with the greatest respect for the learned Judge who was presiding there, and who was always extremely cautious in the exercise of powers, I cannot set his action in that case against the authority of the First Division in the case of *Berwick*, which does not seem to have been brought under his notice.

I am therefore of opinion that this petition must be dismissed.

LORD JOHNSTON — The petitioners here ask for power to do two things—first, to apply £1000 of the trust estate in meliorating a certain heritable subject which is part of that estate, and secondly, to grant a lease for twenty-one years of the said piece of heritable property. I concur with your Lordship in the view which you have expressed with regard to this petition being one under which the Court cannot grant powers. So far as the leasing goes, the application is perfectly unnecessary. Where trustees are appointed by a testator, they are called on to administer and manage his estate on business lines as he would have done himself, with this one limitation, that whereas he might have put his estate to hazard if he had chosen in the way of investment, they must not do so. But where it is not a question of investment, but a question of managing estate in *forma specifica*, they have not only a right but a duty to manage that estate on reasonable business principles. Now heritable property may be of different classes, and the administration of two different pieces of heritable property may happen to be quite different. For instance, a testator may leave a dwelling-house which he has occupied himself, and it may be right that some of his descendants should have the opportunity of occupying it. One would think that trustees would hesitate to place such an item of heritage beyond their control by giving as long a lease of it as would be appropriate had their duty been to put it to another purpose. But where the property is a mere investment for the purpose of profit it is the duty of the trustees to administer that item of the trust estate to the best advantage, and if they think that a twenty-one years' lease of it is to the advantage of the estate, they certainly have power to grant such. It is a matter entirely for their discretion, and therefore they cannot come here to ask us for powers, because that would be simply to ask the Court to put their *imprimatur* upon an exercise of the trustees' discretion where they have the power already.

The same way with the amelioration of the subject for the purpose of letting it. Suppose we were dealing with an agricul-

tural farm, the trustees could not possibly come to us to ask us for authority to make the buildings fit for a new lease, or to meet the requirement of an eligible tenant. They would have to exercise their own discretion, as I think they must do here. If in their discretion they think it is in the interests of the estate to let to the Postmaster-General, and in order to obtain him as a tenant to expend money upon the melioration and extension of the property, there again it is entirely a question for their discretion, and they cannot come here to ask us to back them up by saying that their discretion has been exercised wisely — that is a thing that we cannot possibly do. I therefore concur with your Lordship.

LORD MACKENZIE—I am of the same opinion. The matters that are dealt with in this petition and in the report by Mr Dalziel are matters of trust administration, and as such cannot be dealt with by the Court, in an appeal to the *nobile officium* of the Court. It is for the trustees to administer in the manner which they think best in the circumstances.

I should only like to add with reference to what has been said, that when the expression "the advantage of the estate" is used the trustees have to consider that there are interests in the estate which may at certain points conflict, because whenever there are liferenters and fiars what is for the benefit of the liferenter may not be for the benefit of the fiar, and *vice versa*. But that is a matter for the trustees, and they must in the whole circumstances of the case act in the best interests of all, holding an even balance between the liferenters and the fiars. I feel justified in this case in saying that I do not see that there is any reason to doubt that the trustees have power to grant a lease for twenty-one years if in the whole circumstances of the case that is the best trust administration; and if it is necessary in order to secure the best offer (and here it is an offer made by the Post Office) that capital expenditure should be made, then they are just in the same position as trustees who are managing agricultural property when a farm lease runs out, who may be are face to face with the questions whether buildings are to be renewed, land to be drained, and so on, and how much money will have to be expended in order to get the present tenant to remain or to get a better offer. All that is pure matter of administration. Accordingly, as I have said, these are matters for the trustees to determine, and with regard to which the Court cannot give advice.

The LORD PRESIDENT, who was present at advising, gave no opinion not having heard the case.

The Court dismissed the petition.

Counsel for the Petitioners—Blackburn, K.C.—J. H. Henderson. Agents—Kelly, Paterson, & Co., S.S.C.

Wednesday, July 10.

FIRST DIVISION.

[Lord Dewar, Ordinary.

BOYLE *v.* OLSEN.

THE LINDSEY STEAM FISHING COMPANY, LIMITED *v.* ACTIESELSKABET BONHEUR.

Process — Conjunction — Ship — Common Defender—Pursuers with Hostile Claims —Salvage.

Where separate actions were raised by two pursuers against a common defender claiming recompense in respect of salvage services averred to have been rendered, *held*, notwithstanding that there was a conflict of interest between the pursuers, that the actions should be conjoined.

Proof—Conjoined Actions—Pursuers with Hostile Claims — Cross-examination — English Practice.

Where actions were conjoined in which the pursuers had hostile claims, *held* that, *following* English practice, the pursuers should have the right to cross-examine each other's witnesses.

Process — Tender — Conjoined Actions — Pursuers with Hostile Claims—Apportionment between Pursuers — English Practice.

Where a joint tender was made by a defender in conjoined actions in which the pursuers had hostile claims, *held*, *following* English practice, that defender must apportion the tender between the rival pursuers.

John S. Boyle, trawl owner, Aberdeen, owner of the steam trawler "Glenogil," *pursuer*, brought an action in the Sheriff Court at Aberdeen against Fred. Olsen, Christiania, Norway, registered owner of the steamship "Balduin," *defender*, for £5000 as salvage remuneration, loss, and damage, in respect of salvage services rendered by the "Glenogil" to the "Balduin" in the North Sea on or about 28th and subsequent days of November 1911. The case was remitted to the Court of Session *ob contingentium* on March 9, 1912.

The Lindsey Steam Fishing Company, Limited, Grimsby, owners of the trawler "Lacerta," *pursuers*, brought an action in the Court of Session against Actieselskabet Bonheur, Christiania, owners of the "Balduin," *defenders*, for payment of £500 as remuneration for salvage services rendered to the "Balduin," and compensation for loss and damage suffered by the "Lacerta."

In answer to signals of distress shown by the "Balduin," the "Glenogil" came to her rescue, and, after certain manœuvres on the part of both vessels, the "Glenogil's" hawsers were got on board the "Balduin" and made fast, and thereafter the "Glenogil" proceeded to tow her to Aberdeen. Further assistance in the towage was given by the steam trawler "Lacerta," and Boyle, whose claim included a sum for the "Lacerta's" towage, averred that