muneration for his services in the management of the farm.

The Lord Ordinary pronounced the following interlocutor:

"*Edinburgh*, 12*th June* 1869.—The Lord Ordinary having resumed consideration of the process, with the additional report of the accountant, and heard counsel for the parties thereon—Repels the respondents' eleventh objection to the first report of the accountant in so far as regards the question as to the expense of the advocator's riding-horse, said objection having been formerly repelled *quoad ultra*: Finds that the farm of West Newton having been carried on as a partnership concern by and for behoof of the advocator and respondents and their brother James Anderson, the advocator, being one of said partners, is not entitled to any allowance or remuneration for superintending and managing said farm, and repels the seventh objection stated for him to the first report of the accountant: Finds, in terms of the reports of the accountant and the foregoing findings, that there was a balance on his intromissions, including interest due by the advocator to the said partnership or joint concern, at 15th May 1861, amounting to £1451, 18s. 3d., one-fourth part of which sum is due to each of the respondents; Appoints the respondents to give in a state shewing the portion of said sum for which they ask decree under the conclusions of the action: Finds the advocator liable in the whole expenses of process in the Inferior Court and in this Court to the 12th March 1867; and *quoad ultra*, Finds no expenses due to or by either party; Allows accounts thereof to be given in, and, when lodged, remits the same to the auditor to tax and report.

"*Note.*—The Lord Ordinary feels that, in the peculiar circumstances of this case there is some hardship in the application of the rule of law by which the advocator is precluded from claiming remuneration for his services in carrying on the joint concern belonging to a partnership of which he is a member. But the principle is well established, and has been strictly enforced in cases not materially different from the present—*Campbell, Rivers & Co.* v. *Beath*, 2 W. & S., 25. As the advocator is not allowed any remuneration, the objection taken by the respondents to half of the sum allowed by the accountant for expense of a riding-horse is repelled.

"The result of the findings on these points is that the sum reported in the additional report by the accountant is the balance against the advocator at 15th May 1861, to which period he produced his accounts, and they have been dealt with on the reports of the accountant and the interlocutor of the Lord Ordinary and the Court. But the conclusions of the summons only relate to the balance due at the date of the action, and the respondents will now lodge a state shewing for what sum they ask decree as at that date. It was stated at the bar that the advocator will settle with them for the subsequent period, in conformity with the findings now pronounced.

"The advocator is clearly liable in full expenses to the date of the first remit to the accountant. He was till that time disputing all liability to account. In the proceedings before the accountant under the first remit both parties were maintaining points which have been ultimately held untenable. The respondents were doing so with much keenness and to a large extent. But upon the whole matter, the balance of success was much in favour of the respondents. In the discussion of the accountant's first report (when the respondents persisted in reclaiming, and unsuccessfully opposed the motion of the advocator for leave to withdraw his reclaiming note) and in the procedure following on the second remit, the respondents have succeeded in increasing the amount at the advocator's debit by the sum of £130, 19s., half of which is due to them, and in resisting the advocator's claim for an allowance for management. But during this period, besides maintaining many minor objections which have been repelled, they contended at the debate on the first report, as they had previously done before the accountant, that no item of credit was to be allowed to the advocator for which there was not a voucher; and they also maintained, and got a special remit to the accountant and Mr Dickson on the point, that he ought to be debited with profits on buying, selling, and feeding cattle in addition to the value put upon the produce of the farm. On both of these important points the respondents have been unsuccessful. The parties have latterly been engaged in a partnership accounting in which the advocator has not been dealt with as a factor or manager bound to render an account of his intromissions, but entitled to remuneration for his trouble. In the circumstances, and without any fault of the advocator, some expense might well have been incurred by the joint concern on getting the partnership account properly stated. The actual expense has been greatly increased by the advocator having failed to keep, after 1850, such a record of his transactions as he had previously done, and by the untenable contentions of both parties. The Lord Ordinary has no doubt that a considerable portion of the expense of the accounting must be thrown upon the advocator. But he thinks that, upon the whole matter, substantial justice is done to all parties by giving the respondents their full expenses to the date of the Lord Ordinary's interlocutor disposing of the objection of both parties to the first report of the accountant, and finding no other expenses due to either party."

The defender reclaimed.

SOLICITOR-GENERAL and BALFOUR for him.

WATSON and H. SMITH in answer.

The Court altered this finding, and held that the relation here was not properly partnership, but joint-ownership, and that, in the peculiar circumstances of the case, remuneration to some extent must be allowed. The amount allowed, however, must be limited to £5 a-year for the period over which the management extended.

Agents for Pursuer—Henry & Shiress, S.S.C.

Agent for Defender—James Webster, S.S.C.

Friday, November 26.

SECOND DIVISION.

RUSSELL (GALLOWAY'S TRUSTEE) *v.* NICOLSON & TAYLOR.

Expenses—Bankrupt—Commissioners—Deliverance—Trustee. A trustee having appealed against a deliverance of commissioners in a sequestration fixing his commission, and the Lord Ordinary having ordered service of the appeal upon them, and they having appeared to defend their judgment, *held* (*diss.* Lord Benholme) that they were entitled to their expenses out of the estate, up to the date of a report by the accountant in bankruptcy, (to whom the Lord

Ordinary had remitted) finding their deliverance wrong, but no longer.

Reservation of opinion by Lord Cowan and Lord Neaves on the general question of the right of commissioners in a sequestration to litigate in defence of their judgment.

In this case the appellant complained of a deliverance of the respondents as commissioners in a sequestration in which he (the appellant) was trustee, fixing his commission at a certain sum. That deliverance was as follows "The commissioners fixed the trustee's commission at three per centum on the sum of £2633, 18s. 3d., being the proceeds of the bankrupt's stock in trade, and five per cent upon £321, 6s. 5d., being the balance of the sum recovered by him, and authorised him to take credit for such commission in his accounts with the estate."

The Lord Ordinary (ORMIDALE), on the report of the accountant in bankruptcy, sustained the appeal, and fixed the commission at a sum considerably beyond that allowed by the respondents. He also found the respondents personally liable in modified expenses to the appellant. His Lordship added the following note:—"The Lord Ordinary does not see that he is entitled under this appeal to deal with the charges in the law-agent's account of expenses referred to in the accountant's report; but as the law-agent expresses his willingness to deduct the items referred to, there can be no difficulty in arranging this extrajudicially.

"In regard to the amount of the trustee's commission, the Lord Ordinary has had some difficulty. On the one hand, he has felt that this, being a matter peculiarly for the consideration of the commissioners, their determination ought not to be interfered with on light grounds. But, on the other hand, a remit having been made by a former Lord Ordinary to the accountant in bankruptcy, and the whole matter having been very carefully and minutely investigated by him, the Lord Ordinary has found it impossible to resist the conclusions at which he has arrived.

"Looking at all the circumstances, and as the appellant has not been wholly successful, the Lord Ordinary has only found him entitled to expenses subject to modification, which, however, he does not think ought to be much."

The respondents reclaimed against this finding of expenses.

D.-F. GORDON and DUNCAN for reclaimers.

GIFFORD and CAMPBELL SMITH in answer.

The Court ordered the accounts of both parties to be put in, and to-day they found that up to the date of the accountant's report the expenses of both parties should come out of the estate; but, *quoad ultra*, they adhered to the Lord Ordinary's interlocutor, and, with regard to the Inner House expenses, they found that each party must bear his own.

The LORD JUSTICE-CLERK held that it was the duty of the commissioners to appear and defend their judgment; that they were the proper contradictors of the trustee in that matter; and that, therefore, they were entitled to be relieved of all necessary expenses. They ought, however, to have acquiesced in the accountant's report, and not to have litigated further.

LORD COWAN and LORD NEAVES concurred in the result, in respect that the commissioners were called into the field by the Lord Ordinary, who had ordered the appeal to be served upon them. Their Lordships, however, reserved their opinions on the general question as to the right of the commissioners to litigate in defence of their judgments.

LORD BENHOLME dissented, holding that the commissioners had no right to appear at all, they not representing the creditors, and having no duties other than those specified in the statute.

Agent for Trustee—Adam Morrison, S.S.C.

Agents for Commissioners—Jardine, Stodart & Frasers, W.S.

Saturday, November 27.

FIRST DIVISION.

TURNER AND OTHERS *v.* COUPER & OTHERS.

Succession—Intestate Succession Act—Next of Kin—Representation. The Intestate Succession Act is a remedial statute, only intended to allow representation in a certain situation where the common law denied it. It does not apply where none of the class forming the next of kin at the intestate's death have predeceased him; but only where one or more have predeceased him leaving issue, and one or more survived him.

Agnes Hamilton died leaving certain heritable and moveable estate. She never was married, and left no brother or descendant of a brother; but she had three sisters, who were her nearest relatives, all of whom predeceased her, leaving issue. Mrs Turner was the only child of one; Robert Couper and three sisters the children of another; and Thomas M'Donald and seven brothers and sisters the children of the third. Mrs Turner, Robert Couper, and Thomas M'Donald, were served as heirs-portioners, and took the heritage equally amongst them. All the parties were agreed that the whole residue, both heritable and moveable, fell to be divided as in the case of intestate succession. It is enacted by § 1 of the Intestate Succession Act—"In all cases of intestate moveable succession in Scotland accruing after the passing of this Act, where any person who, had he survived the intestate, would have been among his next of kin, shall have predeceased such intestate, the lawful child or children of such person so predeceasing shall come in the place of such person, and the issue of any such child or children, or of any descendant of such child or children who may in like manner have predeceased the intestate, shall come in the place of his or their parent predeceasing, and shall respectively have right to the share of the moveable estate of the intestate to which the parent of such child or children or of such issue, if he had survived the intestate, would have been entitled: provided always that no representation shall be admitted among collaterals after brothers and sisters descendants, and that the surviving next of kin of the intestate claiming the office of executor shall have exclusive right thereto, in preference to the children or other descendants of any predeceasing next of kin, but that such children or descendants shall be entitled to confirmation when no next of kin shall compete for said office." And by § 2 it is further enacted—"Where the person predeceasing would have been the heir in heritage of an intestate leaving heritable as well as moveable estate had he survived such intestate, his child, being the heir in heritage of such intestate, shall be entitled to collate the heritage to the effect of claiming for himself alone, if there be no other issue of the predeceaser, or for himself and the