defenders' servants began to unload the bales from the truck and place them on his lorry, while he stood on the lorry to pack them; and that in the course of transferring the bales from the truck to the lorry the defenders' servants culpably and negligently tumbled one of them on his leg, and injured him severely.

The defenders pleaded, *inter alia*—(1) The pursuer's averments not being relevant or sufficient to sustain his pleas, the action should be dismissed with expenses. (2) The accident being a risk incidental to common employment, the defenders are entitled to absolvitor. (3) Alternatively, the accident to the pursuer having been caused by the negligence of persons with whom he was virtually a fellow servant, the defenders are entitled to absolvitor.

On 17th January 1893 the Sheriff-Substitute (ERSKINE MURRAY) repelled the defenders' pleas of irrelevancy and allowed a proof. The pursuer appealed to the First Division of the Court of Session for jury trial, and the defenders having objected to the relevancy, the case was sent to the Summar Roll.

Argued for the defenders—It was settled in *Woodhead* v. *Gartness Mineral Company*, February 10, 1877, 4 R. 469, that the defence of common employment applied to a case like the present, and *Woodhead's* case had been repeatedly followed in later decisions—*Wingate* v. *Monkland Iron Company*, November 8, 1884, 12 R. 91; *Maguire* v. *Russell*, June 10, 1885, 10 R. 1071; *Congleton* v. *Angus*, January 12, 1887, 14 R. 309. No doubt the doctrine of *Woodhead's* case had been rejected by the House of Lords in *Johnstone* v. *Lindsay*, L.R. 1891, App. Cas. 371, but that was an English case, and the decision was not intended to apply to Scots Law—*ibid.* opinion of Lord Herschell, p. 380; and of Lord Watson, p. 385.

Counsel for pursuer were not called on to reply on this point.

At advising—

LORD PRESIDENT—On the general question raised by the defenders, I take it that after the decision of the House of Lords in *Johnstone* v. *Lindsay* the case of *Woodhead* has been overruled, and that the doctrine established in that case is no longer the law of Scotland.

LORD ADAM concurred.

LORD M'LAREN—I agree that the decision of the House of Lords in *Johnstone* v. *Lindsay* is a decision on a branch of law prevailing throughout the United Kingdom, and is as much a decision in the law of Scotland as in the law of England, and that in consequence of that decision the defenders cannot maintain the defence of common employment.

LORD KINNEAR—I agree. I have no doubt whatever that the intention of the House of Lords in *Johnstone* v. *Lindsay* was to overrule the case of *Woodhead* as part of the Scots as well as of the English law.

The Court approved of the issue lodged by the pursuer for trial of the cause, and remitted to Lord Wellwood.

Counsel for the Pursuer—Sym—Gunn. Agent—Robert Stewart, S.S.C.

Counsel for the Defenders—C. S. Dickson—Deas. Agent—James Watson, S.S.C.

Saturday, February 18.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

M'NAB (M'NICOL'S EXECUTRIX) *v.* MITCHELL AND OTHERS.

Succession—Testament—Failure of Trustees to Follow Testator's Directions—Quod fieri debet infectum valet.

A testator directed his trustees, upon the youngest of his two sons attaining majority, to determine whether in their opinion it was prudent to give both or either the uncontrolled command of their interest in his estate. If the trustees thought it imprudent in the case of either son to entrust him with uncontrolled command of his share, they were directed to place his share under such restrictions as they might deem advisable, giving him an alimentary liferent of the whole or of part only. In the event of both his sons dying without leaving heirs of their body before his estate was completely exhausted, the testator directed that what remained should be divided equally amongst the next-of-kin of himself and his wife. After the death of the testator, upon the younger of his sons attaining majority, the trustees assigned and made over his share to N. M., the elder son, who was then under curatory. It was set forth in the narrative of the deed of assignation that the trustees had considered that N. M.'s share should be placed under restrictions agreeable to the provisions of the settlement, but that a *curator bonis* having been appointed to N. M., the necessity for further interference on their part had been superseded. N. M. died unmarried and intestate. He was predeceased by his brother, who also died unmarried.

In a multiplepoinding, raised after N. M.'s death, it was *held* that the trustees having decided that N. M.'s share ought to be placed under restrictions, were bound by the terms of the settlement to have restricted his right to an alimentary liferent; that the share must be dealt with as if they had done so; and therefore that it fell to be divided equally among the next-of-kin of the testator and widow.

Donald M'Nicol died in the year 1888, leaving a trust-disposition and settlement whereby he conveyed his whole estates to the trustees therein named. After pro-

viding for the payment of his debts, and bestowing a liferent of his house and furniture and an annuity of £60 upon his wife, and providing for the upbringing and maintenance of his two sons Nicol M'Nicol and John Clark M'Nicol until they attained majority, the said Donald M'Nicol directed his trustees as follows—"And upon the youngest of my said two sons, or the survivor of them, attaining majority subsequent to my decease as aforesaid, or in the event of my decease not taking place until after the said youngest son, or the survivor, arrives at twenty-one years of age, I hereby provide and declare that my trustees shall, in either of these two cases occurring, and within twelve months thereafter, fix and determine whether in their opinion it would be prudent or expedient to give both or either of my said two sons the uncontrolled command and disposal of their understood or expected interest in my succession; and if my trustees shall resolve that it would be inexpedient or imprudent to entrust both of my said sons with such uncontrolled command or disposal, I, in that case, hereby authorise and direct my trustees to set aside for each of my said sons one equal moiety or half of the reversion of my estate, and to place each of said shares under such restrictions and limitations as my trustees may from time to time deem advisable, giving to each of my said sons an alimentary liferent of the whole or of part only of their said respective shares as my trustees may think proper, and making, if thought advisable, such advances out of the capital stock of each share for setting my said sons respectively up in business as my trustees may conceive can be done without much danger of ultimate loss; but if, on the other hand, my trustees shall resolve that only one of my said sons ought to be placed under such restrictions or limitations, I, in that case, direct and appoint my trustees to confine the limitations and restrictions accordingly to that particular son's said share, with similar reserved powers of making advances therefrom, and to assign and make over unconditionally to my said other son his moiety or half of the reversion of the trust: And if my trustees shall resolve that the shares of the succession falling to both of my sons should be unrestricted and without any limitation whatever, I, in like manner, direct and appoint them to assign and make over the same unconditionally, and in accordance with such resolution: And if either of my said sons shall die before his said share is made over or paid to or on his account without leaving heirs of his body, I hereby, in that case, provide and declare that the survivor shall succeed to the whole of the reversion of my estate: . . . And I hereby give the most full and unlimited power to my trustees to judge and decide not only on the fitness or unfitness of my said sons, or either of them, for having such uncontrolled command or disposal of their interest respectively in my said succession, but of the propriety or expediency of all restrictions and limitations to be placed thereon, and of all advances, if any, to be made out of the capital or stock, hereby excluding all courts of law or equity from interference therewith: . . . And I also provide and declare that if both of my sons shall die without leaving heirs of their body before my estate is finally and completely exhausted, that one moiety or half of the reversion shall be paid over and divided equally among my own nearest of kin, and the other moiety or half equally among the nearest of kin of my said spouse, the children of any one of the said nearest of kin predeceasing always succeeding to their parent's share."

Donald M'Nicol was survived by both his sons, Nicol and John Clark. After his death the trustees named in his settlement entered upon the administration of his estate.

In January 1866 John Clark M'Nicol, the youngest of the testator's sons, came of age, and the trustees subsequently paid over to him his share of his father's succession.

In July 1866 a *curator bonis* was appointed to the elder son Nicol M'Nicol, and by assignation and transfer, dated 10th and 18th October, and 7th and 14th November 1866, the trustees, with the consent of the said *curator bonis*, assigned and made over to Nicol M'Nicol, his heirs and assignees, his share of his father's succession. The narrative on which the deed of assignation proceeded contained the following passage —"And whereas we the said trustees . . . being satisfied that the said John Clark M'Nicol, youngest son of the truster, who attained majority in the month of January last, was clearly entitled to have his interest in his father's succession made over to him free and unfettered, have found so accordingly, whereas as regards the share and interest falling to his elder brother the said Nicol M'Nicol, who showed symptoms of imbecility of mind during his father's lifetime, and which still continued, we considered the same ought to be placed under restrictions agreeably to the said provision in said deed of settlement, but the said Malcolm Turner Clark having been appointed *curator bonis* to the latter, the necessity for further interference on the part of us the trustees is thus superseded."

On 18th October 1866 a discharge and ratification was granted by John Clark M'Nicol and Nicol M'Nicol's *curator bonis* in favour of the trustees.

Nicol M'Nicol remained under curatory until the day of his death. He died intestate and unmarried on 15th February 1890. He was predeceased by his brother, who died unmarried.

After the death of Nicol M'Nicol, Christina M'Nab was appointed his executrix-dative, and having received payment from Nicol M'Nicol's *curator bonis* of the estate which he had held for the said Nicol M'Nicol's behoof, she thereafter raised the present action of multiplepoinding and exoneration for the determination of competing claims which had been made to said estate.

Claims to the whole fund *in medio* were lodged on behalf of Grace M'Nicol or

Mitchell and others, the next-of-kin of Nicol M'Nicol, and counter claims to part of the fund were lodged by Margaret Clark or M'Nicol, the next-of-kin of the widow of the testator Donald M'Nicol.

The latter claimants pleaded—"(2) In respect that both of the testator's sons died without leaving heirs of their bodies before the said trust-estate was finally and completely exhausted, one moiety thereof falls to be divided equally amongst the nearest of kin of the testator's widow."

On 13th July 1892 the Lord Ordinary (KYLLACHY) repelled the claim for Margaret Clark or M'Nicol and others, and sustained the claim for Grace M'Nicol and others, and ranked and preferred said last mentioned claimants in terms of their claims.

"*Opinion.*—The question in this case is, whether the share of the estate of the late Donald M'Nicol, piermaster at Dunoon, which fell to his son Nicol M'Nicol, falls to be divided in terms of a destination-over contained in the father's settlement, or falls to be paid to the next-of-kin of the son, as having vested in him prior to his decease?

"The question happens in this way. The share in question, which was paid over to the son's *curator bonis* under the assignation quoted in the fourth article of the condescendence, is to be held as having been paid over without restriction, or is to be held as having been all along subject to the restrictions which by the father's will his trustees were entitled to impose. In the one case it is conceded that the father's estate was 'fully and completely exhausted' in the sense of the settlement, so that the destination-over did not apply. In the other case it is contended that the share must be considered as being *de jure* in the hands of the trustees, and so subject to the destination-over as a still unexhausted part of the father's estate.

"I am of opinion that upon the just construction of what the trustees did—that is to say, on the just construction of the assignation which they in fact executed in favour of the *curator bonis*—the share of Nicol M'Nicol was paid over to the curator without restriction. In other words, if Nicol M'Nicol had convalesced, I do not see that there could have been any doubt as to his right to get full and absolute possession of the fund. And indeed I may go further and say that I do not see that the trustees had any power to convey the share to the curator, or any third party under a trust or under restrictions. If they resolved to impose the restrictions, it rather appears to me that they require to continue the trust in their own hands. If therefore the assignation is to receive effect, I must, I think, prefer the claim of the son's next-of-kin. But then it is said further, and perhaps this is the real question in the case, that looking to the terms of the narrative of the assignation, and particularly to the opinion there expressed under the hand of the trustees, that 'Nicol M'Nicol's share ought to be placed under restriction as provided in the settlement,' it was a breach of trust on the part of the trustees to hand over the money to the curator, or to do anything else than retain the fund in their own hands. In other words, the conditional institutes under the settlement appeal to the maxim, *quod fieri debet infectum valet*, and say that the fund being still extant, the trustees' breach of trust cannot prejudice their (the conditional institutes) rights under the settlement.

"I cannot say that I regard this question as free from difficulty, and I have hesitated a good deal as to how I should deal with it. But in the end I have come to think that regard must be had rather to what the trustees did than to inferences deduced from the execution of their deed as to what they thought. They had an absolute discretion, and I think that reading their attitude fairly it comes to this, that they would not have paid over the share of Nicol M'Nicol if he had been *sui juris*, but that being under curatory, and likely to remain so during his life, they were satisfied with the restrictions which were thereby necessarily imposed, and did not think it necessary to impose restrictions provided by the settlement. In short, they resolved, on grounds reasonable enough, not to keep up the trust, but to close it, paying over the share absolutely to the curator, and taking their chance—probably they knew not a great chance—of the ward convalescing. If this be so, they cannot, I think, be held to have committed any breach of trust, and not having done so, the estate must be held *de jure* as well as *de facto* to have been, in the words of the settlement, 'fully and completely exhausted.'

"I must therefore prefer the claim of Nicol M'Nicol's next-of-kin, and repel the claim of the conditional institutes."

The claimants Margaret Clark or M'Nicol and others reclaimed, and argued—The trustees appointed by Donald M'Nicol were required to determine whether it was prudent that Nicol M'Nicol should have the uncontrolled command of his share. If they decided that question in the negative, as they in fact did, they were bound by the terms of the deed to restrict his right to an alimentary liferent, and in paying Nicol M'Nicol's share over to his *curator bonis* they acted beyond their powers. The maxim *quod fieri debet infectum valet* applied, and Nicol M'Nicol's share must be treated as if his interest had been restricted to an alimentary liferent. If this view were correct, Donald M'Nicol's estate was not finally exhausted, as the share liferented by Nicol M'Nicol had still to be disposed of, and under the terms of Donald M'Nicol's settlement his wife's next-of-kin were entitled to a moiety of that share.

Argued for the claimants Grace M'Nicol or Mitchell and others—It was left entirely to the discretion of Donald M'Nicol's trustees to decide whether or not they should give Nicol M'Nicol the uncontrolled command of his share, or what restrictions and limitations it was proper and expedient should be placed upon it. In acting as they

had done they had merely exercised the discretion entrusted to them, and as they had handed over to Nicol M'Nicol formally and legally the uncontrolled command of his share of his father's succession, that share fell now to be dealt with as part of Nicol M'Nicol's succession. The fact that when the share was assigned to Nicol M'Nicol he was under curatory was immaterial—*Yule* v. *Alexander*, November 25, 1891, 19 R. 167.

At advising—

LORD PRESIDENT—The Lord Ordinary says in his opinion that he has hesitated before arriving at the conclusion expressed in his interlocutor. This makes it the less difficult for me to say, that now that the question has been carefully argued before us, I have formed a different judgment from that of his Lordship.

It seems to me that the testator directed his trustees, as their primary duty in this regard, to consider and decide this question as regards each of his two sons, Is it prudent or expedient that he should have the uncontrolled command and disposal of his understood or expected interest in the succession? According to the trustees' judgment on this issue the fate of the money was made to depend. If, but only if, the trustees answered in the affirmative, then they were to convey to the son to whom their decision applied. There are no antecedent or general words of bequest to the sons to which the clauses in question are related as qualifications or derogations. There is no other warrant in the will for an absolute conveyance to a son except an affirmative decision on the issue I have quoted. If, on the other hand, the decision regarding a son was not affirmative, then as a consequence of that decision the son is to take an alimentary liferent, subject to such limitations and provisions as the trustees might think fit, they having power at the same time to make advances out of capital to set him up in business. The fee of the money thus liferented, in so far as not advanced, is disposed of by the will, for it is provided by clear implication that if the liferenter has children it will go to them, and it is expressly provided that if he has not, the capital thus unexhausted shall go one-half to the testator's next-of-kin and the other half to his wife's next-of-kin.

What, then, was the trustees' decision on the question which the testator bade them decide regarding Nicol M'Nicol, viz., whether it was prudent or expedient that he should have the uncontrolled command and disposal of his estate. Now, in the very deed founded on by Nicol M'Nicol's next-of-kin, the trustees set out that Nicol M'Nicol had shown symptoms of imbecility of mind, and was at the time of writing under curatory.

Now, I ask, did the trustees thereby decide that it was prudent or expedient that Nicol M'Nicol should have the uncontrolled command and disposal of his father's money? It seems to me they decided the exact opposite. They go on, it is true, formally to convey to Nicol M'Nicol himself, but they almost in so many words explain that they do so merely because they knew that the legal effect of that conveyance was, that so long as the curatory subsisted he would not have the uncontrolled command and disposal of the money conveyed.

Now, I think that the trustees having negatived the prudence or expediency of giving Nicol M'Nicol the uncontrolled command and disposal of his money, the legal consequence was that the interest arising to that gentleman was one of alimentary liferent, and that that interest could not be enlarged into a right of fee by any act of the trustees. In conveying to him in fee after having pronounced against the prudence or expediency of letting him have the uncontrolled command and disposal of his estate, the trustees, I think, exceeded their powers, and the conveyance has no legal effect.

I can quite understand that the trustees may have considered that their way of protecting the lunatic was as good as that of the testator, and it is plain enough that this is what they thought. But the present question has shown the vital difference between what he directed and what they purported to do by the deed founded on by the next-of-kin of Nicol M'Nicol. The will contemplated but two events, either an absolute conveyance on the footing that the disponee was a proper person to enjoy uncontrolled command and disposal, or if this assumption of fact could not be adopted by the trustees, the retention by them of the share in their own hands, the son receiving from them the income (under such restrictions as the trustees thought proper) and such advances as the trustees thought justifiable for the purpose of setting him up in business. I agree with the Lord Ordinary in thinking that the will did not authorise the trustees to create restrictions on money the capital of which they parted with, for I think that the testator only authorised their parting with it by giving it to one fit for its uncontrolled command and disposal.

The point of difference between my judgment and that of the Lord Ordinary may be stated in a word. His Lordship looks rather to what they did than to what it may be inferred that they thought. I think that the testator makes the fate of this money depend on their verdict given on the issue which he bids them answer on. I find their answer expressly given, and the testator does not leave it to the deeds of the trustees to affirm or to nullify that answer.

I think, therefore, that we should recal the Lord Ordinary's interlocutor, should find that Nicol M'Nicol had right to no more than an alimentary liferent of one moiety of the residue of his father's estate, and that the capital of the estate conveyed to Nicol M'Nicol by his father's trustees belongs, one-half to the next-of-kin of Donald M'Nicol and one-half to the next-of-kin of the spouse of Donald M'Nicol,

and that the cause should be remitted to the Lord Ordinary to proceed.

LORD ADAM—I concur in the opinion of the Lord Ordinary in that part of the case where he says that the effect of the assignation executed by the trustees was to give Nicol M'Nicol the absolute right to the fund assigned, and that if the assignation is to receive effect, the necessary result is that the claim of Nicol M'Nicol's next-of-kin must be preferred; but the question is whether that assignation is to receive effect, and the ground on which the Lord Ordinary comes to the conclusion that it must receive effect is thus stated in his note—"In the end I have come to think that regard must be had rather to what the trustees did than to inferences deduced from the execution of the deed as to what they thought." I agree with your Lordship that the real question is not what the trustees did but what they thought, because the character of the opinion at which they arrived, determined one way or other under the deed the legal effect of their acts. Now, I do not think it is difficult to find what the real attitude of the mind of the trustees was, because we have it recorded under their own hand in the assignation as certainly as if we had a resolution recorded in the minute-book of the trust. What they say in the assignation is this—"We being satisfied that the said John Clark M'Nicol . . . was clearly entitled to have his interest in his father's succession made over to him free and unfettered, have found so accordingly." That is what they find with regard to John Clark M'Nicol, and then they proceed to state with regard to Nicol M'Nicol—"Whereas as regards the share and interest falling to . . . Nicol M'Nicol, who showed symptoms of imbecility of mind during his father's lifetime, and which still continue, we considered the same ought to be placed under restrictions, agreeably to the said provision in said deed of settlement." That appears to me to be a declaration that it was the opinion of the trustees that Nicol M'Nicol should not have his share paid over to him free and unfettered, but under the restrictions for which provision is made in the settlement.

Now, that being a declaration of the trustees' opinion under their own hand, the question comes to be what was their duty under the trust-disposition and settlement? The provision in the deed placed three alternatives before the trustees. They were to determine whether it was prudent that both or either or neither of the testator's sons should have the uncontrolled command of his share of succession, and the deed then goes on to give special directions to the trustees as to what they are to do in each of the three cases. If they should resolve that it would be imprudent to entrust both of the testator's sons with such uncontrolled command, they are to place the share of each "under such restrictions and limitations as my trustees may from time to time deem advisable, giving to each of my said sons an alimentary liferent of the whole or of part only of their said respective shares as my trustees may think proper, and making, if thought advisable, such advances out of the capital stock of each share for setting my said sons respectively up in business as my trustees may conceive can be done without much danger of ultimate loss." That is a clear direction to the trustees that, if they should determine that it was imprudent to pay over the shares, they should put them under such limitations as would give to the children an alimentary liferent only of the whole or a part of their shares. The right of the children to receive any part of their shares depends on the resolution of the trustees. The following clause deals with the case which we have to consider, the trustees being directed, if they "shall resolve that only one of my sons ought to be placed under such restrictions . . . to confine the restrictions to that particular son's share;" and then follows this other suggestive clause, in which the trustees are directed, if they "shall resolve that the shares of the succession falling to both of my sons should be unrestricted . . . to assign and make over the same unconditionally, and in accordance with such resolution." Now, is there any resolution of the trustees to the effect that both the testator's sons are to have the free and unrestricted command and disposal of their shares? There is no such resolution, but there is a resolution to the contrary as I have already stated. On these grounds I agree with your Lordship that what the trustees did cannot be allowed to stand, because what they did was to make a new will for the testator contrary to the provisions of his settlement.

LORD M'LAREN—I concur in the opinion of your Lordship in the chair, and only wish to add a sentence to point out what I conceive to be the difference between the view taken by the Lord Ordinary, and that which we take to be the true view of the case. The Lord Ordinary says that the trustees had an "absolute discretion," and that being satisfied with the restrictions imposed by the curatory, they did not think it necessary to impose the restrictions provided by the settlement. It appears to me, as it does to all your Lordships, that the trustees had not an absolute discretion. There was, in the first place, a reference to their judgment on a definite question, namely, whether the testator's son was able to take care of the share of succession falling to them, and it was only in the event of their answering that question in one of two ways that any discretion arose, not as to whether they should subject the son's interest to any restrictions, but only as to the form of the restriction to be imposed thereon in order to prevent delapidation. On the question whether Nicol M'Nicol's share was to be subjected to restrictions the trustees were bound to act judicially, and no one doubts that they exercised their judgment fairly, and indeed, looking to the fact that he was under curatory, there could be but one answer to the

question they had to decide. Now, having determined that Nicol M'Nicol was not fit to have the uncontrolled command of his share, they were bound to put it under restrictions, one of these being that he was only to have an alimentary liferent of the share. If the succession to the fee had not depended on the execution of the trust purposes, probably there would have been no great harm in the trustees acting as they did, but apparently in the event of either of his sons being unable to look after the management of his share, the testator wished the money to be divided among the next-of-kin of himself and his wife. That being so, it seems impossible to maintain that the trustees could by any act of their own defeat the expectation of the wife's next-of-kin under this proviso of the will. But this is what they have done, not with the intention of injuring any person, but from thoughtlessness and from not considering carefully the extent of their powers under the will. In such a case I think that the maxim *quod fieri debet infectum valet* applies, and that the estate must be divided as if the trustees had limited Nicol M'Nicol to an alimentary liferent, as they were bound and required to do by the terms of the deed under which they acted.

LORD KINNEAR—If I could have held that the trustees had an absolute discretion, as the Lord Ordinary has done, I should have come to the same conclusion as he did, but I agree with your Lordships that they had no absolute discretion, and that they were required, in the exercise of the duty imposed upon them by the testator, to consider and determine whether it was prudent or expedient to give both or either of his sons the uncontrolled command of their expected interest in his succession. The words in which this direction is expressed are, I think, not immaterial, because the deed describes the interest of the sons in the succession not as given to them, but as "their understood or expected interest." The judgment of the trustees on the question they had to determine is absolute and conclusive, and when they had determined it in favour of either of the testator's sons, there is no question what they had to do. If they determined that either son was not in a position to be entrusted with the uncontrolled command of his expected interest, a very wide discretion was given them as to the method of restricting or limiting that interest. They might limit him to an alimentary liferent of the whole or of a part of his share, or they might advance him a part for the purpose of setting him up in business, but they had no wider discretion than this. They have no discretion to resolve that the son was not in a condition to be entrusted with the uncontrolled command of his share, and then to proceed to give him his share, because the only condition on which they were entitled to make over to him a whole or a part of his share was when they had resolved that it would be prudent that he should have his share uncontrolled and without limitation.

That being my construction of the deed, I agree that what the trustees have done is to resolve that Nicol M'Nicol should not have the uncontrolled disposal of his share, and then to put him formally and legally, if not practically, in the same position as if he had the full control over and the uncontrolled disposal of it. I agree therefore that the Lord Ordinary's interlocutor must be recalled.

The Court recalled the Lord Ordinary's interlocutor, found that Nicol M'Nicol had right only to an alimentary liferent of one moiety of the residue of his father's estate, and that the capital of the estate conveyed to Nicol M'Nicol by his father's trustees belonged, one-half to the next-of-kin of Donald M'Nicol, and one-half to the next-of-kin of the spouse of Donald M'Nicol; and remitted to the Lord Ordinary to proceed.

Counsel for the Claimants Grace M'Nicol or Mitchell and Others—Guthrie—T. B. Morison. Agents—Robert D. Ker, W.S., and Peter Morison, S.S.C.

Counsel for the Claimants Margaret Clark or M'Nicol and Others—H. Johnston—Ure. Agents—J. & J. Galletly, S.S.C.

Saturday, February 18.

FIRST DIVISION.

DRYBROUGH & COMPANY *v.* MACDONALD.

Bankruptcy—Sequestration—Acquisition of Property by Undischarged Bankrupt after Discharge of the Trustee—Acquiescence of Creditors—Appointment of New Trustee—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 103.

The estates of a bankrupt were sequestrated in 1874, and yielded less than a shilling in the £. The trustee was discharged in 1877. In 1893 a creditor petitioned for the election of a new trustee, alleging that it had recently come to his knowledge that the bankrupt was possessed of property of considerable value. The bankrupt answered that any property he possessed had been acquired by his own industry since 1878, and that the petitioner, as he had been aware that the bankrupt was carrying on business and had done nothing to enforce his rights, was barred from insisting in the petition. The Court, without pronouncing any opinion as to the respective rights of the creditors and the bankrupt to the property which the latter had acquired, *granted* the petition.

This was a petition at the instance of Messrs Drybrough & Company, brewers in Edinburgh, for the election of a new trustee on the sequestrated estates of Messrs J. & A. Macdonald, bottlers in