Friday, January 10.

FIRST DIVISION.

TEACHER'S TRUSTEES *v.* TEACHER AND OTHERS.

Trust—Losses on Investments—Liability of Beneficiaries inter se—Allocation of Shares.

A testator after providing that his widow should have the liferent use of a certain property, and making provision for certain legacies and annuities, directed his trustees to divide the residue into as many equal shares as he had children, and to hold one of such shares for behoof of his widow in liferent, and after her decease to pay over the fee to his son W, declaring that this share might in the option of his said son be lent to him during the widow's life on his personal obligation to pay to the trustees for her behoof interest thereon at the rate of 5 per cent. A similar provision made by the testator in his trust-disposition and settlement with regard to his son A was cancelled by a codicil, which directed that the said share should be equally divided among his other children in terms of his settlement. Then with regard to his two sons D and C, the testator directed the trustees to lay aside a like equal share for their behoof, and to pay his widow interest thereon at the rate of 2½ per cent., with power to the trustees to pay over their shares to D and C after securing that the said percentage should be paid to the widow. The rest of the shares the trustees were directed to hold equally for behoof of the testator's four daughters in liferent and their issue in fee, subject to this *proviso* that the widow of the testator was to receive 2½ per cent. thereon during her life.

After the testator's death the estimated amount of his share was paid to W, and in consideration of said payment he granted a bond binding himself to pay interest thereon at the rate of 5 per cent., and declaring that if it should be ascertained that the sum received by him was more than the share of residue to which he might be ultimately entitled he bound himself to account to the trustees for any difference, and reserving right to participate further in his father's estate if it should turn out that the sum received by him was less than his proper share of residue.

Two payments were made to D, but in both cases the terms of the acknowledgments showed that they were payments to account of his share. C also received the estimated amount of his share, and he granted a discharge to the trustees of the sums paid as in full of his share, but under the declaration that the sums paid were subject to "rectification," and that if it should be found that "from loss on any investment or from any cause" the sums paid were greater than the share to which he was entitled he bound himself to repay the excess, while on the other hand if the sum paid turned out too little the trustees were to be bound to pay up the difference to which he was entitled.

In the course of the trust administration certain losses were sustained on investments in the hands of the trustees, and on the death of the widow, when various sums were set free for division among the sons and daughters, questions arose as to the proportions in which the beneficiaries were to bear said losses.

Held that the loss sustained fell to be borne equally by all the children of the testator (other than A), in respect that the leading purpose of the testator was to provide for an equal division of the residue of his estate among his children (other than A), and that there had been no appropriation of funds to particular beneficiaries.

William Teacher, wine and spirit merchant in Glasgow, died on 27th December 1876, leaving a trust-disposition and settlement, dated 28th September 1872, and four codicils thereto dated respectively 19th June 1874, 19th March 1875, 3rd August 1875, and 29th November 1875.

He was survived by his wife Mrs Agnes M'Donald or Teacher, and by eight children, viz., four sons, William, Adam, Donald, and Charles, and four daughters, Catherine, Margaret, Christina, and Agnes. Mrs Teacher, the truster's widow, died on 9th August 1886; William Teacher junior died on 12th April 1880; Donald Teacher on 15th November 1882.

At the date of his death the truster was in partnership with his sons William and Adam, carrying on business as wine and spirit merchants, Glasgow, under the firm of William Teacher & Sons. The truster's estate at his death amounted to about £97,000, of which £75,852 consisted of the sum at his credit in their business.

By his trust-disposition and settlement the truster conveyed his whole estate, heritable and moveable, to trustees for the purpose, in the first place, of paying debts and the expenses of the trust. By the second purpose of the trust the trustees were directed to allow the truster's widow the liferent use of his property of Craigbet, Blairmore, with the furniture and plenishing of every description, and other effects situated on said property. The truster also provided that his widow should have the liferent of the share of the residue of his estate thereinafter directed to be paid to his sons William and Adam; and also that she should receive from his trustees interest at the rate thereinafter specified on the shares of the residue to be held by the trustees for behoof of his daughters and their issue; and also that she should receive interest at the rate thereinafter specified on the shares of the residue to be held for or paid to his sons Donald and Charles. By the third, fourth, and fifth purposes the testator provided for certain legacies and small annuities.

By the sixth purpose the trustees were directed to make over the truster's interest in the business of William Teacher & Sons to his sons William and Adam, and the survivor, they or he accounting to the trustees for the amount at the truster's credit in said business, and paying the said amount to them by three equal instalments at two, four, and six years respectively from the first term occurring after his death, the said William and Adam Teacher being in the meantime bound to pay interest at 6 per cent. upon the amount unpaid, and having power to pay up the capital sooner than therein provided, if they should find it convenient to do so.

The seventh purpose of the trust provided, *inter alia*—"After payment of the foregoing legacies, and provision being made for the foregoing annuities, I direct my trustees, to divide the residue of my estate into as many equal parts or shares as shall correspond to the number of the children of the marriage between me and my said wife, and to hold one such equal part or share for behoof the said Mrs Agnes M'Donald or Teacher in liferent, and after her decease, to pay over the fee of the said share to my said son William: *Item*, to hold a like equal part or share for behoof of my wife in liferent as aforesaid, and after her decease to pay over the fee to my said son Adam; declaring that the said two shares of said residue to be liferented by my said wife may, in the option of my said sons William and Adam, be lent to them during the life of my said wife on their personal obligation and without security, in which case they shall be bound to pay to my said trustees interest thereon at the rate of 5 per cent. per annum from the date of the same being lent to the date of repayment, payable half-yearly: *Item*, to lay aside a like equal part or share for behoof of each of my sons Donald and Charles, and from each of said shares to deduct the sum of £2000 sterling, which several sums of £2000 sterling each my trustees shall hold and invest in their own names for behoof of my said sons Donald and Charles respectively, in liferent, for their respective alimentary liferent use allenarly, and their respective lawful issue in fee, and the balance of said respective shares shall be payable to my said sons respectively on their attaining the age of twenty-five years complete, and when so paid to them, my sons Donald and Charles shall be bound to pay to my trustees for behoof of my said wife during her life a sum corresponding to 2½ per centum per annum on the gross amount of said shares, payable half-yearly, for which annual payments my said sons shall respectively be bound to grant their personal obligations to and in favour of my said trustees; and declaring that should my trustees not be in funds to pay said shares when my said sons respectively attain the age of twenty-five years, my said sons shall be entitled to payment of the interest actually accruing thereon until said shares can be paid."

The trustees were further directed to hold the remaining four equal shares of the residue, and to pay to Mrs Teacher during her life a sum equal to 2½ per cent. per annum upon the amount thereof, and to pay to the daughters, equally among them, the balance of the interest of the said four shares; and after Mrs Teacher's death to hold one of said four shares for behoof of each of his daughters in liferent allenarly. It was then declared that in the event of the decease of any of the sons before receiving payment of their respective provisions, or before the same should have become vested in them, or in the case of the decease of any of the daughters leaving lawful issue, the share provided to be paid to or liferented by such deceaser should be paid to or among his or her lawful issue, and failing such issue, such share or shares should become lapsed and accresce to and go to increase, in equal proportions, the provisions of the survivors of the said sons and daughters.

And it was further declared that "upon any of the sums laid aside or invested for the purpose of securing payment of any annuities or liferents being liberated by the death of the annuitants or liferenter respectively, the same shall be divided equally, and the shares thereof falling to sons be paid to such sons, and the shares of daughters shall be held for behoof of the daughters in liferent, and their respective lawful issue equally among them in fee, all as before provided."

By the first codicil dated 19th June 1874 the truster cancelled the provisions made in the said trust-disposition and settlement for his son Adam and his heirs, and expressed it to be his will "that what would have fallen to his or their share shall be divided share and share alike with my other children and their heirs in terms of said will and testament."

By the fourth codicil the truster, with reference to the share of his estate falling to his son Donald, directed his trustees, instead of paying such share to his said son, and taking his personal obligation for 2½ per cent. per annum on the amount thereof to be paid to his wife during her life, to retain in their own hands, and to invest in their own names, a sum sufficient to yield an income equal to 2½ per cent. per annum on the gross amount of such share, including therein in the amount already advanced by him to his said son, and to pay the balance of such share to the said Donald Teacher as directed by the trust-disposition and settlement, and on the death of Mrs Teacher the trustees were directed to pay the balance of the said share to Donald Teacher in full. The trustees were, however, authorised to pay the full share to Donald Teacher if he gave them a sufficient guarantee for payment of the said 2½ per cent. to Mrs Teacher. It was further provided in said codicil, in regard to the share of the truster's son Charles, that the trustees, instead of paying any portion thereof to himself, should hold the same and invest it in their own names, and apply the interest (1) in making payment to Mrs Teacher of a sum equal to 2½ per cent. per annum on said share; (2) in making payment of £200 a-year to the said Charles Teacher. Any

balance of the income of said share which might remain the trustees were directed to divide among the truster's daughters. It was, however, declared that it should be in the power of the trustees at any time to pay to the said Charles Teacher the capital of said share, in whole or in part, after providing for the said percentage to Mrs Teacher. After the death of the said Charles Teacher his said share was to be divided among his issue, and failing such issue among his surviving brothers and sisters.

After the death of the truster's widow questions were raised as to the proportion in which losses sustained on certain trust investments were to be borne by the several beneficiaries, and the present special case was submitted for the purpose of obtaining the judgment of the Court, *inter alia*, upon the following question—"(1) Whether, in a question between the beneficiaries, the loss sustained upon investments of the trust funds made by the trustees falls to be borne by the whole children of the truster other than Adam Teacher, equally?"

The material facts in connection with the administration of the trust were set forth in the case as follows:—

After Mr Teacher's death his son Adam Teacher intimated that he claimed legitim, and the claim was admitted by the trustees.

On 14th May 1877 "an interim statement and scheme of the division of the estate prepared with a view to show the state of the funds, and to authorise payments to the beneficiaries," was submitted to a meeting of trustees, and was approved of. This statement brought out the share of the residue to be paid to or held for each child (except Adam Teacher who was credited with legitim) at £12,000, and the minute of meeting states that "it was agreed that Mr William's apparent share in the estate should be paid to him on a proper discharge and obligation to Mrs Teacher being granted, and that Mr Adam's legitim should also be paid on a discharge being granted."

The trustees granted a receipt to Messrs William Teacher & Sons for the sum of £12,000 to account of the amount due by them to the trust. The minute of the trustees, dated 9th October 1877, authorising this transaction is as follows:—"Mr Church" (the factor of the trustees) "was further authorised to grant a receipt on behalf of the trustees to Messrs William Teacher & Sons for a further sum of £12,000 to account of the amount due by them to the trust, to be paid to Mr William Teacher in settlement of his share on getting bond by him for payment of interest thereon to Mrs Teacher during her life." William Teacher, on the other hand, granted on 8th October 1877 a personal bond proceeding upon the narrative of his father's trust-disposition and settlement, wherein he acknowledged receipt from the trustees of the sum of £12,000, "which sum is as nearly as can be ascertained at present, the share of residue directed to be held for behoof of the said Agnes M'Donald or Teacher, and destined to me in fee." William Teacher then bound himself to pay interest at the rate of 5 per centum per annum to the trustees on the said sum of £12,000 from the term of Whitsunday 1877 until the death of Mrs Teacher. The said bond contained the following declaration:—"Declaring, however, that if it should be ascertained that the foresaid sum is more than the share of the residue of my father's estate to which I may be ultimately entitled, then I bind and oblige myself to account to the said trustees for any difference, and I reserve my right to participate further in my said father's estate should it turn out that the said sum of £12,000 is less than my proper share thereof."

After the said bond was granted by William Teacher, the trustees, acting upon the advice of counsel, resolved to hold one-eighth of the capital of the estate, viz., the share which would have fallen to Adam Teacher had the provision to him not been revoked during Mrs Teacher's lifetime, and to pay to her the interest thereof, and accordingly they appended a minute of restriction to the said bond in the following terms:—"In respect that when the foregoing bond was prepared and executed the amount necessary to be laid aside to provide a surrogatum to Mrs Teacher for the interest on the share of the estate that would have fallen to Mr Adam Teacher in terms of Mr M'Laren's opinion was not taken into account, the amount of the share falling and advanced to Mr William Teacher is reduced to Ten thousand six hundred pounds sterling, it is hereby agreed and declared that the foregoing bond is restricted to that amount and corresponding interest." From and after the 15th May 1877 the said William Teacher, and after his death his trustees, paid to the testator's widow interest at the rate of 5 per cent. on the said sum of £10,600, and that during her lifetime. The payment of the said sum to William Teacher is entered in the business books of the trust as made on 15th May 1877, and in the trust accounts William Teacher is not dealt with during the lifetime of Mrs Teacher as having any interest in the revenues of the estate remaining undivided, including therein the investments mentioned in article 20 hereof made by the trustees subsequent to the date when in the books of the trust the said sum is entered as paid to William Teacher.

On 8th October 1877 the trustees paid to Adam Teacher the sum of £4028, 11s. 9¾d. in name of legitim.

At the said meeting of the trustees held on 9th October 1877 a letter was submitted from Charles Teacher, with the approval of Mrs Teacher, requesting the trustees to exercise their discretion, and to put him in possession of his interest in his father's estate, and the trustees resolved to comply with his request. No payment to account of his share was, however, made to Charles Teacher until 1879, when a trust-deed by him in favour of trustees for his own behoof, subject to payment to Mrs Teacher of an annuity equal to 2½ per cent. upon his share, was intimated to the trustees. The trustees then made over to Charles Teacher's trustees a bond and disposition in security for £4500, and paid to them the sum of

£6000, for which they and Charles Teacher granted a discharge dated 8th, 9th, and 11th September 1879. Previous to the date of this payment the granters of the bond for £4000 had become bankrupt, and the interest on the bond had fallen into arrear. By the said discharge Charles Teacher and his trustees discharged the trustees of their whole actings and intromissions, and also of their whole omissions as trustees and executors of the truster, and of the said sums paid and assigned as aforesaid, as in full of the said Charles Teacher's share of his father's estate, but the discharge was granted subject to the following declaration and reservation:—"But these presents are granted under the express declaration and reservation, that as it is impossible at the present time correctly to estimate the exact amount of the share falling to the said Charles Teacher, the sums now paid and assigned to us are so paid and assigned subject to rectification, when the sums reserved to meet annuities come to be divided and paid, and we, as trustees foresaid, with consent foresaid declare that if on a final accounting with the estate of the said William Teacher it shall be found that from loss on any investment, or from any cause whatever, the sums now paid and assigned are greater than the share to which the said Charles Teacher is entitled, we bind and oblige ourselves and our successors as trustees foresaid, and the estate under our charge, and the said Charles Teacher binds himself and his heirs, executors, and representatives whomsoever, to repay to the said trustees of the said deceased William Teacher the difference between the *cumulo* amount of the sums now paid and assigned to us and the sum which shall be ascertained to be the true and actual share of the said Charles Teacher, it being understood on the other hand that if the amount now paid and assigned to us turns out to be less than the amount to which the said Charles Teacher is entitled, the said trustees of the said William Teacher shall be bound to make up and pay to us as trustees foresaid or our foresaids the difference to which we are entitled." The said Charles Teacher has now been re-invested in his estate.

During the lifetime of the truster £5000 had been advanced by him to his son Donald Teacher, for which the latter had granted I O U's, and on the 27th February 1878 the trustees delivered the said I O U's to Donald Teacher at his request, and he granted to the trustees an acknowledgment 'that the amount thereof, being £5000, has been received by me to account of the share falling to me of my late father's estate, and that to that extent my interest in the said estate is discharged." On the 21st July 1887 a further sum of £5586, 0s. 2d. was paid to his executors (he having died on 15th November 1882) to account of his share, and his executors to the extent of the said further payment granted a discharge of "a share of the said Donald Teacher, and his right and interest under the trust-disposition and settlement and codicils of the said deceased William Teacher." At the date of said payment on 21st July 1887, it was known both to the trustees and to Donald Teacher's trustees that the interest on the first investment referred to (*infra*) was largely in arrear, and that there might be considerable loss on its realisation; and also that the interest on the second of these investments was in arrear, and that there might be loss on it also.

After the truster's death his trustees realised his estate other than the sum at his credit in the business, which was paid to them by instalments, as directed in the sixth purpose of the trust. The trustees held the residue of the estate for the beneficiaries, without special appropriation or division, and after the payments to the sons already narrated they held the remainder, without appropriation or division, for the daughters in liferent to the extent of their shares, and for the sons to the extent of the unpaid balance of their shares.

The trustees paid 2½ per cent. per annum upon the shares of Donald Teacher and of the daughters to Mrs Teacher during her life, and the balance of income to Donald Teacher and the daughters in proportion to the capital amount at the credit of their several accounts.

The trustees invested the trust funds in their hands in heritable security, and, *inter alia*, on a bond and disposition in security dated 18th August, and recorded 27th September 1877, over house property in Glasgow, for the sum of £4000, which had been resolved to be lent at a meeting of trustees held on the 18th June 1877; and (2) a bond and disposition in security, over house property in Partick, for £3700, which bond was assigned to the trustees on 10th December 1879, in pursuance of a resolution come to at a meeting of trustees on 13th November 1879. The granters of the first of these bonds became bankrupt, and failed to pay the interest due at Whitsunday 1879. The trustees entered into possession of the subjects, but have been unable to let a large part thereof, and the interest upon the said bond was in arrear at Martinmas 1888 to the extent of £1434, 4s. 10d. Further valuations which the trustees have obtained show that if they realise the property, there is likely to be a loss of the capital sum to the amount of £2000 or thereby. The interest upon the second bond mentioned above fell into arrear at the term of Whitsunday 1886, and the amount in arrear at Martinmas 1888 was £267, 4s. 11d.

As already stated, Mrs Teacher died on 9th August 1886, whereupon the estimated share of Adam Teacher, viz. £10,563, 10s. 7d., retained by the trustees as aforesaid, and the proceeds of Craigbet and furniture therein, amounting to £2612, 5s. 4d., became divisible in terms of Mr Teacher's trust-disposition and settlement.

The trustees have been called upon by the trustees of William Teacher and the executors of Donald Teacher to make payment to them respectively of the balance of their shares.

The parties to the case were—*first*, the trustees of William Teacher senior (the

truster); *second*, the daughters of the truster and their children, and representatives of deceased daughters; *third*, the testamentary trustees of William Teacher junior; *fourth*, Charles Teacher; *fifth*, the testamentary trustees of Donald Teacher.

The second parties contended that all loss on investments made by the trustees must fall equally upon all the children except Adam, but if not, that in any event the third and fourth parties must bear a share of the loss on said loan for £4000, and the fifth parties must bear a share of the loss on both loans.

The third parties maintained that the period of vesting of the estate, and also of payment, in so far as not otherwise directed, was the death of the truster; that the sum of £10,600 was paid to William Teacher, in terms of the directions of the settlement, as part payment of his share; and that the sum so paid to him could not be affected by losses upon investments held by the trustees. Further, the third parties maintained that they are entitled to one-seventh of the said sums set free by Mrs Teacher's death.

The fourth party had no contention to make, but was willing to fall in with the views of the second parties.

The fifth parties maintained that the loss upon the said investments must be borne by all the children of the truster (except Adam), in proportion to the amount of the interest in the trust-estate possessed by each such child as at the present date, or alternatively as at the date of the death of Mrs Teacher on 9th August 1886, or alternatively as at the respective dates when each of the said investments was sanctioned by the trustees.

Argued for the second parties—William had only received a loan of the money advanced to him. It was clear from the terms of the bond that he was bound to account to the trustees if the sum advanced to him turned out more than his share. If the trustees did anything more than lend William the money, or advance it to him subject to an ultimate accounting, they went beyond their powers, and this action was null and void. The terms of the discharge granted by Charles showed clearly on the face of it that the payments to him were subject to "rectification," and specially provided for the event which had occurred—losses on investments. In Donald's case the payments were clearly payments to account only. If the shares had increased in value, they would have claimed, and rightly, to participate in the increase. Why should they not be bound to bear their share of the loss which had been incurred. In none of the cases had there been such a setting apart or appropriation of the sons' shares as would exempt them from participating equally in the loss which had been incurred, equal division of the shares of residue being the clear intention of the testator.

Argued for the third parties—The loss on the investments must fall on the beneficiaries according to their interest in the trust-estate at the time of the loss. The intention of the truster was that the share of each child should be appropriated to him, or her, as soon as the legacies had been paid, and the annuities provided for. There was nothing in the character of the estate to prevent the amount being ascertained, and the trustee directed the shares to be made over to his children on an event which might quite well happen before the death of the widow. The truster's direction was to "divide" the estate among his children, and not to retain it in lump sum and pay income to his children. There had been in fact a division and appropriation so far as William was concerned, and from the date of the payment to him he became owner of the share made over to him. The advance to him could only be called up, if it should be subsequently ascertained that the assets at the death of the truster were insufficient to afford him as large a share—*Robinson* v. *Fraser's Trustees*, March 10, 1880, 7 R. 694; August 3, 1881, 8 R. (H. of L.) 127.

Argued for the fifth parties—The terms of the will were that Donald's share should be divided and laid aside for him. That was a direction to allocate his share to Donald, which at all events in part had been carried out by the parties in 1878 before any of the losses had been incurred. To the extent of that payment at all events his interest in the trust-estate had been lessened; the proportion in which he was subject to any losses on that estate had been consequently decreased.

At advising—

LORD PRESIDENT—The question submitted for the determination of the Court in this case has arisen in the winding-up of the trust-estate of the late William Teacher, and the ultimate distribution of what remains undivided of the residue of that estate.

Mr Teacher died in 1876, and his widow in 1886, she having had a liferent of the entire estate, although it was provided to her in rather an unusual way as regards the different shares belonging to the children. There were four sons and four daughters. One of the sons claimed legitim in consequence of having been cut off from all share in the residue of his father's estate by a codicil dated in 1874.

In the trust-deed, besides what may be called the proper testamentary provisions, it is provided that the trustees should offer to the deceased's two sons, William and Adam, his whole interest on the business carried on by him and them for some time prior to his death under the name of William Teacher & Sons, which was of large value, and indeed constituted much the larger part of his estate; and it was directed that they should pay the price, if they accepted the offer, by instalments at two, four, and six years, and should pay interest on the unpaid amount in the meantime. These instalments have all been paid, and so about £76,000 has been obtained by instalments, the business having obviously been of an extensive and lucrative kind.

This brings me to the proper testamentary part of this deed, and it is not necessary to consider any of the legacies or annuities provided in the testament with the exception of the liferent to the widow, which is provided in a peculiar way under the clause which provides for the disposal of the residue of the testator's estate. That is the 7th purpose of the deed and begins thus—"After payment of the foregoing legacies, and provision being made for the foregoing annuities, I direct my trustees to divide the residue of my estate into as many equal parts or shares as shall correspond to the number of the children of the marriage between me and my said wife." Now, the leading idea there of course is that there should be an equal distribution of the truster's estate. The general purpose and intention of the testator is that each child should participate in the residue on an equality, or, in other words, that there should be an equal division of the residue into as many parts as there are children. The clause then goes on to provide in what way the shares are to be disposed of, in the first place during the widow's life, and secondly when set free by her death, and it makes certain provisions as to each of the shares of the sons, which require to be particularly considered for the solution of the present question. The trustees are directed to hold one share for behoof of the testator's widow in liferent, and after her decease to pay it over to his son William. Then follows a similar provision as to his son Adam's share, but there is this declaration as to both these shares—"Declaring that the said two shares of said residue to be liferented by my said wife, may in the option of my said sons William and Adam be lent to them during the life of my said wife on their personal obligation and without security, in which case they shall be bound to pay to my said trustees interest thereon at the rate of 5 per centum per annum from the date of the same being lent to the date of repayment." The fee or rather the value of these shares are still to form part of the trust-estate during the widow's life, and the right to the fee is not to emerge till the widow's death, the sum being merely lent to them at their option, and not removed from the category of part of the trust-estate, because it is declared that it is to bear interest, and that the interest is to run from the date of the advance till repayment, clearly contemplating that the loan might be paid back, or else the sons might continue to pay interest till the widow's death, when the shares would become their own.

Then with regard to his two sons Donald and Charles the testator makes this provision—"To lay aside a like equal part or share for behoof of each of my sons Donald and Charles, and from each of said shares to deduct the sum of £2000 sterling, which several sums of £2000 each, my trustees shall hold and invest in their own names for behoof of my said sons Donald and Charles respectively, in liferent, for their respective alimentary liferent use allenarly, and their respective lawful issue in fee, and the balance of said respective shares shall be payable to my said sons respectively on their attaining the age of twenty-five years complete, and when so paid to them, my sons Donald and Charles shall be bound to pay to my trustees for behoof of my said wife during her life, a sum corresponding to 2½ per centum per annum on the gross amount of said shares, payable half-yearly, for which annual payments my said sons shall respectively be bound to grant their personal obligations to and in favour of my said trustees; and declaring that should my trustees not be in funds to pay said shares when my sons respectively attain the age of twenty-five years, my said sons shall be entitled to payment of the interest actually accruing thereon, until said shares can be paid." The provision as to Donald and Charles is thus somewhat different from the provision in the case of William and Adam, but still it all comes to this, that the shares belonging to them are in the meantime, till they reach the age of twenty-five, to form part of the trust-estate, and then they are entitled to have the value of these shares paid over to them *minus* the sums of £2000 which is settled in the case of Donald and Charles on them in liferent and the fee to their children. The widow's interest as to these two shares is provided in this way, that Donald and Charles are to pay 2½ per cent. on their shares for her behoof to the trustees.

There then follow the provisions as regards the daughters. There are four equal shares provided for them, but the testator's widow is to have 2½ per cent. on the amount of these shares, and then the trustees are to pay to the daughters Catherine, Margaret, Christina, and Agnes the balance of the interest and annual profits on these shares; and after the decease of the wife provision is made for settling the shares of the daughters, which are not important for the solution of the present question.

There is a provision following the one I have just referred to, which also has an important bearing on the question before us—"And upon any of the sums laid aside or invested for the purpose of securing payment of any annuities or liferents being liberated by the death of the annuitants or liferenters respectively, the same shall be divided equally, and the shares thereof falling to sons be paid to such sons, and the shares of daughters shall be held for behoof of the daughters in liferent," and so forth. Here again with regard to the disposal of sums liberated by the death of annuitants or liferenters there is to be a perfectly equal division among the eight children of the testator.

It appears that after the trust had been in operation for some years the trustees made two unfortunate investments by which loss has been caused to the trust-estate. It is not contended that the trustees are personally answerable for this loss. On the contrary, it is agreed that the losses are to be dealt with as accidental losses for which no one is personally liable, and the question is, whether the benefici-

aries are all in the same position as regards these losses, or whether those who have obtained payment in part of their shares of the residue, and have actually carried off money to account of their shares, are or are not to be liable for the losses or any part of the losses which have been incurred. In determining this question we must consider what has happened in each case in which payment has been made.

The divisible fund was ascertained approximately in May 1877, and the statement then prepared is printed It appears that the total capital was about £97,000, from which there fell to be deducted a sum of over £9000 to meet debts, expenses, legacies, &c., leaving as the nett amount capable of division the sum of £87,652, 3s. 6d., and the executors proposed to deal with this sum in this way. They paid off Adam Teacher's claim of legitim amounting to £4028, 11s. 9¾d., and it was estimated at that time that each of the testator's other children would be entitled to £12,000. This estimate was rather large as it turned out, independently of the losses afterwards incurred, and consequently in dealing with William Teacher they took from him a bond for the total amount, which was afterwards restricted to £10,600. This bond contained among other provisions the following declaration—"That if it should be ascertained that the foresaid sum is more than the share of residue of my father's estate to which I may be ultimately entitled, then I bind and oblige myself to account to the said trustees for any difference, and I reserve my right to participate further in my said father's estate should it turn out that the said sum of £12,000 is less than my proper share thereof." Then it is stated in the case that after this bond was granted the trustees, acting by the advice of counsel, "resolved to hold one-eighth of the capital of the estate—viz., the share which would have fallen to Adam Teacher had the provision to him not been revoked—during Mrs Teacher's lifetime, and to pay to her the interest thereof, and accordingly they appended a minute of restriction to the said bond," restricting the amount to be advanced to William Teacher to £10,600. It is then further stated that "from and after the 15th May 1877 the said William Teacher, and after his death his trustees, paid to the testator's widow interest at the rate of 5 per cent. on the said sum of £10,600, and that during her lifetime. The payment of the said sum to William Teacher is entered in the business books of the trust as made on 15th May 1877, and in the trust accounts William Teacher is not dealt with during the lifetime of Mrs Teacher, as having any interest in the revenues of the estate remaining undivided, including therein the investments mentioned in article 20 hereof made by the trustees subsequent to the date when in the books of the trust the said sum is entered as paid to William Teacher"—being those on which the losses have been incurred.

Now, as regards the case of William Teacher no question can very well be raised as has been attempted, because in the bond granted by him, and on which he received payment of the £10,600, it is distinctly explained that the payment is not to have the effect of entitling him to say that he cannot be called upon to account if it turns out that he had been overpaid, and, on the other hand, that he is not to be debarred from making a further claim if the trust-estate turns out to yield more than had been estimated. This necessarily leads to the inference that William Teacher followed the fortunes of the trust. He is to be settled with in the end just according to the fortunes of the trust, and is to receive one-seventh of the residue.

Now, with regard to the case of Charles Teacher, what happened is set out in the 16th article of the case, and the arrangement with him, though more complicated than the arrangement with William, is made nnder the express declaration "that as it is impossible at the present time correctly to estimate the exact amount of the share falling to the said Charles Teacher, the sums now paid and assigned to us are so paid and assigned subject to rectification, when the sums reserved to meet annuities come to be divided and paid, and we, as trustees foresaid, with consent foresaid, declare that if on a final accounting with the estate of the said William Teacher it shall be found that from loss on any investment or from any cause whatever the sums now paid and assigned are greater than the share to which the said Charles Teacher is entitled, we bind and oblige ourselves and our successors as trustees foresaid and the estate under our charge, and the said Charles Teacher binds himself and his heirs, executors, and representatives whomsoever to repay to the said trustees of the said deceased William Teacher the difference between the *cumulo* amount of the sums now paid and assigned to us and the sum which shall be ascertained to be the true and actual share of the said Charles Teacher." And there is a corresponding arrangement that if the estate affords more than is expected he is to have the benefit of the increase. Here again Charles Teacher binds himself up with the trust-estate till it is wound up, and not to receive more than one-seventh part of the residue.

Then in regard to Donald, the 18th article of the case sets out the circumstances in which payments were made to him, and they leave on the mind a clear impression that he received payment of the sums the trustees were able to advance on condition that, although the advances were made, he was not to be placed in a better position as regards a possible loss of investments than his brothers. There can be nothing more unreasonable than to suppose, in the face of the circumstances set forth in that article, that he was to carry off his estimated share of the estate paid over to him, and was not to be liable in repayment if the estate fell short of the estimated amount. He and his brothers were just to be tied to the trust-estate throughout till a final adjustment was made, and were entitled to receive only one-

seventh of the residue, neither more nor less.

Keeping, therefore, in view that the lead ing purpose of the testator is an equal divi sion of the whole residue of his estate among his children, is that purpose not to be given effect to? I doubt even if the trustees had made advances to the sons on another footing than they have done if they could have had power to do so in face of the clearly expressed intention of the testator. They have, however, carried out the intention of the testator. There is a good deal of complexity in the deed, but I call it a very carefully prepared deed, because though there is complications if one is careful to follow out the intentions of the testator as to the provisions to his sons and daughters, there is nothing to interfere with his expressed intention of an equal division among his whole children. The circumstance of Adam having claimed legitim created a little difficulty at first sight, bnt now that the widow is dead the trustees are in a position to wind up the whole estate and make a final settlement with the children, which settlement must be made on the footing that no advantage is to be given to one over another. Consequently we shall answer the first question in the affirmative, and the other questions do not require to be answered.

LORD SHAND—The question to be decided in this case arises upon the argument which was submitted by the third, fourth, and fifth parties to the case, these being the sons or representatives of sons of the testator other than Adam Teacher, who claimed his legitim.

These parties, or certain of them, received large sums out of the trust funds at a very early date in the history of the trust-management, and they maintain that they should not be responsible for any part of the loss upon investments of that part of the residue of the estate which remained in the trustees' hands; and as I understand the argument, it was rested upon the rule or principle which was said to have been established, or at least illustrated, in our law by the decision of the House of Lords in the case of *Robinson* v. *Fraser's Trustees*, reported in the 8th volume of Rettie (H.L), p. 127. The principle upon which that case was decided may I think be thus explained. In many trust-administrations the truster has provided that after certain trust purposes have been served a certain fund should be laid aside for a particular beneficiary, or series of beneficiaries, or he may have so framed his settlement that at a certain stage in the administration of the trust-estate a class of beneficiaries may be entitled to require that the amount of the legacies left to them should be specially set aside for their behoof. In these cases, where by direction of the testator or by right of the legatees certain funds have been severed from the general funds and appropriated to particular purposes, and have as so severed and appropriated been invested in special securities, the parties on whose behalf the securities are taken and held must bear the risk of the chances and fluctuations of the securities. That is the principle to which effect was given in *Robinson's* case, and as I understand the argument on behalf of the parties already mentioned, it was this, that they having practically got payment of what was due to them under the trust-deed before loss had occurred on any securities, the funds remaining in the trustees' hands were to be regarded as having been appropriated to the payment of the other legatees, the testator's daughters and their children, that the daughters and their families were the persons interested in these securities, and that they alone therefore should bear the losses which have occurred. An alternative view was presented, viz., that if the shares of daughters did not bear the whole loss, at least they should bear the larger part of it, in the view that there should be a proportion of the loss estimated as applicable to the larger funds which the trustees held for the daughters and their families, and a smaller proportion of the loss taken as applicable only to the smaller sums which the sons had still to receive from the estate.

I have come without difficulty to the conclusion that the circumstances of this case are not such as to lead to the application of the principle of the case of *Fraser's Trustees* at all. I think there was no appropriation or setting aside and severance of funds for a particular purpose or for particular beneficiaries under the trust. I do not propose, after the full analysis which your Lordship has made of the provisions of the trust-deed, and the full statement given of the trustees' actings, to go over the same ground. All that the trustees were entitled to do was to lend to certain sons the amount of their shares, and to make certain payments to others on obtaining obligations to the effect specified in the trust-deed, and all that followed was either the loan or the payment of parts of the trust-funds on the understanding and stipulation that the sums lent or paid were to be regarded as being to account of each legatee's share of residue—indeed, that in the future and final accounting for the residue, according as the balance should be for or against the legatee, the final payment should be paid to or by him. I find it impossible to infer from these interim loans or payments that there was thereby an appropriation of the remaining fund and of the securities applicable to that fund to the daughters' shares, so as to make the losses fall upon these shares alone. It is plain that every one of the legatees was interested in the ultimate result of the residue, and that the trustees, representing all the children or their representatives, held the trust securities for all who were interested in the residue. There was no appropriation and severance of funds and investment of these in securities for particular legatees so as to admit of the application of the principle to which effect was given in *Fraser's Trustees'* case; and accordingly for the sons or their representatives the argument mainly relied on fails.

It was, however, further argued that in

consequence of the large loans or payments made to account, the daughters had much the larger interest in the residue left with the trustees, and in the securities in which part of that residue was invested, and that consequently the daughters' shares should bear a larger part of the losses than the sons, who had a smaller interest in the part of the residue left in the trustees' hands. If this argument were sustained it would introduce a new rule or principle in accounting in trust-estates. The argument is in my opinion clearly unsound. Each party is interested in the residue, though the extent of their several interests varies. But before these interests are met by a division of funds the balance of the residue must be ascertained. There must first be deducted the charges against residue—debts, expenses of administration, and the like, including the amount of the losses on the securities. The balance is the residue, and the residue being so ascertained each party will take the share that belongs to him less the amount he has already received. And so upon that view of the case, and holding that the principle contended for has no application, I agree with your Lordship in thinking that we should answer the questions as your Lordship proposes.

Lord Adam—The question before us arises as to the division of the residue of the trust-estate of the late William Teacher. Up to this time there has been no final division of the residue, but now that the testator's widow is dead the entire sum is set free and ready for division, and it is stated that the sons are calling for payment of the balance of their shares. Now, it appears that in course of the administration of the trust loss has occurred on certain of the securities, and the question comes to be whether or not that loss is to be borne by all the children equally, or in what proportion they are to bear it, and in that question I can state my opinion shortly.

It appears to me quite clear and without ambiguity that under the settlement the residue is to be divided into as many equal parts as correspond with the number of the testator's children. Various directions are given as to the treatment of the several shares, but there is nothing which impinges on the principle of equal division. The only other thing which I must notice is that Adam is disinherited by the codicil of 1874, and it is directed that his share is to be divided equally among the others. Putting his case out of the way an equal division among the children is directed.

Now, if that be so, is there any reason why this direction should not be carried out? Of course if the loss incurred on the investments is not borne equally the residue will not be equally divided. The question is, I think, conclusively settled by the statement in article 19, where it is said that—"After the truster's death his trustees realised his estate other than the sum at his credit in the business, which was paid to them by instalments, as directed in the sixth purpose of the trust. The trustees held the residue of the estate for the beneficiaries without special appropriation or division, and after the payments to the sons already narrated they held the remainder without special appropriation or division for the daughters in liferent to the extent of their shares, and for the sons to the extent of the unpaid balance of their shares." What is that but saying that after realising the estate and making certain payments to account, the trustees held the remainder of the funds for the general purposes of the trust.

The next article states what the investments were on which the losses were incurred. They were just losses in the general trust fund. I can perfectly well understand if the position of the trustees had been different, if any residuary legatee had had right to an immediate payment, and if the share of that legatee had been ascertained and paid to him and he had retired with the whole share in his pocket, it would have been clear enough that the remainder of the estate was not held for his benefit to any extent, and therefore that loss incurred with regard to it could not fall on him. That, however, is not at all the position of the sons' shares in this case, and, again, if on the principle of the case of *Robinson's Trustees*, the trustees had divided the estate and set apart certain shares and held them applicable to particular legatees, and if loss had been incurred on a particular investment particularly appropriated to a particular legatee, that loss must necessarily have fallen on the party for whom the trustees held the investment. I could perfectly understand in that case that the loss should not be equally divided, but there is no such case here. The largest payment has been made to William Teacher, and that payment provided on an estimate of his share in an *interim* statement of the trust-estate, and in respect of this *interim* statement the advance was made to him because he had the right on call to the advance of some such sum as was there brought out, and it was provided that as soon as the widow died the sum should become his own. The money was not paid him as a final settlement between him and the trustees, but on the terms that if he had got too much he was bound to pay back the surplus, and if he had got less than his proper share he was to get more to make him equal to the rest.

The next payment was made to Charles Teacher and is of the same character. The only difference is that the discharge granted by him foresees and provides for the particular event which has occurred—loss on investments. Everything is left subject to subsequent rectification.

Two payments were also made to Donald Teacher, but both on their face are payments to account.

Now, we have come to the ultimate division of the residue; the question is what are the trustees to do? Are they not to make an equal division of the residue of the estate among the children of the testator except Adam. If, however, a loss incurred on

funds held for the general trust purposes does not fall on all equally, there will not be an equal division. The only result of the loss must be that the sons get so much less than they would have done had it not been for the loss, because the trustees have less funds in their hands.

LORD M'LAREN was absent at the hearing.

The Court found and declared that in a question between the beneficiaries under the settlement of the late William Teacher, the loss sustained upon investments of the trust-funds made by the trustees falls to be borne by the whole children of the testator other than Adam Teacher, equally, and decerned.

Counsel for the First Parties — Low. Agents—Ronald & Ritchie, S.S.C.

Counsel for the Second and Fourth Parties —Sir Charles Pearson—Wallace. Agents—John C. Brodie & Sons, W.S.

Counsel for the Third Parties—Asher, Q.C. —Ure. Agents—Ronald & Ritchie, S.S.C.

Counsel for the Fifth Parties—W. Campbell. Agents—J. & A. F. Adam, W.S.

Friday, January 10.

FIRST DIVISION.

MOLLESON (PRINGLE PATTISON'S CURATOR), PETITIONER.

Curator Bonis—Power to Grant Leases and Abatements of Rent—Trusts Acts 1867, 1884, *and* 1887—*Judicial Factors Act* 1889.

A *curator bonis* has power to grant leases of agricultural subjects for a duration not exceeding twenty-one years, and to grant abatements of rent.

J. A. Molleson, C.A., who was appointed *curator bonis* to Mrs Pringle Pattison in July 1888, let a farm forming part of the ward's estate for fifteen years from Whitsunday 1889, and at the collection of rents in August 1888 he granted to the tenants of six other farms abatements of rent. Thereafter in February 1889 he presented this note craving the Court to find that he was empowered by the Trusts Acts of 1867, 1884, and 1887 to grant the lease and the abatements of rent mentioned without the necessity of applying to the Court for the sanction contemplated by section 7 of the Pupils Protection Act.

The 2nd section of the Act of 1867 gave power to certain classes of trustees to grant agricultural leases for periods not exceeding twenty-one years.

The Act of 1884, which conferred increased powers of investment upon trustees, enacted in its 2nd section that "trustee" should in the Acts of 1861 and 1867 include, *inter alia*, *curator bonis*.

Section 2 of the Act of 1887 provided that, in addition to the powers conferred upon trustees by the 2nd section of the Act of 1867, in all trusts to which that section applied trustees should have power to grant abatements of rent, and section 3 provided that abatements granted prior to the passing of the Act should not be liable to challenge.

The Lord Ordinary (WELLWOOD) reported the matter to the First Division, who, after hearing counsel for the curator and the Accountant of Court, ordered the case to be argued before Seven Judges. Before the case was heard the Judicial Factors (Scotland) Act 1889 came into operation, by section 19 of which it was enacted that the provisions of the Trusts Act of 1887 should apply to and include all trusts and trustees as defined by the 2nd section of the Act of 1884.

On 10th January 1890 the Court recalled their interlocutor ordering the case to be argued before Seven Judges as no longer necessary, and found that in terms of the Trusts Act 1867, as amended and extended by the Act of 1884, and of the Trusts Act 1887, and of the 19th section of the Judicial Factors Act 1889, the *curator bonis* was empowered to grant the lease and the abatements of rent already mentioned without the necessity of applying to the Court for the sanction required by section 7 of the Pupils Protection Act.

Counsel for the *Curator Bonis*—R. Johnstone—C. K. Mackenzie. Agent—Robert Strathern, W.S.

Counsel for the Accountant of Court—W. Campbell. Agents—Mackenzie, Innes, & Logan, W.S.

Thursday, January 16.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

MORE AND OTHERS *v.* WATT'S TRUSTEES.

Process — Reclaiming-Note — Competency—Boxing on Monday where Reclaiming-Days had Expired on Saturday—Judicature Act (6 *Geo. IV. cap.* 120), *sec.* 18.

An objection was taken to the competency of a reclaiming-note that it had been boxed on Monday, January 13, instead of on the previous Saturday, which was the last of the reclaiming-days. Objection *sustained.*

Reference made to the remedies under the Administration of Justice and Appeals Act 1808 (48 Geo. III. cap. 151), sec. 16, and *Steedman* v. *Steedman*, March 19, 1887, 14 R. 682.

By the 18th section of the Judicature Act (6 Geo. IV. cap. 120) it is provided that "When any interlocutor shall have been pronounced by the Lord Ordinary, either of the parties dissatisfied therewith shall be entitled to apply for a review of it to the Inner House of the Division to which the Lord Ordinary belongs, provided that such party shall, within twenty-one days