ceeded by a flagman, a water-tank was placed in the bend of a curve so as to interrupt the view of the line by the guard and driver of the waggons. By this arrangement it is said the flagman was exposed to unnecessary, that is, to avoidable danger, in consequence whereof he, that is, the pursuer's son, lost his life.

We are not at present concerned with the truth of these allegations; it may be that having regard to the requirements of the service at the station in question, no better position for the water-tank could be found. If this be so, a jury may justifiably come to the conclusion that the water-tank constituted an unavoidable danger; and that, as in other cases of hazardous employment, the risk was accepted by the company's servants. But if the allegations be true, I see no distinction in principle between the case alleged and the case of unfenced machinery. The water-tank is part of the permanent equipment of the station, and in the laying out of a station, just as in the construction and placing of stationary machinery, due regard must be had to the safety of those who are to be employed there on the business of the company, so that their lives may not be exposed to unnecessary and avoidable hazard. This, I think, is a duty incumbent on the employer whether he be an individual or a company acting through directors, and while the employer would of course be morally right in relying to a large extent on the judgment of engineers or practical men, he is not in my opinion relieved of his responsibility by the mere fact that he had appointed competent engineers and managers to whose judgment he trusts. I therefore think that the issue should be allowed.

The LORD PRESIDENT, LORD ADAM, and LORD KINNEAR concurred.

The Court approved of the proposed issue.

Counsel for the Appellant—Ure—Dewar. Agents—Simpson & Marwick, W.S.

Counsel for Respondents—Asher, Q.C.—Grierson. Agent—James Watson, S.S.C.

Tuesday, June 2.

OUTER HOUSE.

[Lord Pearson.

BAILLIE'S TRUSTEES, PETITIONERS.

Trust—Administration of Trust—Advances out of Capital—Vesting—Destination-over—Trusts Act 1867 (30 *and* 31 *Vict. c.* 97), *sec.* 7.

Where a truster directs his trustees to pay the income of his estate to the widow in liferent, and at her death to divide the estate equally among his children and the survivors or survivor of them, and in the event of all the children predeceasing the widow to divide the estate among certain other parties, vesting is postponed until the date of payment, and the Court has no power, either at common law or under section 7 of the Trusts Act 1867, to authorise the trustees to make advances to the children out of capital during the lifetime of the widow.

Parent and Child—Aliment—Trust—Right of Child to Aliment out of Father's Trust-Estate—Authority to Trustees.

Where a truster leaves his estate to his widow in liferent and his children in fee, subject to provisions by which the vesting of the estate in the children is suspended, the children, if unable to support themselves, may have a claim for aliment against their father's estate, but this claim must be dealt with by the trustees on their own responsibility, and the Court will not grant a petition for authority to make advances out of capital in name of aliment.

By his trust-disposition and settlement the late John Baillie, wholesale provision merchant, Edinburgh, who died on 4th February 1888, conveyed his whole estate to trustees, who were directed to pay the income of the estate to his widow Mrs Agnes Ainslie Tillie or Baillie, subject to the burden of the maintenance and upbringing of the children of the marriage. By the fifth and sixth purposes the trustees were directed as follows:—"(*Fifth*) At and immediately after the decease or second marriage of the said Agnes Ainslie Tillie or Baillie, or after my own death, in the event of her having predeceased me, my trustees shall pay, assign, and dispone the residue of my estate to and in favour of my children equally among them, share and share alike, on their respectively attaining majority, if sons, or attaining majority or being married, whichever of these events shall first happen, if daughters, and in the event of the death of any of my children occurring before the period hereby fixed for payment of his or her share, then the share of residue which would otherwise have fallen to such predeceasing child shall accrue to his or her child or children or issue equally among them *per stirpes*, and failing child, children, or issue, then to such of his or her surviving brothers and sisters, and the child, children, or issue of deceased brothers and sisters as may themselves take a share of my estate, and that equally among them *per stirpes*; and (*Sixth*) in the event of all my children predeceasing the period of division among them hereinbefore fixed without leaving issue, then my trustees shall realise and divide the residue of my whole heritable and moveable means and estate above conveyed, or proceeds thereof, and pay, assign, and dispone the same as follows, viz., one-third thereof to the said Agnes Ainslie Tillie or Baillie, in the event of her being alive when my children and issue of them fail, and, in the event of her being then dead, to her heirs and assignees whomsoever, and the remaining two-thirds thereof to such of my brothers and sisters as may be alive when my children and issue of them fail and their respective heirs and assignees whom-

soever, and it is hereby specially provided and declared that the provisions hereinafter conceived in favour of the said Agnes Ainslie Tillie or Baillie and my children shall be accepted by them, and the same are hereby declared to be in full of all their legal claims of terce, *jus relictæ*, legitim, portion natural, bairns' part of gear, executry, and every other right or claim which they or any of them or their heirs, executors, or representatives could ask or claim by or through my decease."

John Baillie was survived by his wife and six children. Mrs Baillie did not accept the provisions in her favour, but claimed her legal rights, which were satisfied. By this the trust-estate was reduced to a sum of £270, 19s. 3d.

The children being all in pupillarity or minority, and the income from the estate being trifling, Mrs Baillie applied to the trustees for advances out of the capital sum to enable her to maintain and educate the family. The present petition was accordingly presented by the trustees and by Mrs Baillie as an individual, praying for authority to the trustees to pay to Mrs Baillie the sum of £145, 19s. 3d., to wipe off debts incurred by her in meeting the family expenditure, and a further annual sum of £30, out of the trust-funds of the estate.

On 18th March 1896 the following interlocutor was pronounced:—"The Lords having considered the petition, to which no answers have been lodged, and heard counsel, remit to Mr James Bannerman, W.S., to consider and report upon the regularity of the procedure and upon the authority desired to make advances out of the capital of the trust-funds and trust-estate: Further, remit to the Lord Ordinary on the Bills to proceed further as may be necessary."

Mr Bannerman presented a report, which, after stating the facts of the case, proceeded as follows:—"I would respectfully submit that there is no vested interest in any individual child or in the children as a class till the period of division—the death or second marriage of Mrs Baillie. The direction in the children's favour is only to take effect at that period, and only surviving children or the issue of predeceasing children will then have a vested interest. In the event of all the children dying without issue before the period of division, there is a destination-over to Mrs Baillie and her heirs and assignees whomsoever, and to the truster's brothers and sisters. The provisions not having yet vested in the children, and there being a destination-over, it humbly appears to me, that following the case of *Mundell and Others*, 24th January 1862, 24 D. 327, the petition is incompetent. But there are circumstances to which I would respectfully direct the attention of the Court. The primary purpose of the trust-disposition and settlement, after providing a liferent to Mrs Baillie, is the maintenance and education of the children, and she having claimed her legal rights, the estate is now held solely for the benefit of the children. Aliment of the children is a claim against the representatives of the father, and the children are creditors on his estate. The petitioners' agent has represented to me that it is competent for the Court to authorise the trustees to make advances to pay this claim of aliment. I have grave doubts as to the competency of trustees coming to the Court for authority to pay a debt which, I would respectfully submit, they, in their capacity of tutors and curators to the children, are bound to take the responsibility of paying after fixing the amount with due care. I would respectfully refer to the case of *Woodrow*, 8 S. 604, 26th February 1830. The 7th section of the Trust (Scotland) Act 1867 enacts that the Court may 'authorise trustees to advance any part of the capital of a fund destined either absolutely or contingently to minor descendants of the truster, being beneficiaries having a vested interest in such fund, if it shall appear that the income of the fund is insufficient . . . . and that such advance is necessary for the maintenance or education of such beneficiaries or any of them, and that it is not expressly prohibited by the trust deed, and that the rights of parties other than the heirs or representatives of such minor beneficiaries shall not be thereby prejudiced." I would submit that the trusters' children have a 'vested interest' or 'primary interest' in the estate within the meaning of the Act as interpreted by the Court in the case of *Pattison and Others*, 19th Feb. 1870, 8 Macph. 575, and that the petition might be granted were it not for the words of the 7th section 'that the rights of parties other than the heirs or representatives of such minor beneficiaries shall not be prejudiced.' As in my opinion there is no vesting in the children until the time of division, and in the event of all the truster's children predeceasing that term without issue the fund is directed to be divided in certain proportions between Mrs Baillie and her heirs and assignees whomsoever, and the truster's brothers and sisters, I would respectfully submit that the granting of the petition would prejudice the rights of the truster's brothers and sisters who are parties 'other than the heirs or representatives of such minor beneficiaries,' and therefore that the petition cannot be granted in virtue of the Act."

On 2nd June 1896 the Lord Ordinary (PEARSON) refused the prayer of the petition.

Opinion.—"I cannot see my way to grant any part of the prayer of this petition, either under the statute or at common law.

"The vesting of the fee is suspended, and apart from statutory power, the case of *Mundell*, 24 D. 327, seems to be conclusive against the petitioners. In the case of *Taylor*, 13 D. 948, referred to, the application was merely for a balance of rents, which would otherwise have been accumulated to augment the ultimate portions of the children themselves.

"The Statute of 1867, sec. 7, was no doubt intended to mitigate the effect of such a case as that of *Mundell*. But it

was carefully guarded so as not to be applicable to such a case as this, where the destination-over, which suspends vesting, is not to the survivors of the class or to the issue of predeceasers, but is in favour of third parties.

"I agree with the reporter in thinking that there may be a claim of debt here, as for aliment, against the estate left by the father, in the case of such of the children as are not able to support themselves. But it is for the trustees, and tutors and curators, to work that out on their own responsibility, with the consent, if they can obtain it, of the other contingent fiars.

"I am constrained to refuse the petition."

Counsel for the Petitioners—A. S. D. Thomson. Agent — Andrew Newlands, S.S.C.

Tuesday, June 2.

FIRST DIVISION.

WHITTLE, PETITIONER.

Trust—Trustee—Bankruptcy of Trustee—Removal.

One of two testamentary trustees who had been sequestrated, and who was indebted to the trust-estate, *removed* on the petition of the other trustees and the beneficiaries.

This was a petition at the instance of Mr Robert Whittle, one of two trustees under the trust-disposition of the late Mr John Whittle, Barnhill, Dumfries, with consent and concurrence of the beneficiaries under the trust, craving the Court to remove the other trustee, Mr Joseph Carruthers, solicitor, Moffat, from the management of the trust. Under the trust-disposition the trustees were directed to hold the residue of the truster's estate in liferent for his widow, the fee being left equally among the children.

The petitioner averred that the respondent had been lately in financial difficulties, that on April 21st, 1896, his estates had been sequestrated, and that a claim had been lodged in the sequestration by the petitioner on behalf of the trust estate for the sum of £117, in respect of transactions between the respondent and the late John Whittle.

The respondent lodged answers in which he averred that the claim against him on behalf of the trust-estate was greatly overstated, and that he had counter claims which would more than meet it. He averred further that he had acted for years as the law-agent of the truster, and that the latter had never wished to recal his appointment.

Argued for petitioner—The effect of the sequestration of a trustee clearly was to render him ineligible for the office, more especially in a case like this, where the trust-estate had a claim against him, and also where the trust was a continuing one—*M'Dowall* v. *M'Dowall*, 1789, M. 7453; *Towart*, May 14th, 1823, 2 S. 305; *Smith*, May 15th, 1832, 10 S. 531; *Macpherson* v. *A B*, December 19th, 1840, 3 D. 315. In the last case the trustee was removed even though he offered to find caution.

Argued for respondent—No charge was made against him personally. The debt had existed before the appointment was made, and his sequestration had placed the respondent in a more favourable position with regard to holding this office, since it was the trustee in the sequestration who was interested in resisting the claim, and not himself. In any case the Court should not remove him, but if they thought a change of management necessary, should appoint a judicial factor.

LORD PRESIDENT—I think there is enough to render necessary the removal of this trustee.

It is quite clear that his position as a sequestrated bankrupt, alleged to be indebted to the trust-estate, makes him a very unsuitable person to act as one of two trustees managing that estate. I think it is to be regretted that the respondent did not solve the difficulty by retiring. As, however, he declines to do so, it appears to me that our clear course is to remove him. No more censure of him is implied by our doing so than is involved in his having rendered this course necessary by not himself taking the proper step of retiring from the trust. It is out of the question that a person in the respondent's position should be allowed, in order to save his dignity, to insist upon the appointment of a judicial factor, that is, to mulct the estate in the expenses of judicial management in place of the present gratuitous administration.

LORD M'LAREN and LORD KINNEAR concurred.

LORD ADAM was absent.

The Court granted the petition.

Counsel for Petitioner—Younger. Agents—Steele & Johnston, W.S.

Counsel for Respondent—Cullen. Agent—Alex. Wyllie, S.S.C.

Tuesday, June 9.

FIRST DIVISION.

THE GOVERNORS OF BELL'S TRUST, PETITIONERS.

Trust—Scheme for Administration of Educational Trust—Amendment of Scheme—Educational Endowments (Scotland) Act 1882 (45 *and* 46 *Vict. cap.* 59), *sec.* 7—*Extension of Area of Benefits of Trust.*

The Educational Endowments (Scotland) Act 1882, sec. 7, enacts that, "subject to the provisions of this Act, it shall be the duty of the Commissioners, in re-organising as aforesaid educational endowments, to have special regard to