build a new one. If the school is worth anything, the School Board, if they desire a transfer of it ought to make some equivalent. It further appears that it would still be of use if retained by the petitioners as a lecture-hall for promoting education in the district among young persons who have left school. While disapproving of the proposal to convey the school gratuitously to the board, I am prepared, in common with your Lordship, to consider, when formulated, an alternative scheme such as that which has been suggested by Mr Gordon.

LORD KINNEAR—I have no doubt that this matter has been carefully considered both by the trustees and by the School Board, and that the arrangement proposed seemed to them the best in the circumstances. But it is an essential part of their proposal that we should authorise the trustees to hand over the land and buildings of the trust gratuitously to the School Board. I agree that this is not within their power as trustees, nor is it in accordance with the practice of the Court to sanction gratuitous conveyances of a trust estate to persons who are not beneficiaries under the trust. It is clear enough that according to the ordinary principles of trust administration such a proceeding is out of the question. But it was said to be justified by certain clauses of the Education Act, which are supposed to sanction such conveyances to a school board. I agree, however, with what was said by Lord Shand in the case of *M'Culloch* v. *Kirk-Session and Heritors of Dalry*, that it cannot be held that by these provisions the Legislature intended that trustees, in the administration of endowed schools throughout the country, should be entitled to divest themselves of their school buildings, with the result of defeating the trust under which these are held. I think that the petitioners derive no aid from the provisions of that Act.

Some alternative suggestions have been put before us, but I do not think we are in a position to deal with them decisively at present. So long as it seemed possible that the Court might sanction their own scheme it was hardly to be expected that the petitioners should give the same diligence to the consideration of other methods for relieving the board of its difficulties, as they may probably find necessary now that it has been decided that the trust estate cannot be handed over gratuitously to the School Board. I agree that we should refuse the petition so far as it seeks authority for a gratuitous conveyance of the buildings, and that for the rest the petitioners should have an opportunity of preparing and presenting to us a new scheme.

The LORD PRESIDENT was absent.

The Court pronounced this interlocutor—

"Refuse to authorise the petitioners to convey the heritable subjects belonging to the trust gratuitously to said School Board, and allow the petitioners to prepare and lodge a scheme for the administration of the endowment in question."

Counsel for the Petitioners — Gordon. Agents—Carment, Wedderburn, & Watson, W.S.

Counsel for the School Board—Skinner. Agents—Macrae, Flett, & Rennie, W.S.

Thursday, February 5.

FIRST DIVISION.

ELDER'S TRUSTEES, PETITIONERS.

Process—Bankruptcy—Discharge of Trustee—Death of Trustee—Discharge of Trustee's Representatives—Expenses—Petition to Inner House—Procedure by Representatives of deceased Trustee to obtain Exoneration of his Intromissions as Trustee—Bankruptcy Act 1856 (19 *and* 20 *Vict. c.* 79), *sec.* 152.

It is competent for the representatives of a trustee in a sequestration who has died during the dependence of the sequestration to obtain discharge by taking the proceedings directed by sec. 152 of the Bankruptcy Act 1856 to be taken by the trustee, and, if the representatives of the deceased trustee proceed by petition to the Inner House for exoneration and discharge of the deceased trustee's intromissions, the expenses of such petition will be authorised to be paid out of the sequestrated estate only to the extent of £5 5s., that being the amount required for a discharge in the ordinary form under sec. 152 of the Bankruptcy Act 1856.

The late Mr John Elder, S.S.C., was trustee on the sequestrated estate of Henri Marie Louis Pompe, 13 Royston Terrace. The sequestration had been awarded by the Sheriff of the Lothians and Peebles at Edinburgh. Mr Elder was elected trustee on the sequestrated estate on January 18, 1893. His election was confirmed by the Sheriff on January 25, 1893. Mr Elder lodged a bond of caution, and proceeded to realise and distribute the estate. On February 9, 1900, a first and final dividend was paid to the creditors whose claims had been duly lodged and admitted.

On May 24, 1901, Mr Elder died undischarged as trustee. Mrs Annie Hurst Whyte or Elder and others, the testamentary trustees of the deceased John Elder, presented a petition to the First Division of the Court praying for their exoneration and discharge as the trustees and representatives of the deceased John Elder of his whole intromissions as trustee, for warrant for delivery of his bond of caution, and for an appointment that the expenses of the petition should be paid out of the sequestrated estate.

The petition, besides narrating the facts above set forth, stated that a meeting of creditors of the sequestrated estate, on

September 8, 1902, approved of the intention intimated to it by the petitioners to make an application to the Court for their discharge and to have the expenses of the application paid out of the remaining funds of the estate in their hands.

The petition further stated, *inter alia*, as follows—"No trustee has been appointed in room and place of the said deceased John Elder. The Bankruptcy (Scotland) Act 1856 contains no provisions as to the mode in which the representatives of a trustee dying undischarged after a final division of the sequestrated estates, or otherwise, shall apply for discharge of the intromissions of the deceased trustee; and the said statute contains no provision authorising either the Lord Ordinary or the Sheriff to grant such discharge or warrant for delivery of the deceased's bond of caution to his representatives. The petitioners are thus under the necessity of making the present application to your Lordships."

The Court having remitted to the Accountant of Court to report on the intromissions of John Elder as trustee in the sequestration, the Accountant, after stating that the accounts showed an unapplied balance of £24, 1s. 8d., which fell to be consigned, stated as follows—"The Accountant is aware of only two applications to your Lordships under similar circumstances (*Brown's Trustees*, 1864, 3 Macph. 56; *MacEwan's Trustees*, 1872, 9 S.L.R. 568). The procedure is expensive, and might entail considerable hardship on the deceased trustee's representatives where the estate was entirely exhausted or where the usual cost of discharge (£5, 5s.) had only been retained. For the last twenty years a more liberal interpretation of section 152 of the Bankruptcy (Scotland) Act 1856 has prevailed, and in numerous cases before the Lord Ordinary and in the Sheriff Court the trustees' representatives have been allowed to take the proceedings directed by that section to be taken by the trustee, and have called meetings and got their discharge in ordinary form. This was pointed out to the petitioners, but though they went the length of calling and holding the final meeting of creditors they have thought it necessary to present the present petition. The Accountant would humbly suggest to your Lordships that on consignation of the unapplied balance of funds the petitioners may be exonered and discharged and the bond of caution directed to be delivered up, and that the expenses of this application may be authorised to be paid out of the funds of the estate, but that only to the extent of £5, 5s., the amount required for a discharge in ordinary form."

Argued for the petitioners—Section 152 of the Bankruptcy Act contained no provisions authorising the Lord Ordinary on the bills or the Sheriff to grant discharge of the intromissions of a trustee dying during the dependence of the sequestration. In any view the cases of *Brown's Trustees*, November 17, 1864, 3 Macph. 56, and *M'Ewan's Trustees*, June 28, 1872, 9 S.L.R. 568, showed that the procedure by petition to the Inner House was competent, and the procedure being competent full expenses should be allowed out of the estate.

The Court granted the prayer of the petition, but in respect that the petitioners in presenting this petition, instead of following the usual practice of proceeding under section 152 of the Bankruptcy Act 1856, had adopted an unnecessarily expensive procedure, authorised the expenses of the application to be paid out of the funds of the estate only to the extent of £5, 5s.

The Court pronounced this interlocutor:—

"Approve of said report, and on consignation by the petitioners of the unapplied balance of funds exoner and discharge them as the trustees and representatives of the deceased John Elder, S.S.C., and all others his heirs and representatives whomsoever, of the whole intromissions and management as trustee mentioned in the petition: Grant warrant to and authorise the Sheriff-Clerk of the county of Edinburgh, or other custodier of the deceased's bond of caution, to deliver up the same to the petitioners as trustees and representatives foresaid, and decern: Find the petitioners entitled to expenses, modifying the amount thereof to £5, 5s., and ordain the same to be paid out of the funds belonging to the sequestrated estate."

Counsel for the Petitioners—R. D. Melville. Agents—Elder & Aikman, W.S.

Thursday, February 5.

FIRST DIVISION.

CULLEN *v.* MAGISTRATES OF EDINBURGH.

Process—Jury Trial—Fee Fund Dues not Paid by Pursuer—Dismissal of Action—Act of Sederunt 16th Feb. 1841, *sec.* 46.

A pursuer in a jury trial did not pay the fee fund dues so as to enable a jury to be summoned for the day appointed for the trial of the cause. The defenders presented a note craving absolvitor, but in sending the note to the pursuer's agent the agent of the defenders gave notice that they were to move that the action be dismissed. The Court *dismissed* the action with expenses.

John Cullen, shoemaker, 34 Potterow, Edinburgh, brought an action of damages against the Lord Provost, Magistrates, and Council of the City of Edinburgh for alleged injury caused to him owing to a piece of fireclay chimney-can having fallen upon him from property alleged by the pursuer to belong to the defenders.

On July 1st 1902 the Lord Ordinary (PEARSON) approved of an issue for the trial of the cause.