upon the clause of survivorship, and the provision as to the disposal of the shares of beneficiaries in minority. But I agree with your Lordship as to both the clauses. I do not think that ths survivorship clause can be held to weaken the effect of the express declaration as to the period of payment in the earlier part of the deed. As regards the administration of the share of a nephew or niece who might be a pupil or a minor, and unmarried at the testator's death, I see no difficulty. I think the mode of administration which the testator provides is a fair one, and not inconsistent with the construction I have put upon the earlier clauses.

Lord Adam.—I concur. Early in the discussion I thought that it would be hard to support the interlocutor of the Lord Ordinary. I remain of that opinion now, and on the grounds stated by your Lordships I concur in your opinion.

The Court recalled the interlocutor reclaimed against, and remitted to the Lord Ordinary to rank and prefer the reclaimers in terms of their claim.

Counsel for the Reclaimers—Gloag—Strachan. Agent—A. Newlands, S.S.C.

Counsel for the Respondent—D.-F. Mackintosh—Graham Murray. Agents—Smith & Mason, S.S.C.

Friday, February 10.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

BINNIE AND OTHERS *v.* BROOM AND OTHERS.

Trust—Trust Management—Ultra vires—Failure on Part of Beneficiaries to Prove Loss.

In an action at the instance of the beneficiaries under a trust-settlement against the trustees, to make good loss which it was alleged had been caused by their management of the estate, it was proved that the actings of the trustees had been imprudent and *ultra vires*, in borrowing money, which they had no power to do under the trust-deed, in order to pay off the truster's debts. It was shown, however, that even if the management of the trustees had been of the most strictly prudent and legal character, the ultimate result, which was the bankruptcy of the trust-estate, could not have been avoided, and that thus the pursuers had suffered no loss. Defenders therefore *assoilzied.*

This was an action at the instance of William Binnie and others, the children of the deceased John Binnie, wright and builder in Glasgow, against David Broom, house-agent, 75 Bath Street, Glasgow, as an individual, and as sole surviving trustee nominated and appointed by the trust-disposition and settlement executed by John Binnie on 24th October 1856, and against Mrs Binnie and others, the trustees who had been assumed, and also against the testamentary trustees of those of John Binnie's trustees who were deceased.

The conclusions of the action were directed against David Broom, as an individual and as trustee, and against the other defenders, as trustees, for an accounting in connection with the intromissions of the trustees with John Binnie's trust-estate, and for payment of £20,000.

William Binnie died on 7th October 1857, leaving the trust-disposition and settlement above mentioned, and survived by his widow Mrs Jane M'Dougall or Binnie and by the pursuers.

By his trust-disposition and settlement the testator directed his trustees, in the first place, to make "payment of all my just and lawful debts, deathbed and funeral expenses, and the expense of executing this trust." In the second place, he appointed his trustees to pay all such legacies, gifts, or provisions as he might appoint to be paid under any codicil, writing, or memorandum clearly expressive of his will and intention; and in the third place, he appointed them to "pay, assign, and dispone to the said Jane M'Dougall or Binnie, in case she should survive him, in liferent for her liferent use allenarly, the rents, interests, dividends, and annual profits of the free residue of my estate, after paying all annuities, legacies, or other charges and burdens, but that only to the extent, for the periods, and at the terms as follows, viz. :—During the first three years after my death, one-fourth part; on the elapse of three years after my death, and during the next succeeding seven years, one-third part or share; and on the elapse of ten years from the period of my death, in the event of the said Mrs Jane M'Dougall or Binnie remaining then unmarried, but not otherwise (except as after provided), one-half of the rents, interests, dividends, and annual profits of the free residue of my estate." He further declared that in the event of Mrs Jane M'Dougall or Binnie marrying after she became entitled to the increased allowance of one-half as above mentioned, then the same should be reduced and restricted to one-third part of the rents and others. In the fourth place, he appointed his trustees, "from the rents, interests, dividends, and annual profits of the free residue of my estate, as before mentioned," to pay, assign, and dispone to and in favour of his children therein named—of whom the pursuers were three—and any other to be thereafter born, in liferent for their liferent use allenarly, the following provisions "for the purpose of their education, upbringing, and support, to be divided amongst them, share and share alike, during the periods and at the terms after specified, viz.—During the first three years after my death, one-fourth part; after the elapse of the said three years, and during the succeeding seven years after my death, one-third part, and on the elapse of ten years from the period of my death, the allowances to my said children shall be increased to one-half of the said rents and others; . . . declaring that the said respective provisions to them shall continue to be paid to them or for their behoof until my youngest child shall attain thirty years complete." This period had not arrived at the date of the action

In the seventh place, William Binnie directed his trustees to apportion and divide the free residue and remainder into two equal parts or shares, and to lay out and invest one

part or share in the purchase of lands and heritages, and to dispone and convey the same to and in favour of Mrs Jane M'Dougall or Binnie in liferent for her own liferent use allenarly, and to the children in fee, equally among them, share and share alike; "and with regard to the other half, or, in the event of the marriage of the said Mrs Jane M'Dougall or Binnie, the remaining two-thirds of the free residue and remainder of my estate and effects, heritable and moveable, above conveyed (excepting in the case of her separation from her husband, as before provided, or of her said husband predeceasing her), I appoint my said trustees to pay, assign, and dispone the same to and in favour of" the children equally between or among them, share and share alike, in liferent for their liferent use allenarly, and their lawful issue respectively in fee. He further nominated and appointed the trustees to be tutors and curators to his children.

In Cond. 4 the pursuers averred that the personal estate of the truster as contained in the inventory given up by the trustees amounted to £1904, 17s. 9d. "The heritable estate consisted of property situated in Argyle Street, Hope Street, and Oswald Street, Glasgow, which was of the value in 1858 as ascertained by the trustees of £42,980, and which when subsequently sold realised about £42,000. That property was subject to a heritable debt created by the truster of £12,000, while his personal debts amounted, as ascertained and stated by the trustees, to £15,000. The "free residue" of his estate after paying or making provision for said debts, amounted at the date of the truster's death to and was estimated by the said trustees at £17,880, or thereby." They then averred that the trustees in place of paying off the truster's debts as directed, wrongfully proceeded to raise a loan on the security of the trust-estate, that they obtained from the Royal Bank of Scotland a loan of £26,000, and with consent of Mrs Binnie for her right of liferent, granted a bond and disposition in security over the whole of the heritable property, which was recorded on 24th November 1858; and further, that they borrowed from the National Bank of Scotland at ordinary cash account rates the sum of £2250, and for this advance authorised their factor to grant a promissory-note.

Under the trust-deed the trustees had no power either to sell or to borrow on the security of the trust-estate.

The defenders in answer to this statement admitted that the personal estate amounted to about the sum stated, but that it consisted to a considerable extent of household furniture, liferented by the widow. Explained that the valuations of the heritable properties were based on increased rentals expected to be obtained after further outlay on the property; that the truster's personal debts amounted to £24,613, and that the bond for £26,000 included the heritable debt of £12,000 created by the truster, and that the sum borrowed was applied in paying off the truster's debts. They averred—"The truster left no funds or estate sufficient for the payment of his debts, without realising or borrowing upon the security of the said heritable property." They stated that they had acted upon the opinion of counsel, and in the honest discharge of their duty."

In Cond. 5 the pursuers averred that in borrowing this money, and in granting the bond and disposition in security, the trustees had wrongfully engaged in a speculation and undertook the risk. "It was their duty to have realised such portions of the estate as were necessary for paying off the truster's debts as directed by him, and had they done so there would have remained a surplus or free residue of the value of £16,000 or thereby." They also stated that the money might have been borrowed at a lower rate of interest than that charged by the bank. "On an average the interest paid exceeded reasonable secured rates by from 2 to 2½ per cent.; and from this cause alone the estate was wasted to the extent of between £7000 and £8000. The above-mentioned maladministration by the trustees was *ultra vires*, wrongful, and recklessly improvident."

The defenders stated in answer that the loan could not be obtained on easier terms; that when it was arranged the creditors were pressing for payment, and the trustees had to find funds to meet the debts; and that in consequence of the great depression in Glasgow at that time, in consequence of the failure of the Western Bank, any realisation of the heritable properties would have been very unwise.

In Cond. 7 the pursuers averred that the trustees had disregarded the terms of the settlement and paid annually to Mrs Binnie sums of money out of the estate in excess of what she was entitled to, and that shortly before her second marriage in 1861 they had paid her a capital sum of £400; that during the years when these payments were being made the interest due to the bank was simply allowed to accumulate. "The said trustees in failing to pay off the truster's debts as directed by him, in borrowing on heritable security as already mentioned, in making the extravagant payments alleged, and in allowing the the interest on the said loan to accumulate, as hereinafter mentioned, acted *ultra vires*, wrongfully, in a grossly negligent and culpable manner, and in manifest breach of duty."

In answer the trustees stated that under the trust-deed they had power to increase the provisions to the children, and pay these to Mrs Binnie for their aliment and education, and that the sum of £400 paid to Mrs Binnie was a compromise of her claims under a postnuptial settlement by which she was entitled to an annuity of £100 a-year.

Mrs Binnie's second husband died in 1865.

In Cond. 8 the pursuers averred that as a result of the wrongful conduct and actings of the trustees, there was no surplus left to pay the interest on the heritable bond, which was allowed to accumulate to over £9000, and that from a minute of the trustees, of date 19th April 1866, it appeared that the "rental of the properties was insufficient to meet the interest on the heritable debts in consequence of the high rates charged by the bank."

Sequestration of the trust-estate was accordingly applied for by the trustees on 17th June 1867, with concurrence of the marriage-contract trustees of Mrs Isabella Binnie or Aitken, who had a claim for £1159, 2s. 3d., which had not been paid, and sequestration was awarded.

The defenders in answer stated that attempts had been made to sell the heritable properties, but that they had only been able to sell part of

the Hope Street property for £7000, which had been applied in paying the truster's debts. To fortify the title, premonition had been given under a bond granted by Mr Binnie's father, and the subsequent sale was made under this bond. With regard to the rest it had either been impossible to find a purchaser, or difficulties were raised in regard to taking a title from the trustees, and that in these circumstances realisation could only be effected through sequestration.

In Cond. 9 the pursuers averred that Mr Wyllie Guild, the trustee in the sequestration, sold the rest of the heritable property for £34,900, which he applied in paying £29,287, 9s. 8d. to the Royal Bank, and £2640, 3s. 3d. to the National Bank, as preferable creditors, and with the balance that he paid his own commission and the law-agents' accounts, and divided a balance of £988, 10s. among other creditors. In 1871 the trustee was discharged.

The pursuers pleaded—"(4) The trustees having acted wrongfully, in disregard of the terms of the trust-deed, and in contravention of their duty as trustees, are bound to make good to the pursuers the loss occasioned thereby, and decree falls to be granted against them under the alternative conclusion of the summons, with expenses."

The defenders pleaded—"(3) The pursuers' averments are irrelevant and insufficient to support the conclusions of the action. (7) The trustees having acted within their powers, and *separatim* having acted *in bona fide* and under advice of counsel in the transactions condescended on, the defenders are entitled to absolvitor."

On 16th February 1887 the Lord Ordinary (M'Laren) allowed a proof before answer.

"*Opinion.*—This is an action instituted by beneficiaries against a trustee, and the representatives of other trustees, claiming compensation for the loss of the trust-estate, which they say was caused by the trustees first allowing the interest of debt to accumulate at bank discount rates, and then throwing the estate into sequestration, and allowing it to be sacrificed with a view to their own exoneration from the personal responsibility which they had incurred to the banks.

"It is with some reluctance that I have decided to make an order for proof, because the sequestration was applied for in 1867, and when a claim of this kind is made twenty years after the event it is natural to suppose that there is not much substance in it. Lapse of time, however, is not an absolute bar to an action for enforcing accountability; it is a circumstance to be weighed along with the other elements of fact, when these have been ascertained.

"In the argument on relevancy it was contended with much anxiety on behalf of the trustees, that from the nature of the instructions which they received from the truster they could not do otherwise than borrow from the banks, and continue borrowing from year to year to make up the annual deficits. Under such a mode of administration bankruptcy is of course inevitable, and the period of its occurrence can be calculated in advance with reasonable certainty. Nevertheless the thing must be done, because it is the will of the truster; this is the proposition that is masked by the eloquent argument addressed to me in defence of the trustees' administration. Now, I think it is very likely that the trustees may be able to show that they were justified in borrowing from the banks to pay off unsecured debts, but it could not be sound administration to retain the heritable property and to continue the system of borrowing after it became clear that the interest of debt and necesssary expenses were permanently in excess of the rents. Their duty under such circumstances would be to realise the estate, and to invest whatever residue it might yield for the truster's family.

"I have difficulty in accepting the statement that it was impossible for the trustees to sell until the estate became insolvent. Under such circumstances as I have supposed the trustees might have obtained a declaratory judgment affirming their power of sale; at all events, they might have tried. Other modes of solving the difficulty may be suggested. And it may be noticed that when the trustees wanted to sell a part of the property they did so (through the intervention of an heritable creditor) without raising any question regarding their powers.

"Therefore, while very sensible of the inconvenience of such an inquiry as is proposed after such an interval of time, I cannot say that on the facts as stated, the action of the trustees is so clearly right as to render all inquiry superfluous. The evidence I suppose will be mainly documentary, and all the defenders' pleas are of course reserved entire."

The defenders reclaimed.

On 3rd March 1887 the Court recalled the Lord Ordinary's interlocutor and remitted to Mr James A. Robertson, C.A., Edinburgh, to inquire into the amount of the trust-estate from the date of the truster's death, the amount of debts due by the truster and paid by the trustees, and the yearly income and expenditure of the trust, and to report.

On 17th January 1888 Mr Robertson lodged his report, in which he estimated the amount of the trust-estate at the date of the truster's death at £43,035, 18s. 10d., and the amount of debts due by the truster, and paid by the trustees, at £32,685, 17s. 2d. The total income of the trust from 7th October 1857 to 15th May 1870 was £17,518, and the total expenditure for the same period £22,165. The personal property of the truster was estimated by the reporter at £1135, 18s. 10d., and the heritage at £41,900, being the estimated value of the property at the date of the truster's death. Upon this property there was a heritable debt of £12,000. After payment of the various debts of the truster, including the debts paid by the trustee in the sequestration, and the inventory duty of the personal estate, there remained on the showing of the reporter a surplus of £7132, 4s. 7d. This surplus, as explained in the report, was disposed of in various ways, partly in meeting excess of expenditure over income, partly in making payments to the widow and children of the truster, and partly in paying the expenses of the sequestration; but after all these disbursements had been made there still remained, in the opinion of the accountant, a sum of £2180, upon which the question of liability for holding the heritable property depended.

Argued for the reclaimers (the defenders)—The valuation of the heritable property upon

which the accountant proceeded was utterly fallacious. Such a price could not have been obtained at the time of the truster's death, nor at any time thereafter, till the sale under the sequestration. The trustees throughout acted in *bona fide*, and to the best of their judgment, though when looked back upon their actings might not have been the most advantageous for the trust-estate; yet in borrowing on this property rather than selling a portion of it, the trustees acted under the advice of counsel, and for the best, and they were advised that in acting as they did they were within their powers. It was maintained that the creditors might have been sooner urged to force a sale, but it could not be suggested as a ground for rendering the trustees personally liable that they did not urge third parties to act against the express purposes of the deed. The pursuers had to show not only mismanagement on the part of the trustees, but that they had suffered loss thereby, and in that they had failed—*Kinloch, Petitioner*, December 7, 1859, 22 D. 174; *Hay's Trustees* v. *Hay Miln*, June 13, 1873, 11 Macph. 694; *Weir's Trustees*, June 13, 1877, 4 R. 876.

Replied for the respondents (the pursuers)—The whole actings of the trustees were reckless and *ultra vires*. What the pursuers objected to was the burdening of the estate, and the borrowing from the bank upon such ruinous rates of interest. Until the Trusts Act of 1867 no such power existed as that of borrowing upon the security of the trust-estate, and no case could be shown in which this was done—*Erskine's Trustees*, May 13, 1829, 7 S. 594; *Graham* v. *Graham's Trustees*, December 21, 1850, 13 D. 420; *Whyte, Petitioner*, March 7, 1855, 17 D. 599. The duty of the trustees in such a case was to have sold a portion of the trust-estate, and not followed the course they did, which was too speculative. There should have been a sale for every year that the expenditure exceeded the income. Further, from the first, the trustees violated the trust by allowing to the widow and children an allowance far in excess of what the trust-deed permitted. Had the trustees come to the Court and got authority to sell, the sequestration and all that followed would have been unnecessary—*Henderson* v. *Somerville*, June 22, 1841, 3 D. 1049. By their actings the trustees had rendered themselves personally liable.

At advising—

Lord President—When this case came before us on a reclaiming-note from the Lord Ordinary's interlocutor of 16th February 1887, we shared his Lordship's reluctance to make an order for proof, and accordingly we endeavoured to get the case into a shape for decision without the necessity of having a proof, and with that in view we remitted the matters in dispute to an accountant. From his report, which we have now before us, sufficient materials have been supplied to enable us to dispose of the case.

The case arises out of the trust-disposition and settlement of the late Mr Binnie of Glasgow, which is dated in 1856. The truster died shortly thereafter, and his estate seems to have consisted chiefly of house property in Glasgow, which, however, was heavily burdened with debt. The provisions of the deed, so far as relating to the truster's family, deal with the income which the truster expected his investments to produce; then he leaves his widow for the first three years one-fourth part of the income of the free residue of his estate, thereafter for seven years one-third of the income of the free residue, and thereafter upon certain conditions one-half thereof, while the balance of the income of the residue was to be devoted to the reduction of the debt upon his heritable estate. That the testator was in the belief that he was leaving his family in comfortable circumstances may be seen from the position in life for which he directed that his sons should be brought up, for he recommends his wife and the trustees to educate so many of his sons for the church, and so many for the bar, or for other learned professions. Looking at the deed as a whole, I can only remark that it was a most sanguine settlement. Turning, then, to the management of this trust-estate, two circumstances at the outset are specially to be noticed—the first of them is, that the death of the testator took place shortly after the failure of the Western Bank, and the other is, that under the powers in the trust-deed the trustees had no power either to sell or to borrow money on the security of the trust-estate.

In this state of matters there can be no doubt that the management of the trust ought to have been very cautiously gone about, and as we now see it would have been very much better if the trustees had not accepted office at all, or if they had allowed the estate to be wound up under the sequestration statute. This is a course of procedure which I am surprised is not more frequently adopted than it is. There seems to be a sort of fear that to wind up a testamentary trust-estate under the sequestration statute involves a kind of confession of bankruptcy. This is quite a mistake. It is not the least necessary that an estate should be bankrupt or insolvent to enable it to be wound up under the sequestration statute. The proceeding is one to be recommended, because it saves gratuitous trustees from the risk of being rendered personally liable, while at the same time it secures that the management be of a statutory kind, and also that the trustees may be guided by the decision of the Court if any difficulty arises in the management of the trust.

The trustees, however, took another and a very different course, and seem to have thought that they were bound to provide for the widow and children as the testator had directed, at any cost. They could not have realised this estate in order to pay off the debts that pressed upon it so heavily without judicial authority, but I think, looking to the circumstances of this case, that there would have been no difficulty in obtaining that authority, if not by petition, then by means of a declarator as in the case of *Henderson* v. *Somerville*, 3 D. 1049. But they took another course, and one which was not authorised by the deed, nor would they have obtained authority to adopt it if they had applied to the Court. They proceeded to borrow money from the bank at a heavy rate of interest, and continued borrowing in order to make up the annual deficits. Now, anything more *ultra vires*, imprudent, and disastrous for this trust-estate I cannot well imagine; it was a course of procedure that could only end in one way, namely, the complete ruin of this estate. That of itself

would be sufficient to involve the trustees in personal liability, but their course of mismanagement did not stop there. There was a small free income after paying the interest upon the heritable debts, but the trustees did not follow the direction of the truster by giving one-third thereof to the widow, and applying the remainder in reduction of the heritable debt; they gave away an income which the trust did not warrant, and they permitted the bank interest to run on. These are the faults which are alleged against the trustees, and there can be no doubt that they are charges of a most serious character.

In order, however, that the pursuers should be successful in rendering the present defenders personally liable, something more is necessary than merely to show that the trustees were grossly negligent; the pursuers must show that they themselves have suffered loss by the actings of these trustees. It is upon this part of the case that the report of the accountant comes to be so valuable in order to show whether, if this estate had been managed in the most prudent manner possible, the result would have been in any way different so far as the present pursuers are concerned.

If we turn to the accountant's report we find that he brings out a balance, which at first sight seems highly favourable to the pursuers, of £7132, and the pursuers say that is the measure of the loss they have sustained through the trustees' mismanagement. I think, however, that this balance is brought out by viewing this trust-estate in much too favourable a light. The moveable estate, for example, is returned at £1135, but this includes the household furniture, which is entered at £562, and which we are told was carried off to London, and there impledged by the widow for advances made to her, and so lost to the trust-estate. I cannot say that the trustees are to be held responsible for that loss, because they were not in a position to have prevented the widow from acting as she did. Accordingly, in estimating the moveable estate, this sum of £562 falls to be deducted. Again, as to the heritage, the heritable property is taken by the reporter at £41,900, which he fixes as the value of the property at the date of the truster's death in 1857. I do not think, however, that that is a fair valuation to put upon it. Heritable property at the date of the truster's death had become in consequence of the failure of the Western Bank very much less valuable. After a time house property again recovered its value somewhat, and the trustees obtained a fresh valuation with a view to a sale. This was in 1862, and the estimate then formed of its value was £36,748. This I consider a much fairer valuation, and one which I am prepared to take for the purposes of the present case, and for this reason, that looking to the state of the property market in consequence of the failure of the Western Bank, this house property could not have been sold sooner than 1862, nor would it have fetched more than the amount of this valuation. Now, if we add these two sums together, the personal estate and the estimated value of the heritage, we have £37,321, instead of the figure brought out by the accountant.

The valuation being thus reduced, let us turn now to the other side of the account. We there find that the total amount of debts brought out by the accountant is £35,084. I do not think, however, that this embraces the whole liabilities of the trust-estate. The accountant has taken these debts as if paid at the time of the sequestration, and he has estimated them at this amount as at the date of the sequestration. It appears to me, however, to be necessary to add to the amount of debt brought out by the accountant the sum of £877, 7s. 8d., being the difference between the amounts due to W. H. Muir and Aitken's trustees, and the dividends which they actually received. Then there was a heavy agent's account due by the trustees, which they compounded for £340, and against which account no objection was taken that the disbursements had been unnecessary. There was also the widow's annuity of £100, which undoubtedly was a debt due by the trust-estate, though it was constituted only by a postnuptial contract of marriage, and was not upon that account so fully secured as if it it had been under an antenuptial contract. This debt was also compromised, and upon terms most favourable to the trust-estate, for the trustees succeeded in buying off Mrs Binnie for a sum of £400, a sum very far below the actuarial value of such an annuity. Both these two last sums must be taken into account in estimating the amount of the debts due by the trust-estate.

Now, placing the sums I mentioned first on the credit side of the account, and adding to the amount of the debt as shown by the accountant's report, the sums I have just mentioned, we find that the total amount of the estate was £37,321, and that the debt amounted to £37,520, 11s. 8d., the result of which is that at the time when this trust commenced there was an absolute deficiency of £199, 11s. 8d. If this was the true position of the trust-estate when the trustees entered upon their management, it seems to me impossible that any action upon their part could have produced a surplus for the benefit of the beneficiaries. Therefore, while condemning the management of the trustees in the most emphatic terms, I do not see that even if their management had been of the most strictly legal and prudent character that the result would have been different so far as the pursuers are concerned. It follows therefore that the pursuers have failed to establish their grounds of action, inasmuch as they have established only one of the two propositions upon which their case was founded, first, that there was mismanagement, and second, that the mismanagement resulted in loss to them which could not have been avoided even if the management had been otherwise. Upon these grounds I think the defenders must be assoilzied.

Lord Mure concurred.

Lord Adam—I concur, and desire to make only a single remark regarding the value of the heritable property here. The accountant in his report says this—"Any sum that may be arrived at as the value of the property at the date of the truster's death must necessarily be a valuation, and although so many years elapsed between the date of the death and the date of the realisation of the whole of the property, the accountant is of opinion that by taking the sums realised from time to time for the different properties, no injustice is done either to the pursuers or defenders;" and the sum which

he does take is £41,900, which nearly corresponds with the valuation of the property at the commencement of the trust. What would have been realised if the trustees had sold this estate in 1861 can best be seen by the rent-sheet given in the accountant's report. In 1870, when the property was sold, the rental was £1576, and it is idle to suppose that this property in 1862 with a rental of only £1156 would have brought anything like what it realised in 1870 when the rental had been increased by nearly one-half.

LORD SHAND was absent from illness.

The Court assoilzied the defenders from the conclusions of the action.

Counsel for the Pursuers—Shaw—A. S. D. Thomson. Agent—Marcus J. Brown, S.S.C.

Counsel for the Defenders—D.-F. Mackintosh —Dickson. Agents—Henry & Scott, S.S.C.

HIGH COURT OF JUSTICIARY.

Friday, February 10.

(Before the Lord Justice-Clerk, Lord Craighill, and Lord Rutherfurd Clark.)

MILLER *v.* LINTON.

Justiciary Cases — Trafficking in Exciseable Liquors without a Licence—Transfer of Certificate—9 *Geo. IV. c.* 58, *sec.* 19.

In July 1887 R by arrangement with M, who held a licence to sell exciseable liquors for a year from May 1887, obtained a transfer of M's certificate from two magistrates in virtue of the powers contained in sec. 19 of 9 Geo. IV. c. 58, the transfer bearing "to be of force only until 18th October 1887, being the next general meeting to be held for granting such certificates." R, who had been convicted in August of breach of his certificate, was refused a renewal of the certificate at the meeting of Justices of the Peace in October, and M, without obtaining a new licence, resumed business in the premises. He was thereafter convicted of trafficking in exciseable liquors without a licence. Upon appeal, *held* that M's licence had been transferred absolutely to R, and that no right of trading under it reverted to M when a renewal of the licence was refused to R. Appeal *dismissed.*

Peter Miller, residing in Raeburn Place, Edinburgh, was charged in the Police Court there on 15th December 1887 at the instance of Thomas Linton, public prosecutor in the City Police Court, with trafficking in exciseable liquors on 1st and 3rd December 1887 in the premises in the Canongate, Edinburgh, occupied or used by him, without having obtained a certificate in that behalf in terms of the Public-Houses Acts Amendment (Scotland) Act 1862. The accused pleaded not guilty.

The Sheriff-Substitute (RUTHERFURD) found the charge proved, and fined him 25s.

Miller appealed to the High Court of Justiciary. The case set forth that the following facts had been proved—"That upon the 12th day of April 1887 the appellant obtained from the Magistrates of Edinburgh, at their general half-yearly meeting for granting publicans' certificates, a renewal of his then existing certificate for premises in Canongate, said renewed certificate to be in force from 15th May 1887 until 15th May 1888. That upon the 16th day of July 1887 Charles Rattray, by arrangement with the appellant, applied for and obtained from two of the Magistrates of Edinburgh, in virtue of the powers contained in section 19 of 9 Geo. IV. c. 58, a transfer of appellant's said certificate for the premises in Canongate aforesaid, the said transfer bearing 'to be of force only until 18th October 1887, being the next general meeting to be held for granting such certificates.' That the said Charles Rattray, immediately upon the said transfer having been granted, entered into possession of the said premises which were ceded to him by the appellant. That upon the 8th day of August 1887 the said Charles Rattray was convicted in the Edinburgh City Police Court of having committed a breach of his said public-house certificate by selling and supplying exciseable liquors to a man who was in a state of intoxication. That upon the 18th day of October 1887 the said Charles Rattray applied to the Magistrates of Edinburgh at their general half-yearly meeting for granting publicans' certificates for a renewal of the certificate transferred to him from the appellant upon the 16th day of July aforesaid, which renewal was refused by the Magistrates to whom the aforesaid conviction had been intimated. That upon the 29th day of October 1887, the said Charles Rattray appealed to the Quarter Sessions of the Justices of the Peace for the city of Edinburgh, against the said refusal of renewal of certificate by the Magistrates, which appeal the said Justices dismissed. That the appellant did not thereafter apply for or obtain a new certificate in his favour. That the appellant, on or about the 28th day of November 1887, applied for and obtained from the Town-Clerk a duplicate of his said certificate from the register of licences, which duplicate was produced and proved to be correct. That the said register of licences kept by the Town-Clerk, in accordance with the said Public-Houses Acts, bears that on 12th April 1887 the appellant was granted a renewal of his existing public-house certificate from 15th May 1887 until 15th May 1888, and the said register contains no entry cancelling said certificate. That the appellant between the hours of eight o'clock a.m. and eleven o'clock p.m. upon the dates libelled, and in the premises for which the said certificate was granted, trafficked in and sold exciseable liquors to the persons designed in the complaint."

By the Act 9 Geo. IV. c. 58, sec. 19, it is provided—"That if any person duly authorised to keep a common inn, alehouse, or victualling-house . . . shall remove from or yield up the possession of the house and premises for which such certificate shall have been granted, it shall be lawful for two or more justices of the peace or magistrates respectively as aforesaid, sitting publicly in their ordinary place of meeting, to grant to any new tenant or occupier of such