with the expression natives, and that it would be difficult to attach a different meaning to it on the one occasion from that given to it on the other. I am not, however, much moved by that consideration, because in referring to the magistrates the testator could give them no other designation than Magistrates of Irvine, but when he speaks of those whom he is intending to benefit he is declaring his own purpose. Now, if one places oneself in the position of a man making a will in 1859, and having a general acquaintance with the town of Irvine and its boundaries, it seems to me that the more natural supposition is, that a person expressing himself in the way that the testator here did, meant Irvine in its larger sense—that is to say, the town of Irvine as it then existed. Now, the town of Irvine as it then existed, I should say, comprehended everything that was within the Parliamentary boundaries. I cannot give any effect to the Act of 1881, because the boundary thereby created was entirely unknown to the testator, and could not have been foreseen by him. It therefore appears to me that the true answer to the case is, that the expression "natives of Irvine" in the deed is to be interpreted as meaning persons born within the Parliamentary burgh as it stood at the time of the testator's settlement and death.

LORD MURE—There is no doubt that a little difficulty has been created by the use of the words "Magistrates of Irvine" and "natives of Irvine" in the same sentence, but that difficulty may, I think, be got over by taking the words "natives of Irvine" in a popular sense. Keeping in mind the date at which the testator made his will, I agree with your Lordship in thinking that by "natives of Irvine" he meant to include all those within the Parliamentary burgh.

LORD ADAM—The question here is, what did the testator mean when he used the words "natives of Irvine?" Four suggestions have been offered as to his meaning. The first limits the beneficiaries to persons within the old royal burgh; the second embraces those within the Parliamentary burgh; the third includes all within the burgh as extended by the Act of 1881; while the fourth takes in the natives of the parish of Irvine.

As to the last suggestion there is, I think, nothing to be said for it; while as to the third it is sufficient to observe that the Act of 1881 was passed after the death of the testator, so obviously its provisions cannot apply. I think that the proper interpretation of the words "natives of Irvine" is to hold them to be applicable not merely to the old royal burgh but also to the Parliamentary burgh as defined by the Reform Act of 1832.

LORD SHAND was absent from illness.

The Court found that the terms of the bequest were to be construed so as to include natives of the Parliamentary burgh of Irvine as defined by the Act 2 and 3 Will. IV. cap. 65.

Counsel for the First Parties—Macfarlane. Agents—Morton, Neilson, & Smart, W.S.

Counsel for the Second Party—Ure. Agents—Dove & Lockhart, S.S.C.

Thursday, February 9.

FIRST DIVISION.

[Lord Fraser, Ordinary.

HUNTER AND OTHERS (TRUSTEES OF T. O. HUNTER *primus*) *v.* HUNTER AND OTHERS (TRUSTEES OF T. O. HUNTER *secundus*).

Succession—Testament—Construction—Trust.

A truster died leaving a trust-disposition and settlement, by which he directed his trustees to hold certain shares of residue for behoof of his four nephews absolutely, and for behoof of his two nieces and their issue in liferent and fee, subject to the conditions after written. There was a survivorship clause under which the shares of nephews predeceasing, without issue, should belong to their surviving brothers and sisters. There were also these provisions—"The interest in the said residue, whether in fee or liferent of my said nephews and nieces and their issue, shall not vest in them till the term of payment shall have arrived." The term of payment was by the deed declared to be the first term of Whitsunday or Martinmas that should occur after the expiry of six months after the truster's death. The deed then declared, "that in case any of my said nephews or nieces or their issue shall be pupils or minors, and unmarried at the time of my death, or when their interest in my means falls to be paid . . . then the share of such pupils or unmarried minors shall be retained till they shall successively become major or be married." There was then a discretionary power given to the trustees either to accumulate the annual proceeds while they retained the capital, or to apply them for the support and education of such pupils or unmarried minors, "and that although the said fee or principal should not have vested in such pupils or unmarried minors."

One of the truster's nephews survived the term of payment fixed by the settlement, but died unmarried before attaining majority. The share of residue destined to him was claimed by his testamentary trustees on the ground that it had vested in him, and was also claimed by the surviving nephews and nieces under the survivorship clause. *Held* that the nephew's share of residue vested in him at the term of payment fixed by the settlement, and that his testamentary trustees were therefore entitled to payment.

Thomas Oliphant Hunter died unmarried on 18th September 1877, leaving a trust-disposition and settlement dated 31st October 1876, with codicils annexed, by which he conveyed to the trustees therein named his whole estate, heritable and moveable, for the purposes therein specified.

The *eighth* purpose of the trust was as follows:—"I direct my trustees to divide the rest, residue, and remainder of my estate, heritable and moveable, into two equal por-

tions, and to hold the first of these halves or portions for behoof of my sister the said Ann Hunter, whom failing, of my said nephews, William Hugh Hunter, Alexander Deas Hunter, Francis Hunter, and Thomas Oliphant Hunter (second), absolutely, and of my said nieces Emma Hay Hunter and Isabella Hunter and their issue, in liferent and fee, and in the proportions, and otherwise subject to the conditions as to the succession of nephews or nieces dying with or without issue, and as to nephews and nieces or their issue, being pupils or minors and unmarried, and to the other conditions hereinafter written, applicable to nephews and nieces and their issue; and my trustees shall divide the second of the said halves or portions of said residue into sixteen equal parts, and they shall hold three of the said sixteenth parts of residue for behoof of each of my nephews, the said William Hugh Hunter, Alexander Deas Hunter, Francis Hunter, and Thomas Oliphant Hunter (second), absolutely, and my trustees shall hold two of the said sixteenth parts of residue for behoof of each of my nieces, the said Emma Hay Hunter and Isabella Hunter in liferent, for the liferent alimentary use allenarly of them respectively, exclusive of the *jus mariti* and right of administration of their respective husbands, and declaring that the same shall not be assignable by my said nieces, or liable to or attachable for the debts or deeds of them or their husbands, and for behoof of the lawful issue of my said two nieces equally among them, *per stirpes*, in fee, and the said shares of residue shall be payable as follows, viz.—The one-half falling to my said sister, if she shall survive me, also the said three-sixteenth parts falling to each of my said nephews (as well those shares destined to them, failing my said sister, if she shall fail, as those shares directly destined to themselves), at the first term of Whitsunday or Martinmas that shall occur after the expiry of six months after my death; and my trustees shall retain and invest, in the way hereinafter provided, the said two-sixteenth parts falling to each of my said two nieces in liferent, and their issue in fee (as well those shares destined to them, failing my said sister, if she shall fail, as those shares directly destined to themselves), and my trustees shall make payment to my said two nieces of the interest or annual produce of the parts or shares effeiring to them respectively at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first payment at the first of these terms that shall occur after the expiry of six months after my death, . . . and if any of my said nephews, sons of my said brother William shall die without leaving lawful issue, the shares of residue effeiring to such predeceasers shall go, descend, and belong to their surviving brothers and sisters, and the issue of sisters absolutely, or in liferent and fee, according to the provisions before written . . . and the interest in the said residue, whether in fee or in liferent of my said nephews and nieces, and their issue, shall not vest in them till the term of payment shall have arrived; further, declaring that in case any of my said nephews or nieces, or their issue shall, be pupils or minors, and unmarried at the time of my death, or when their interest in my means falls to be paid under the provisions of these presents, then the shares of such pupils or unmarried minors shall be retained by my trustees till they shall successively become major or be married, whichever event shall first happen, the annual proceeds being in the meantime, in the exclusive discretion of my trustees, either added to the principal or accumulated, or such interest or a part, or even the the whole of the fee or principal effeiring to such pupils or unmarried minors shall, in the exclusive discretion of my trustees, be applied as my trustees shall, in their judgment, deem best for the support and education of such pupils or unmarried minors, and that although the said fee or principal should not then have vested in such pupils or unmarried minors."

Thomas Hunter was survived by his sister Miss Ann Hunter, who died on 24th November 1878, leaving a trust-disposition and settlement which contained the same directions as to the disposal of residue as those above quoted from her brother's settlement.

The trustees realised the estates of both trusters, and paid over or invested the residue, in terms of the provisions to that effect, to the various nephews and nieces upon their attaining majority or marriage. All of them did attain majority or married except Thomas Oliphant Hunter *secundus*, who died on 26th February 1887, and who would not have attained majority until May 1887.

This was an action of multiplepoinding, in which the trustees under the settlements of Thomas Oliphant Hunter *primus* and Miss Ann Hunter were the pursuers and real raisers, to settle the conflicting claims which had arisen as to the share of residue destined to Thomas Oliphant Hunter *secundus* under both settlements.

The pursuers stated that they held three-sixteenths of the residue of both estates effeiring to him, and that they from time to time had made certain payments on his account in virtue of the powers conferred upon them by the said trust-dispositions and settlements. The total, after the deduction of the sums so paid to account, and with accumulations of interest, amounted at the date of the action to £11,655, 10s. 8d., and formed the fund *in medio*.

The fund *in medio* was claimed, in the first place, by the trustees of Thomas Oliphant Hunter *secundus*, acting under a trust-disposition and settlement granted by him, and dated 12th February 1887, upon the ground that three-sixteenths of the residue had vested in him. It was also claimed by the surviving nephews and nieces of Thomas Oliphant Hunter *primus* and Ann Hunter, in terms of the survivorship clause above quoted.

On 28th October 1887 the Lord Ordinary (Fraser) found that the share of the succession destined to Thomas Oliphant Hunter *secundus* did not vest in him, and therefore repelled the claim of his trustees.

"*Opinion.*—The testator intended the shares of the residue of his nephews to vest as at the date of payment, but there is a marked distinction drawn as to what is the term of payment when the legatee has attained majority, and when he is still a minor. In the former case the term of payment is the first term of Whitsunday or Martinmas happening six months after the testator's death, and the vesting does not take place till that term, simply because there is a clause of

survivorship which prevents it vesting as at the death of the testator.

"In regard to legatees in minority there is a special and distinct clause in the following terms —'Further, declaring that in case any of my said nephews or nieces or their issue shall be pupils or minors and unmarried at the time of my death, or when their interest in my means falls to be paid under the provisions of these presents, then the share of such pupils or unmarried minors shall be retained by my trustees till they shall successively become major or be married, whichever event shall first happen, the annual proceeds being in the meantime, in the exclusive discretion of my trustees, either added to the principal and accumulated, or such interest or a part or even the whole of the fee or principal effeiring to such pupils or unmarried minors shall, in the exclusive discretion of my trustees, be applied as my trustees shall in their judgment deem best for the support and education of such pupils or unmarried minors, and that although the said fee or principal should not then have vested in such pupils or unmarried minors.' This clause fixes the day of payment of the children who are minors. It says that the share of such minors 'shall be retained by my trustees till they shall successively become major or be married,' the words are implied after this sentence, 'and it shall then be paid.' Now, it is quite clear that the testator had it in his mind that nothing should vest in these minor children until their term of payment had arrived, because he has allowed the trustees in their discretion to deal with the 'annual' proceeds of the estate in the interim, 'although the said fee or principal should not then have vested in such pupils or unmarried minors,' or, to put it in other words, 'notwithstanding that the said fee or principal has not vested in such minors.' Moreover, when he speaks of annual proceeds, he cannot mean the number of months up to the first term of Whitsunday after the testator's death, which was the term of vesting for the adult nephews. He applies the same rule to the case of minors as he does to adults in fixing the term of payment as the term of vesting, but the terms of payment are different. The result is that the claim for the trustees of Thomas Oliphant Hunter *secundus* must be refused."

The trustees under the settlement of Thomas Oliphant Hunter *secundus* reclaimed, and argued —This was a case in which vesting took place before the beneficiary attained majority. No doubt the clause which provided for vesting was attended with some difficulty, still there was an absolute gift, and a fixed term of payment. The mere circumstance that the trustees had given to them a discretionary power as to the time of payment was not sufficient to suspend vesting. When, as in the present case, there was an express period of payment mentioned, then if the testator intended to suspend vesting, nothing but a direct declaration to that effect could effectually do so. This was a case in which there was no destination over—*Byar's Trustees* v. *Hay*, July 19, 1887, 14 R. 1034.

Replied for the respondents—An examination of the trust-deed showed that there were many "terms of payment" of the residue in the testator's mind, as opposed to one fixed period running through the whole deed. There was no discretionary power given to the trustees in regard to this matter; they were to retain till majority or marriage. If this argument as to the period of vesting were sound, then the survivorship clause did apply; besides, the express declaration as to vesting must necessarily receive effect. There was no difference between the expressions "payment" and "term of payment." There was here a postponement beyond the death of the testator, and a general clause of survivorship; in such a case vesting was postponed. It fell upon the reclaimers to show that the period of vesting and the period of distribution were different—*Peacock's Trustees* v. *Peacock*, March 20, 1885, 12 R. 878.

At advising—

Lord President — The Lord Ordinary has found that the share of the succession destined to Thomas Oliphant Hunter *secundus* did not vest in him, and has therefore repelled the claim of his trustees—that is, to the share of the succession destined to him in his uncle's settlement—and the reason which the Lord Ordinary assigns in support of this interlocutor is, that Thomas Oliphant Hunter died in minority, and that therefore according to the terms of the settlement the share destined to him had not vested in him at the time of his death.

In considering this question it is necessary, I think, in the first place, to attend to the terms of the gift. It is a gift of a share of the residue of the estate, and occurs in the eighth clause of the trust-deed. The deceased truster directs his trustees "to divide the rest, residue, and remainder of my estate, heritable and moveable, into two equal portions, and to hold the first of these halves or portions for behoof of my sister the said Ann Hunter, whom failing" for behoof of his four nephews, of whom this Thomas Oliphant Hunter *secundus* is one, "absolutely, and of my said nieces Emma Hay Hunter and Isabella Hunter, and their issue in liferent and fee, and in the proportions and otherwise subject to the conditions as to the succession of nephews or nieces dying with or without issue, and as to nephews or nieces or their issue being pupils or minors and unmarried, and to the other conditions hereinafter written applicable to nephews and nieces and their issue; and my trustees shall divide the second of the said halves or portions of said residue into sixteen equal parts, and they shall hold three of the said sixteenth parts of residue for behoof of each of" his four nephews, Thomas Oliphant Hunter *secundus* again being one, "absolutely, and my trustees shall hold two of the said sixteenth parts of residue for behoof of each of his two nieces" in liferent for the liferent alimentary use allenarly of them respectively, exclusive of the *jus mariti* and right of administration of their respective husbands, and declaring that the same shall not be assignable by my said nieces, or liable to or attachable for the debts or deeds of them or their husbands, and for behoof of the lawful issue of my said two nieces equally among them *per stirpes*, in fee."

Now, there is no difficulty of construction there in so far as the nephews are concerned. It is a gift in fee absolutely, and what they have is, in the first place, an additional right failing

the testator's sister to one-half of the entire fee of the estate, and independently of that 12-16th parts of the other half of the estate, the other 4-16th parts of that half being given to the nieces.

Now, in this clause of gift we have one expression which I think it necessary to construe in passing. The first half of the estate is given to the testator's sister, whom failing to the nephews and nieces. Now, by that expression I understand the testator to mean that in the event of his sister failing before the half of the estate has vested in her it is to go to his nephews and nieces in place of his sister.

There is also another clause in the deed in which a similar expression occurs, the clause of survivorship as regards the nephews, which is thus expressed—"And if any of my said nephews, sons of my brother William, shall die without leaving lawful issue, the share of residue effeiring to such predeceasers shall go, descend, and belong to their surviving brothers and sisters." Now, here in like manner I construe the words "shall die" as meaning "shall die before their shares have vested," and I apprehend that there can be no question that that is the meaning of such an expression in a deed like the present.

It therefore becomes of the greatest possible importance to ascertain what is the term of vesting in this deed. And we have an express declaration upon that subject by the testator himself, which, I think, leads to a very clear and obvious conclusion. He says—"The interest in the said residue, whether in fee or liferent of my said nephews and nieces, and their issue, shall not vest in them till the term of payment shall have arrived." That, I apprehend, implies quite clearly that these interests shall vest when the time of payment arrives. Therefore the next question to be considered is, what does the testator mean by the term of payment?

Now, we have to go back to another part of the deed in order to ascertain that, and I think he expresses himself very clearly here also. He says—"The shares of residue shall be payable as follows, viz., the one-half falling to my said sister] if she shall survive me, also the three-sixteenth parts falling to each of my said nephews (as well as those shares destined to them failing my said sister, if she shall fail, as those shares directly destined to themselves) at the first term of Whitsunday or Martinmas that shall occur after the expiry of six months after my death; and my trustees shall retain and invest, in the way hereinafter provided, the said two sixteenth parts falling to each of my said two nieces in liferent and their issue in fee . . . And my trustees shall make payment to my said two nieces of the interest or annual produce of the parts or shares effeiring to them respectively," and on their death shall pay the fee to their children.

Now, I think it must be quite apparent that when the testator says that the shares of the residue shall be payable at a certain time after his death he means that this residue shall then be divisible. He could not effectually provide that the residue should be in whole at least payable at that particular time, because the residue of his estate is of such a nature that it really does not become payable all at once, and certainly not within such a short time as he has here prescribed after his death. There is heritable estate to realise, there are debts to be recovered, there are various contingencies that may make the realisation and payment of the residue a thing to be done by instalments, and therefore the word "payable" here occurring, I apprehend, must be construed to mean the term of division of the residue of the estate, and taking it in that sense I think the testator has made it very clear that he intends the term of division to be the first "term of Whitsunday or Martinmas that shall occur after the expiry of six months after my death."

What is to be done then? In the first place, the absolute gifts are to be at once paid in so far as they can be paid, and in so far as they cannot be paid actual payment must be postponed. But the division must be made, and it must be made to this effect, among others, that the shares of the nieces have to be separated and set apart from the shares of the nephews, and are to be held by the trustees after the period of division for the benefit of the nieces in liferent and of their children in fee. These shares are to be cut off and separately held from the rest of the residue of the estate, and are to be held by the trustees according to the directions of the truster for the nieces in liferent and their issue in fee. And in like manner the shares or portions of the residue of the estate which belong to the nephews are to be held by the trustees, so far as they cannot be actually paid, from and after that date for behoof of the nephews themselves. These trustees from that date become trustees for them, holding a certain portion of the residue for each of these nephews. This will be further made clear, I think, when we come to consider the particular clauses of which we have heard so much in argument. But up to this point I think the examination of the deed has made out pretty clearly that vesting is not to take place till the term of division, and that that term of division is the first term of Whitsunday or Martinmas that shall happen six months after the death of the testator.

Now we come to the words which I am about to read. They follow immediately after the clause bearing that the interests shall not vest till the term of payment has arrived, meaning also and implying that they shall vest when the term of payment has arrived. The words are these—"Declaring that in case any of my said nephews or nieces, or their issue, shall be pupils or minors, and unmarried at the time of my death, or when their interest in my means falls to be paid under the provisions of these presents, then the share of such pupils or unmarried minors shall be retained."

Now, what is the meaning of these words so far as we have gone. One alternative is, that the period contemplated has arrived when "their interest in my means falls to be paid." And what is to be done then? Well, it is not to be paid actually—which, again, shows conclusively what he meant when he took the term of payment before as being really the term of division, because what he prescribes here is division although not payment—the shares are to be retained. They are to be retained as separated shares, set apart for the nephews or nieces who are unmarried minors or pupils, and from that

time forth, I apprehend, the trustees hold these shares, not as part of the undistributed estate, but as the shares set apart for the particular nephews or nieces. And they are to be retained "till they shall successively become major or be married, whichever event shall first happen, the annual proceeds being in the meantime, in the exclusive discretion of my trustees, either added to the principal and accumulated, or such interest, or a part, or even the whole of the fee or principal effeiring to such pupils or unmarried minors shall, in the exclusive discretion of my trustees, be applied as my trustees shall in their judgment deem best for the support and education of such pupils or unmarried minors."

Now, without going further, or saying anything in the meantime about the clause upon which the greatest amount of argument has been expended, what is the effect of these words? Do they not demonstrate more clearly that the shares of these unmarried minors or pupils, if there be an undivided portion of the residue of the estate, have become their appropriated shares, because the trustees are vested with the fullest powers to apply the whole shares, principal and interest, if they think fit, for the support and education of these minors to whom they belong. I can hardly conceive of any arrangement more reasonable or proper than that the shares having become appropriated were to be devoted to the exclusive interests of those to whom they were appointed to belong.

Now, if that be so, what shall be said as to the effect of the words that follow. On the one hand, it is said that they derogate from the effect of what I have just read; and on the other, it is contended that they add considerable force and effect to the construction I have put upon the preceding clause. I rather agree with the latter suggestion I must say. The words are these—"And that although"—and that applies to the entire power of the trustees to dispose of the share of each pupil or unmarried minor for his benefit—"the said fee or principal should not then have vested in such pupils or unmarried minors."

Now, if the fee or principal has not vested in such pupils or unmarried minors, that must be because the term of division has not arrived, for it is already impliedly but distinctly provided that when the term of division has arrived it does vest, and therefore I apprehend the meaning of the words is simply this—although the first term of Whitsunday or Martinmas that shall occur after the expiry of six months after my death has not arrived. And it was quite natural to provide for that, because eleven months might elapse from the death of the testator and the arrival of the period of division, and during that period it might be of the greatest possible consequence that the minors should be provided with support and education, and that a considerable sum of money should be expended for the purpose of setting them up in life. One can easily understand these things occurring to the mind of the testator, and they fully account for the words which I have just read. It means that if it should so happen that an opportunity occurs, or a necessity occurs, for expending the share of one of the unmarried minors or pupils for his advancement in life, or for his education or anything else in the interval between the testator's death and the arrival of the period of division, then the trustees have full power to use their discretion in the matter, and to advance money, although during that interval his provision has not in terms vested. To read the clause we are now construing in the way that the Lord Ordinary has done seems to me just to substitute one set of words and expressions for another set of words and expressions having an opposite meaning. Now, that is not interpretation, and to interpret is all that we are entitled to do in the case of a deed of this kind. I confess I do not entertain much difficulty in arriving at the conclusion I have just expressed. It may be that the clauses might have been expressed with a little more precision, but I think they are not susceptible of any construction except that which I have assigned to them.

I am therefore for recalling the interlocutor, and remitting to the Lord Ordinary to rank the reclaimers, the trustees of the deceased minor, in terms of their claim.

Lord Mure—I agree, and have little to add to what your Lordship has said. In the first part of the eighth purpose of the settlement there is, in the view I take of it, a clear and express gift of certain portions or shares of residue to the testator's sister, to his nephews in fee, and to his nieces in liferent, and to their issue in fee, without distinct mention of any period of payment. It is simply a gift to the persons named, the nephews taking under it absolutely in fee, while the nieces are to take in liferent, and their issue in fee. Now, in the ordinary case of such a clear and distinct gift with no mention of any period of payment, the usual presumption is in favour of vesting *a morte testatoris*, and if the clause had stopped there the above rules would, as I conceive, have applied. But the testator has not left this matter to presumption, for in the second part of the clause he goes on to declare that "the shares shall be payable, the one half falling to my said sister if she shall survive me, also the three-sixteenth parts falling to each of my said nephews (as well those shares destined to them failing my said sister, if she shall fail, as those shares directly destined to themselves) at the first term of Whitsunday or Martinmas that shall occur at the expiry of six months after my death." He is thus distinct as to the period of payment of the portion falling to his sister, whom failing to the nephews, and of the shares falling to the nephews in their own right. Then, as to the interest of the portion which the nieces are to have in liferent, it is provided that they shall receive it in equal portions, beginning at the first term happening six months after the testator's death. Taking these clauses together, I find no difficulty in the construction of the deed. I think the term of payment must be held to be the term of vesting. There can, I conceive, be no doubt about this as regards the half portion gifted to the sister, or as to the first half-year's interest provided in liferent to the nieces. As to these the period of payment is the same, and very express, and I can see no reason why the same rule should not be applied in the case of shares gifted absolutely to the nephews, as to which the clause is equally express.

As I understood the argument in support of the interlocutor, the respondents' view is based

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