enced by the consideration that it is established that in point of fact they did so traffick, and that it has been the practice of the company to credit to revenue profit made upon the sale of securities during those years in which a profit overhead was made upon the sales. Take, for instance, the sales of general investments for the year ending 1st January 1892. We find that during that year six different sets of shares were realised. On an average none of them had when they were sold been held for above six months. The total price realised on re-sale amounted to £27,347, 16s. 3d., about a third of the total capital of the company. There was a profit overhead of £1351, 2s. 6d. The profit so realised was credited to revenue and divided as dividend among the shareholders.

The same thing occurred in regard to the sales effected during the financial year ending 31st January 1893. Nine different investments were realised at a total price of £28,974, 15s. 3d., at a profit overhead of £896, 17s., which was credited to revenue as profit.

All these securities also had been held for short periods.

The sales effected during the financial years ending 31st January 1894 and 1895 were limited in number, presumably because there had been a great fall in the value of such securities. There was a loss on the sales during the year ending 31st January 1894 which was debited to revenue.

The statements to which I have just referred indicate, I think, that during these years the company were trafficking in stocks and shares and other securities, and as it cannot be said that the memorandum and articles of association do not empower them to do so, I think it must be held that the capital which they used for that purpose was circulating and not fixed.

Some difficulty, however, arises from the fact that the securities on which the loss actually occurred were acquired in 1891 and are still held by the company. The loss has not occurred through their being sold at a loss, and they have been held sufficiently long to give colour to the contention that they are held as investments. I think, however, looking to the admission in article 19 of the case, that we must look upon the loss sustained on them as being as fixed and certain as if the securities had been sold at a loss, or the companies in which the shares were held had reduced their nominal value. As regards the length of time during which the securities were held, the explanation probably is, that during these years they could not have been sold except at serious loss.

The circumstances of the case of *Verner* v. *The General and Investment Trust* differed from those of the present case in this material respect, that in that case no trafficking with the assets took place. I find this noted in the opinion of Mr Justice Stirling, p. 256, and Lord Justice Kay, p. 269. The company seem to have purchased the securities as investments, and made the profit which they divided as revenue, not out of the sale of the securities but out of the interest at a high rate which they received on the investments.

The present case I regard as special; a slight difference of circumstances might lead to a different result. But on the whole I think that the proposed treatment of the loss by the company which has been submitted to and approved of by the shareholders is within the powers of the company.

The LORD JUSTICE-CLERK was absent.

The Court answered the question in the affirmative, found and declared accordingly, and decerned.

Counsel for the First Parties—Sol.-Gen. Dickson, Q.C.—Kincaid Mackenzie. Agents—J. & J. Ross, W.S.

Counsel for the Second Party—Lorimer—Clyde. Agents—Menzies, Black, & Menzies, W.S.

Wednesday, December 15.

FIRST DIVISION.

[Lord Stormonth-Darling, Ordinary.

BROWN AND OTHERS (M'CONNELL'S TRUSTEES), PETITIONERS.

Trust—Trustee—Power to Resign—Trusts (Scotland) Acts 1861 *and* 1867 (24 *and* 25 *Vict. c.* 84; 30 *and* 31 *Vict. c.* 97)*—Judicial Factor—Discretionary Power.*

A truster directed his trustees, *inter alia,* to hold the residue of his estate for his children in liferent and their issue in fee, declaring that the grandchildren's shares should not vest till they respectively attained majority, and that such vesting should take place subject to the liferent of their parent. He further conferred on the trustees full power to advance to the fiars a portion not exceeding one-half of their respective shares.

The trustees having presented a petition for authority to resign and for the appointment of a judicial factor on the trust-estate, on the ground that certain other trust purposes were unworkable, the *curator ad litem* to the minor grandchildren called the attention of the Court to the power to make advances, and raised the question whether the Court would confer the same power upon a judicial factor.

The Court *granted* the petition, holding that the trustees had an absolute right to resign under the Trust Acts 1861 and 1867, and that that right could not be defeated by the possibility of the administration of the estate being more limited in the hands of a judicial factor than under the trust-deed.

Alexander Kirkwood Brown and others, testamentary trustees of the late Robert M'Connell, bleacher, Glasgow, presented a petition for authority to resign the office of

trustee, and for the appointment of a judicial factor on the trust-estate.

By the fourth purpose of his trust-disposition and settlement the testator, who died on 7th April 1897, recommended and empowered the trustees to carry on his bleach-works, with full discretion, if they saw fit, to wind it up or dispose of it as a going concern. By the sixth purpose he directed his trustees to erect tenements of dwelling-houses on certain specified steadings of ground. He lastly directed them to hold the residue of his estate for his children equally among them in liferent and their issue in fee, it being declared that the shares of grandchildren should vest at twenty-one in the case of males, and at twenty-one or marriage in that of females, and "that such vesting shall take place subject to the life interest of their parent if then alive, and the right given to such parent as after mentioned to confer a similar life interest on his or her surviving spouse." The truster at the same time conferred on the trustees "the full power in their own absolute discretion to pay even before the said period of vesting, to or for behoof of any grandchild, such portion as they may think fit, not exceeding one-half thereof, of the capital of its prospective or presumptive share, and that for any purpose, and under any conditions they may consider proper, declaring that, notwithstanding what is hereinbefore written, each of my sons shall have full power to confer upon his surviving wife . . . and each of my daughters upon their surviving husbands . . . a liferent of the whole or any portion of the share of residue hereby directed to be held in liferent for such son or daughter."

The petitioners set forth that they desired to sell the buildings and steadings which formed one block of ground, and to dispose of the business as a going concern; but that they were advised that they could not safely disregard the imperative direction of the truster in the sixth purpose to build tenements. Yet, to carry out this direction, they averred, would necessitate their embarking the whole of the trust-estate in a hazardous building speculation, and borrowing money for at least an equal amount; and thus the trust had become unworkable, all the fiars being in minority, and it being therefore impossible to arrive at an agreement authorising the petitioners to take any particular course.

The application was presented under the Trusts (Scotland) Act 1861, and the Trusts (Scotland) Act 1867. The former (24 and 25 Vict. cap. 84), section 1, empowers all gratuitous trustees under any deed to resign; the latter (30 and 31 Vict. cap. 97), section 10, makes provision for the appointment of new trustees or a judicial factor by the Court, if any trustee entitled to resign, and desirous of so doing, is at the time sole trustee.

Mr Blackburn, advocate, who was appointed *curator ad litem* to the fiars, lodged a minute in which, while expressing his belief that the trust-estate would be more efficiently administered by a judicial factor than by trustees, he called the attention of the Court to the clause of the settlement with respect to advances to the fiar quoted above, and proceeded thus—"This is a very peculiar power, and very different from the power frequently met with where trustees are authorised to make an advance of capital to an individual who is enjoying the liferent of that capital. Here the trustees are actually empowered to deprive the liferenters of a portion of their beneficiary interest in the estate, and to bestow that portion on an individual who has no present beneficiary interest in the estate, and may even not have any vested interest in the estate.

"The trust-deed contains a power to assume new trustees, so the truster must be held to have indicated no *delectus personæ* as to the carrying out of this power, and in such cases the Court has, on an application by a judicial factor, frequently extended to him the special powers contained in the original trust-deed. But the special power above referred to is of such a peculiar nature, and implies such a power of selection as to the individuals on whom the beneficiary interest of the estate is to be conferred, that the curator has grave doubts as to whether the Court would allow a judicial factor to exercise the power. If this doubt is justified, then the interests of his ward would be adversely affected by the granting of the prayer of the petition in its present form, and he considers it right to draw the attention of the Court to this fact at the present stage of the proceedings."

The Lord Ordinary (STORMONTH DARLING) reported the petition to the First Division.

The petitioners argued that under the statutes they had an absolute right to resign, pointed out that the discretion conferred on the trustees could only be exercised after the death of the liferenter, and referred to *Maxwell's Trustees* v. *Maxwell*, November 4, 1874, 2 R. 71; *Simson, &c.*, January 27, 1883, 10 R. 540; *Robbie's Judicial Factor* v. *Macrae*, February 4, 1893, 20 R. 358; *Howden* v. *Simson*, November 16, 1895, 23 R. 113,

LORD PRESIDENT—I am not surprised that Lord Stormonth Darling has thought it desirable to call attention to this case, because undoubtedly there may be involved in the future administration of the trust powers which do not belong to his Lordship sitting alone in the Outer House.

At the same time it appears to me that the case admits of a distinct solution upon this ground, that these trustees have a right to have the prayer of their petition granted, and accordingly that any doubt or difficulty which may arise in the sequel in consequence of the different powers of a judicial factor does not present a legitimate answer to the prayer of the petition.

But as this latter subject has been mooted, it is in accordance with what Lord Stormonth Darling has said, that the Court cannot in anticipation determine whether the application of a judicial factor for authority to exercise the powers conferred

on the trustees falls within the cases referred to. That must necessarily stand over, for we cannot pronounce as to what would happen should such a contingency arise. I think the prayer of the petition should be granted.

LORD ADAM—These gentlemen are gratuitous trustees, and as such they have under the Act of 1861 a power to resign. The later Act is only regulative of the earlier; that is, it makes provision that the trustees shall not so resign as to leave the trust unrepresented in any way. Accordingly, it authorises any gratuitous trustee, who happens to be sole trustee at the time, to resign if he has assumed new trustees, or he may apply to the Court stating his wish to resign, and praying for the appointment of new trustees or of a judicial factor. Now, as regards new trustees, we only appoint these on the application of the beneficiaries, and the beneficiaries here have not asked us to make such an appointment. We are therefore shut up to the other alternative, viz., the appointment of a judicial factor. That is enough for the decision of this matter, for if the trustees desire to resign, and have complied with all the regulations of the statute, we have no right to refuse their petition.

As to our giving any particular power to the judicial factor, that is not possible at this stage. If after the factor is appointed the question should arise, he can come to the Court and state the whole circumstances. We shall then be in a position to decide whether or not power should be given to him to exercise the discretion.

LORD M'LAREN—I agree that the trustees are entitled to resign on finding a substitute, or failing this, that the Court will provide for the administration of the trust by the appointment of a judicial factor.

I also agree with what has been said as to the future administration. Whenever a judicial factor is appointed the Court becomes the trustee, and I think that the parties may be satisfied that the interests of the beneficiaries will be safe in the hands of the Court whatever emergencies may arise.

LORD KINNEAR—I am entirely of the same opinion. These trustees are exactly in the same position under the statute as if the truster had given them the absolute power to resign whatever the consequences of their resignation may be. I concur with your Lordship that the possibility, if such there be, of the administration of the estate being more limited when it comes into the hands of a judicial factor than when in the hands of trustees, is no reason for denying them the right which the statute gives them.

I agree also that it is impossible for the Court at present to say what special power they might think fit to grant to a judicial factor in circumstances which cannot be anticipated. Any application for special powers must be considered upon its own merits at the time when it is made. For a somewhat similar reason I confess it appears to me that the other persons interested in the estate could not be required to tie themselves down in anticipation to the position they are to take up in circumstances which they cannot possibly foresee.

Therefore I think we must appoint a judicial factor, having for my own part no doubt that the administration of the estate will be safe in his hands, subject to the control and superintendence of the Court.

The Court granted the prayer of the petition.

Counsel for the Petitioners — Fleming. Agents—Forrester & Davidson, W.S.

HIGH COURT OF JUSTICIARY.

Thursday, December 16.

(Before the Lord Justice-Clerk, and Lords Trayner and Moncreiff.)

DON *v.* JOHNSTON.

Justiciary Cases — Salmon Fisheries — Bye-law—Liability for Act of Servant—Damnum Fatale — Salmon Fisheries (Scotland) Act 1868, *sec.* 24, *and sec.* 3 *of the Bye-law, Schedule D.*

The Salmon Fisheries (Scotland) Act 1868, sec. 24, provides—". . . The occupier of every fishing . . . shall do all acts required by any bye-law . . . for the due observance of the weekly close-time," and if he "shall omit to do any act so required," shall incur certain penalties.

At a certain fishery the leaders of the nets had been left in the water in contravention of a bye-law. It was proved that this was solely due to the carelessness of an overseer employed by the occupier, and that the latter had taken every reasonable precaution to insure conformance with the bye-law, and was personally ignorant of its breach.

Held, nevertheless, that the occupier was liable, inasmuch as section 24 imposed on him an absolute obligation to do or see done all that the bye-law required.

Opinion of Lord Justice-Clerk that he would not have been so liable had the contravention been due to some cause absolutely beyond his control, as, *e.g.*, a violent storm making the lifting of the nets a physical impossibility.

This was an appeal on a stated case against a judgment of the Sheriff-Substitute (CAMPBELL SMITH) in the Sheriff-Court of Forfarshire, at Forfar, assoilzieing the respondent on a charge of having contravened the Salmon Fisheries (Scotland) Act 1868, section 24, and section 3 of the bye-law, Schedule D, annexed to the said Act.