But on consideration I am satisfied that if these two facts are established there was nothing to prevent the innkeeper from keeping open house in the sense of admitting and furnishing these guests with liquor after eleven o'clock till any hour they might think fit to remain.

The facts of the present case go far beyond those of any previous case in Scotland. In this case seventy guests were invited to the entertainment. They came, probably, not long before eleven, and stayed till some time in the morning of the following day. But if it is once conceded that without a breach of certificate a lodger may be permitted to entertain guests where is the line to be drawn? I have come to the conclusion that it is impossible for us safely to draw a line anywhere. At one time I thought the line might be drawn at a dinner party, which may be expected to terminate at a reasonable hour, unlike a ball which begins about eleven and does not terminate until a late hour in the morning, during the whole of which time, as we know, refreshments would be served. But I am satisfied that that is not a sound distinction. We cannot safely draw a distinction between a dinner-party of forty and a ball of forty guests.

There is another risk. If we were to hold that a line might be drawn, it would in each case be a question in the discretion of the magistrate. Magistrates in one part of the country might draw the line at ten guests, and in another part the line might be drawn at seventy.

While I agree with your Lordships that this judgment should be affirmed, I think we can only safely affirm it on the broad ground that, if the lodger was a *bona fide* lodger and was giving a *bona fide* entertainment to his guests, then the innkeeper did not require a special licence, but was bound under the terms of the certificate to supply the refreshments ordered.

I would only say, in conclusion, that I think it is rather to be regretted that a test case should have been made out of this very harmless and laudable entertainment given by Captain Spalding to his friends, which seems to have passed off quietly.

The Court answered the first and third questions in the affirmative, and the second in the negative, and dismissed the appeal.

Counsel for the Appellant—Balfour, Q.C. —Clyde. Agents—Alex. Morison & Co., W.S.

Counsel for the Respondents—H. Johnston, Q.C.—M'Clure. Agent—Jas. Purves, S.S.C.

COURT OF SESSION.

Friday, July 14.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

STEWART *v.* DOBIE'S TRUSTEES.

Trust—Administration of Trust—Personal Liability of Trustee Acting Alone without Consultation with Co-Trustee.

For one trustee to take on himself the conduct of an action directed against the trust is not within the due course of trust administration, and while a trustee intervening in that way may be able to show that his intervention was for the benefit of the estate, it lies upon him to do so in order to entitle him to indemnification.

A and B were C's testamentary trustees. A acted alone without consultation with B in a reference following upon the sale of a farm forming part of the trust-estate between the purchaser and the trustees, and also in an action raised by the tenants on the farm against the trustees with regard to their waygoing. On a final division of the trust-estate, in an action of count, reckoning, and payment against the representatives of A and B, and the then acting trustees of C, the pursuers objected that the defenders had taken credit for certain payments entered in their account in connection with the proceedings referred to which had been made by A individually, by cheque on his own bank account, without consultation with his co-trustee. A's representatives having failed to show that his actings were beneficial to the estate, *held* that they were not entitled to debit the trust with the loss incurred in these proceedings, including the cost of the action.

Thomas Dobie died in 1872 leaving a trust-disposition and settlement by which he appointed George Rogerson and David Dobie his trustees. After Thomas Dobie's death his widow and one of his sons remained on the farm of Scalehill, which formed part of his estate, as tenants, until January 1879, when the property was sold by the trustees. The waygoing of the widow and son gave rise to certain questions between the purchaser and the trustees on one hand, and the tenants and the trustees on the other. The questions between the purchaser and the trustees were referred to arbitration, and resulted in a payment by the purchaser of £248, 14s. 4d. The questions between the tenants and the trustees were the subject of an action in the Court of Session at the instance of the tenants, concluding for £466, which was defended only by David Dobie, who had undertaken the management of the trust all along. After an

order for proof this action was settled on the morning of the proof by a joint-minute setting forth "that the defender David Dobie had agreed to pay, and had paid, the pursuers the sum of £350 in full of the sums sued for in the action." This sum of £350 was paid by a cheque on David Dobie's private account, and the sum of £248, 14s. 4d. recovered in the arbitration was paid into his private account.

In 1897, George Rogerson and David Dobie having died, Mrs Stewart, a daughter of the deceased Thomas Dobie, and James Stewart her husband, to whom Joseph Jardine Dobie, one of Thomas Dobie's sons, had assigned his share of his father's estate, raised an action of count, reckoning, and payment against George Rogerson's trustees, David Dobie's trustees, and David Dobie and Joseph Jardine Dobie, the acting trustees of Thomas Dobie.

An account of the intromissions of Thomas Dobie's trustees was lodged for the defenders, David Dobie's trustees and the defender David Dobie, in which the above sums of £248, 14s. 4d., and £350 appeared as credit and debit entries respectively. To these and to other debit entries, being payments of expenses in connection with the reference and action referred to, the pursuers objected on the grounnd that all the transactions in connection with the reference and action were carried through by the deceased David Dobie alone, on his own responsibility, and without consultation with his co-trustee.

After a proof the Lord Ordinary (STORMONTH DARLING) pronounced an interlocutor sustaining, with certain exceptions, the pursuers' objections, so far as applicable to the account of intromissions lodged for the defenders David Dobie's trustees and the defender David Dobie.

The objections sustained included the credit entry of £248, 14s. 4d., the debit entry of £350, two debit entries of £47, 14s. 10d. and £71, 0s. 10d., representing the expenses incurred in the action at the instance of the tenants against the trustees. Objections to debit entries of £79, 0s. 10d. and £28, 13s. 8d., representing the expenses incurred in connection with the reference between the purchaser and the trustees, were repelled. With regard to these two last entries no question was raised in the Inner House.

Note.—"I have found some difficulty in deciding the questions raised by this note of objections, chiefly because most of the events out of which they arise occurred eighteen years ago, and are now involved in considerable obscurity.

"Thomas Dobie of Scalehill died in 1872, leaving a widow and family, and an estate which consisted almost entirely of heritable property. The accepting trustees under his will were his brother David Dobie and Mr Rogerson of Pearcebyhall, but from the first Mr David Dobie seems to have undertaken the entire management of the trust. For some years there was very little to do, because the widow and family remained in occupation of Scalehill, under a lease granted by the trustees to the widow and the eldest surviving son. This arrangement came to an end in January 1879, when the property was sold for £9000 to Sir Robert Jardine. On receipt of the price, an interim division was made among the family, the trustees reserving £2500 to meet the widow's annuity. A further division was made after her death in 1891, but there still remains a balance for final division, and the questions raised by the pursuer, who is one of the beneficiaries, relates to certain items which the present trustees (Mr David Dobie and Mr Rogerson both having died) propose to charge against the trust-estate.

"The first of these consists of a credit entry of £248, 14s. 4d., and a debit entry of £350, connected with the waygoing of the widow and son when they left the farm at Whitsunday 1879. This waygoing gave rise to questions between the purchaser and the trustees on the one hand, and the tenants and the trustees on the other. The questions between the purchaser and the trustees were referred to Mr Asher, the arbiter appointed in the articles of roup, and the reference resulted, not in a formal award, but in findings by the arbiter which were acquiesced in, and which led to payment by the purchaser of £248, 14s. 4d. The questions between the tenants and the trustees gave rise to an action at the instance of the tenants in this Court, concluding for £406. This action was directed against the trustees, but it was defended only by Mr David Dobie. It was raised in May 1880, and after sundry procedure a proof was ordered, but on the morning of the proof the case was settled by joint-minute, and the Lord Ordinary was craved to assoilzie the defenders and to find neither party entitled to expenses, the first head of the joint-minute bearing 'that the defender David Dobie had agreed to pay, and had paid, the pursuers the sum of £350 in full of the sums sued for in the action.' It appears that the sum was paid by cheque on Mr Dobie's private account; that the sum of £248, 14s. 4d. received from Sir Robert Jardine was paid into the same account; and that neither of these sums ever appeared in the accounts of the trustees until after the raising of the present action. On the other hand, it appears that the two business accounts of £147, 14s. 10d. and £71, 0s. 10d., representing Mr Dobie's expenses in connection with the action, formed part of a sum of £197, 16s. 6d., which was paid by cheque on the trust account in September 1880, a year before that gentleman's death.

"I do not think that the different manner in which these payments were treated can form any ground in principle for distinguishing between them now. If Mr David Dobie settled the tenants' action on his own responsibility, and out of his own pocket, his costs in the action must form a charge against his own estate and not against the trust. No reason completely satisfactory to my mind has been suggested why he should have taken this burden on his own shoulders. I discard the suggestion that he was at fault in not

taking the purchaser bound to pay for all the outgoings for which the trustees were bound to pay. I have looked at the clause in the articles of roup, and it seems to be in the ordinary form. Moreover, I think the pursuer and the other beneficiaries are barred by the discharge of 3rd March 1880 from challenging any acts or omissions of the trustees prior to 10th November 1879, and the articles of roup were prior to that date. I also discard the suggestion that there was any special agreement outside the joint-minute to the effect that Mr Dobie should pay the expenses of the action out of his own pocket. I do not think that any such agreement is proved. But there may have been reasons which it is difficult to estimate now for Mr Dobie undertaking this responsibility. It appears from the oral evidence, confirmed by the discharge to which I have alluded, that he had previously paid out of his own pocket the defenders' expenses in an action of count, reckoning, and payment brought by the beneficiaries against the trustees in October 1879. Moreover, one reason, and I think the principal reason, why Sir Robert Jardine had not to pay the full amount of the tenants' claim was that Mr Asher held him bound to take over only 29 acres of white crop, while the tenants' claim was for 45½ acres. This plainly shows that there had been miscropping by the tenants to that extent, and possibly Mr Dobie may have held himself personally responsible for allowing the tenants to do this. There is also some reason to believe, from the evidence of Mr Cormack (a witness for the defenders), that counsel's advice to settle the action was, in part at least, dictated by a desire to save Mr Dobie from worry in the then highly nervous condition of his health, which ended in his dying in a lunatic asylum.

"These, however, are all more or less matters of speculation. The substantial fact is that it was Mr Dobie, and not the trustees, who defended the action and settled it. He, and not they, gave the instructions which resulted in the expenses being incurred. He, and not they, agreed to pay, and did pay, the sum of £350 by way of settlement. I do not for a moment doubt that an individual trustee intervening personally for the defence of a lawsuit directed against a trust, might afterwards succeed in showing that his action had been beneficial to the trust, and so might recover his expenditure from the trust estate. But the onus of explaining his action and of proving benefit would be entirely on him. If the proof in this case were to be viewed as an attempt by Mr Dobie's representatives to discharge that onus, it would be difficult I think to say that they had succeeded. I see from the condescendence in the tenants' action that the pursuers offered before the closing of the record to deduct £30 from their original claim of £406, in respect of certain questions as to second year's grass which Mr Asher in the reference had decided in favour of the purchaser. It would thus have been better, so far as the interests of the trust estate were concerned, to have allowed decree to pass for £376, together with the small amount of expenses then incurred by both sides, than to carry on the action till the morning of the proof, and then to pay £350 in addition to a sum of £118, 15s. 8d. as the expenses of the defence. I therefore come to the conclusion that none of the items connected with the tenants' action are chargeable against the trust estate.

"None of these considerations, however, apply to the items of £79, 0s. 10d. and £28, 13s. 8d., being the expenses incurred in connection with the reference to Mr Asher. These were proper trust expenses, and the pursuer has shown no reason for disallowing them. The mere fact that the smaller of these two sums was not brought into account until after the raising of the present action seems to me of no consequence."

The defenders David Dobie's trustees and David Dobie reclaimed, and argued—Though only one trustee lodged defences in the action against the trust, the trust was properly brought into Court. The deceased David Dobie did not profess to be more than one of two trustees, and no objection was taken by the pursuers in the action, or by the co-trustee, or by the beneficiaries. The fact that only one trustee defended the action did not lead to the inference which the Lord Ordinary had drawn, that that trustee intended to pay the expenses of the action out of his own pocket; nor was that inference justified by the fact that he paid the expenses by a cheque on his own account, that having been done as a mere matter of temporary accommodation while there was not a sufficient sum at the credit of the bank account of the trust. The onus having been discharged of showing that the debts paid were trust debts, the only question that remained was as to the propriety of the payments; and their propriety had been unchallenged for eighteen years, and was not challenged on record or in the proof; the defenders ought therefore to be assoilzied.

The defenders Rogerson's trustees adopted the argument presented by the reclaimers, and maintained further that in any case no responsibility attached to them.

Argued for the pursuers—One of two trustees had no power to act without the concurrence of his co-trustee, and a compromise effected by one trustee in such circumstances in an action against the trust was not a trust act. Even if both trustees had acted in the reference entered into and the action defended by the deceased David Dobie, the trust estate had suffered by his actings, and there had been fault on the part of the trustees, for the consequence of which their representatives were liable.

Lord M'Laren—The questions that have come before us on this reclaiming-note relate to the principal sum and certain accounts of expenses which all depend upon the view that may be taken of the action of Mr Dobie, the deceased trustee, as a litigant in a previous case in this Court. Mr Dobie and Mr Rogerson were co-trustees. Neither of them appears to

have been in very good health. We were referred to some correspondence in which it was arranged that Mr Rogerson was not to be troubled about trust matters, and Mr Dobie seems to have lost his health not long after, which may perhaps explain the irregularities that occurred in the administration of the trust. Mr Dobie took the more active part in the administration. He was a brother of the truster, and he arranged that the widow and sons should continue to occupy the farm as tenants and make a living out of it. Eventually the estate was sold to Mr Robert Jardine, and Mr Dobie, as acting trustee, took upon him to give the purchaser a right to the crop and waygoing subjects without having consulted or at least without having preserved evidence of the consent of the tenants to this arrangement. A reference was entered into between the trustees or Mr Dobie on their behalf and the purchaser which resulted in a sum of I think £240 being found due to the trust for crop and waygoing subjects. But concurrently with this reference an action was brought by the beneficiaries or those who were interested in the farm against the trustees claiming the value of the crop and waygoing subjects which had been taken possession of by them. To this action Mr Dobie, apparently without consulting his co-trustee, put in defences, designing himself one of the trustees of the late Mr Dobie, his brother. There is no reason to believe that the propriety of defending the action was ever considered by the trustees in consultation, and for one trustee to take on himself the conduct of an action directed against the trust is certainly a proceeding outwith the due course of that administration. The result of the action was that after proof had been ordered and was about to be commenced, counsel compromised the case under an agreement that Mr Dobie should pay £350 in full of the sum sued for. When the expenses of the suit are added to this sum, it appears that so far from the trust-estate being benefited by the defence of the action, there was a loss of £102—that is to say, the sum of £350 agreed to be paid and the expenses added together come to £102 more than the sum sued for. Whatever may be the rights of Mr Dobie, represented now by his testamentary trustees, it cannot be said that the defence of this action about the waygoing crop was beneficial to the trust-estate. The Lord Ordinary, on a consideration of the claim made against Mr Dobie's representatives for this loss, has decided it by striking out of the account the credit entry for the sum recovered under the reference, and also the debit entry for the sum which was paid under the agreement of counsel, the result being to throw the difference between these two sums (or the loss to the trust-estate on the waygoing), and also the costs of the action, upon Mr Dobie's representatives. His Lordship explains his judgment in this way—he says that while it may be that a trustee intervening in an action without the consent of his co-trustee is able to show that his intervention has been for the benefit of the estate, and may on that ground be entitled to indemnity, it lies upon him to show that it has been beneficial. This, as I think, is a sound and sufficient ground of judgment on the points in dispute in this case. If these two trustees had consulted, and after advising with their solicitor or counsel if necessary, came to be satisfied that the action ought to be defended, then although their defence might turn out to be unsuccessful, or although on further investigation of the facts the trustees might be satisfied that they had no good defence, and that their best course was to make a compromise of the action, I say that if acting according to the best of their judgment after consultation and in the ordinary course of trust administration, the case went against them, they would in the general case be indemnified as to their expenses, and would be entitled to debit the trust with the accruing loss on the matter in dispute. Their right to indemnity in such circumstances may be supported on this ground, that trustees do not in general undertake personal responsibility or guarantee the success of their transactions, but only undertake to give such attention to the conduct of the affairs of the trust as a prudent man of business would give. But then there is no call upon one trustee to defend actions without the consent of his colleague, and still less without consulting his colleague, and if a trustee takes such an unusual course, he is not within the scope of the principle which entitles trustees to debit the trust-estate with loss, and to take credit for their expenses in defending it. In such a case the trustee is not even in so favourable a position as a *negotiorum gestor*. In the case we are now considering, Mr Rogerson, the co-trustee, was not absent from the country. We know of no reason why he should not have been consulted, or why he should not have been joined as a defender if a joint defence had been resolved upon. I wish to guard myself against being supposed to express any view that would be adverse to the claim of a trustee acting in an emergency, and under circumstances which make it impossible to have the co-operation of his co-trustee. There are cases in which a trustee may legitimately act alone, but certainly the defending of an action while the other trustee is on the spot is not a case which can be justified on the ground of emergency. Then if Mr Dobie was not entitled to the protection which the law gives to a person exercising the office of trustee or other administrative office, it has not been shown that he is entitled to any special protection. He intervened in a manner out of the ordinary course of administration, and it seems to follow that as he intervened in a way in which he was not bound to intervene, that he could only justify his action by showing that it was for the benefit of the estate. I am therefore of opinion with the Lord Ordinary that this loss must fall upon Mr Dobie's representatives. The interlocutor, I think, brings out the pecuniary result correctly, and it is not suggested that there is any

question of detail to be considered. I presume your Lordships would not, in the judgment now to be given, say anything prejudicial to the claim which Mr Rogerson through his counsel intimates he may have to make at a later stage in the proceedings. Mr Rogerson, I understand, contends that if there is any individual loss he is not to share it. There is nothing in the interlocutor which affects Mr Rogerson's position, and we give no opinion upon it.

The LORD PRESIDENT and LORD KINNEAR concurred.

LORD ADAM was absent.

The Court adhered.

Counsel for the Pursuers — Kennedy — Gunn. Agents—Mackay & Young, W.S.

Counsel for the Defenders Dobie's Trustees—Ure, Q.C.—Cullen. Agents—Webster, Will, & Co., S.S.C.

Counsel for the Defenders Rogerson's Trustees—C. N. Johnston—A. F. Steuart. Agents—J. C. & A. Steuart, W.S.

Tuesday, July 18.

FIRST DIVISION.

[Sheriff-Court of Lanarkshire.

FAGAN *v.* MURDOCH.

Reparation — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37) 1*st Schedule* (1) (*a*)—*Claim by Person Partly Dependent on Deceased — Whether Excluded by Existence of One Wholly Dependent.*

By the first schedule of the Workmen's Compensation Act it is provided that the amount of compensation payable under the Act shall be "(*a*) where death results from the injury, (1) If the workman leaves any dependants wholly dependent upon his earnings at the time of his death" . . . a certain sum depending on the amount of his wages. "(2) If the workman does not leave any such dependants, but leaves any dependants in part dependent upon his earnings at the time of his death" . . . a sum to be fixed by agreement or arbitration. "(3) If he leaves no dependants" . . . the expenses of deathbed and funeral. *Held* that the claim of a person in part dependent on a deceased workman is excluded by the fact of his leaving a dependant wholly dependent on him.

This was an appeal at the instance of Robert Murdoch, builder, Glasgow, in an arbitration under the Workmen's Compensation Act at the instance of Patrick Fagan, workman, who claimed £200 as compensation for the death of his son.

The following facts were stated by the Sheriff (STRACHAN), as having been proved in the case:—"(1) That said deceased John Fagan died on 28th February 1899, from injuries sustained by him while a workman in the employment of the appellant in the sense of The Workmen's Compensation Act. (2) That the respondent is the father of the said John Fagan, and was partially dependent for his maintenance on his said son at the time of his death. (3) That the average wage of the said John Fagan while in the employment of the appellant was 23s. 6d. per week, so that the total amount of compensation payable by the appellant under the Act was £187. (4) That the said John Fagan was survived by a widow, but no children, and an arrangement was entered into between the appellant and Margaret Skerry or Fagan, then wife now widow of the said John Fagan, under which she accepted the sum of £80 as in full of all claims then competent to her or which might arise through the death of her said husband, in addition to the sum of £20 for funeral expenses. These sums, together with a further sum of £3, were duly paid by the appellant, on which a discharge was granted by the said widow in favour of the appellant, in full 'of all claims either existing then or to become due on the death of my said husband.' This discharge forms No. 3 of process. (5) That at the time of said discharge the appellant understood that the said Margaret Skerry or Fagan was the only person entitled to compensation in respect of the death of the said John Fagan. (6) That the widow of the said John Fagan was, on 12th April 1899, four months gone in pregnancy, conform to medical certificate, which forms No. 5 of process." The Sheriff proceeded:—"On these facts I held that the respondent was partially dependent on his son at the time of his death, and I awarded him the sum of £25 as compensation due to him under the Act, and also found him entitled to £5, 5s. of expenses."

The following questions were submitted for the opinion of the Court:—"(1) Whether the fact that the respondent held a decree for aliment against the deceased and received payment of aliment from him constituted the respondent a part dependent within the meaning of the Act? (2) Whether the fact that the deceased left a dependent wholly dependent on him excludes the claim of the respondent as a part dependent on the deceased?"

At advising—

LORD PRESIDENT—In my opinion no one who was only partially dependent on the deceased can claim compensation under the Act of 1897 if a person exists who was wholly dependent on the deceased. I cannot say that this is perfectly clear, or at least so clear as might be expected, one way or another, on a point of this importance. But it seems to be the necessary result of the part of the Act relating to this subject. Moreover, I do not think this at all a surprising result. It must be borne in mind that the Act leaves untouched the common law rights of persons who do not come under it. And the remedies which it provides do not profess to be a complete or systematic satisfaction of all legal claims, but rather a more or less