his widow, who had accepted her provisions, was entitled in addition thereto to terce and *jus relictæ* out of such heritage and moveables as fell to be disposed of as intestate succession. This case appears to me *a fortiori* of the present, inasmuch as there is not in the mutual settlement of Mr and Mrs Farquharson any express condition that the children should be put to their election between the testamentary provisions made for them and their legal rights, though no doubt they would, even in the absence of such an express condition, have been bound to make such election where their claiming any legal right would disturb to any extent the dispositions of the settlement.

LORD M'LAREN and LORD KINNEAR concurred.

LORD ADAM was absent.

The Court pronounced this interlocutor—

"Answer the first question in the case in the negative: In answer to the second question, say that the third party Miss Burnett has right to the one-fourth share which her mother Mrs Burnett would have taken if she had survived Mrs Farquharson: In answer to the third question, say that the second parties are not entitled to participate in the shares which would have been taken by the predeceasing children if they had survived Mrs Farquharson; that the third party Miss Burnett is entitled to the share bequeathed to her mother Mrs Burnett, and that the first party and third party Miss Burnett are entitled to participate in the shares which have fallen into intestacy: In answer to the fourth question, say that the shares of the estate of Mrs Farquharson bequeathed by her to Mrs Niddrie and William Wilkie Farquharson have fallen into intestacy: In answer to the fifth question, say that the first party, as the only surviving child of Mrs Farquharson, is entitled to claim legitim out of the parts of the estate which have fallen into intestacy, in addition to the provisions bequeathed to her by the mutual disposition and settlement of her parents: Accordingly, find the first party entitled to five-eighths of the free residue of the estate of the said Mrs Farquharson, and the third parties entitled to three-eighths thereof, and decern."

Counsel for the First Party—Salvesen, Q.C.—Adamson. Agents—W. & J. L. Officer, W.S.

Counsel for the Second Parties—Young—W. Thomson. Agents—Nisbet & Mathison, S.S.C.

Counsel for the Third Parties—Greenlees—Grainger Stewart. Agents—Turnbull & Herdman, W.S.

Friday, March 16.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

BOAG *v.* TEACHER.

Public-House — Licensing Authority—Application for Certificate—Death of Applicant Pending Application — Sisting of Other Member of Applicant's Firm in Place of Deceased Applicant — Supplementary Application Lodged after Date of Meeting—Home Drummond Act (9 Geo. IV. c. 58), *secs.* 7, 9, *and* 11—*Public-Houses Acts Amendment (Scotland) Act* 1862 (25 *and* 26 *Vict. c.* 35), *secs.* 1, 4, 8, *and* 10.

An application for "renewal in applicant's name" of a public-house certificate was duly and timeously lodged by "A for A & Sons," the firm of which he was a member. Between the last day for lodging applications and the date of the general meeting of the magistrates for granting and renewing certificates A died. At the general meeting B, a partner of the firm of A & Sons, craved the magistrates to sist him as a party to A's application, and tendered a supplementary application in name of "B, a partner of A & Sons, for behoof of said firm." The magistrates, at an adjourned meeting held on the following day, sisted B as a party to the application lodged by A, allowed the supplementary application to be received, and directed public intimation thereof to be made in certain newspapers ten days previous to a date, fifteen days later, to which they adjourned the meeting. Advertisement was made accordingly, and thereafter at the second adjourned meeting a public-house certificate was granted to "B (trading under the firm of A & Sons)" for the premises referred to in the applications lodged. It did not appear whether it proceeded upon the original application as amended or upon the supplementary application. In an action for declarator that the magistrates had acted *ultra vires*, and for reduction of the certificate granted—*held* (1) that the original application having been made on behalf of the firm of A & Sons, did not fall upon the death of A, that the magistrates were entitled to sist B, another partner of that firm, as a party thereto, and to grant him a certificate thereon, and that consequently the certificate having been so granted was valid and effectual; but (2) that it would not have been competent for the magistrates to grant a certificate upon the supplementary application in respect that it did not comply with the statutory requirements as to being lodged fourteen days before the general meeting, and that this objection could not be obviated by adjourning the meeting for fifteen days before granting the application.

Observations as to certificates held by the nominees of companies or firms doing an extensive business.

This was an action at the instance of Peter Boag, hallkeeper, and John Mackie, hammerman, both residing at 30 Clyde Street, Anderston, Glasgow, against (1) William Curtis Teacher, a partner of the firm of William Teacher & Sons, wine and spirit merchants, Glasgow; (2) the Lord Provost, and Magistrates of the City and royal burgh of Glasgow; and (3) the Town-Clerk of the city and royal burgh of Glasgow, as such Town-Clerk, and as representing the Magistrates, in which the pursuer concluded (*Primo*) for declarator that it was *ultra vires* of the Magistrates at an adjourned general half-yearly meeting for granting publicans' certificates, held by them on 13th April 1898 (1) to sist the defender William Curtis Teacher, a partner of the firm of William Teacher & Sons, as a party to the application lodged with the Town-Clerk by the deceased Adam Teacher, wine and spirit merchant, Glasgow, for renewal of a public-house certificate for premises at 55 and 57 Clyde Street, Anderston, Glasgow; (2) to authorise the Town-Clerk to receive on 13th April 1898 a supplementary application by William Curtis Teacher, a partuer of the firm of William Teacher & Sons, for renewal in his favour of the public-house certificate held by Adam Teacher at the time of his death; and (3) to direct public intimation thereof to be made by the Town-Clerk at least twice in the newspapers ten days previous to 28th April 1898: (*Secundo*) for declarator that it was *ultra vires* of the Magistrates, at an adjourned general half-yearly meeting for granting publicans' certificates held by them on 28th April 1898, to grant the supplementary application of the defender William Curtis Teacher above mentioned: (*Tertio*) for declarator that (1) the entry in the register of applications for the sale of exciseable liquors for the city and royal burgh of Glasgow kept by the Town-Clerk in terms of 9 Geo. IV. c. 58, and 16 and 17 Vict. c. 67, to the effect that said supplementary application had been received by him, and (2) the entry that it had been granted, were null and void: (*Quarto*) for declarator that the public-house certificate issued by the Town-Clerk to the defender William Curtis Teacher in consequence of the said deliverance by the Magistrates was null and void: and (*Quinto*) for interdict against the defender William Curtis Teacher trafficking in exciseable liquors in virtue of the said certificate: And further for reduction (1) of the entry in the register specifying that the supplementary application had been received; (2) of the entry in the register specifying that the defender William Curtis Teacher's application for renewal was granted; and (3) of the public-house certificate issued to the defender William Curtis Teacher.

The Magistrates had sisted "William Curtis Teacher, a partner of the firm of William Teacher & Sons," as a party to an application originally lodged by "Adam Teacher . . . for William Teacher & Sons," Adam Teacher having meantime died. The supplementary application above mentioned was made in name of "William Curtis Teacher, . . . a partner of William Teacher & Sons." The public-house certificate sought to be reduced was granted to "William Curtis Teacher (trading under the firm of William Teacher & Sons)." It did not appear on the face of the certificate whether it was granted upon the original application of Adam Teacher or upon the supplementary application of William Curtis Teacher.

The Public-Houses Acts Amendment (Scotland) Act 1862 (25 and 26 Vict. c. 35) enacts as follows:—Section 1—"The magistrates of burghs shall meet for granting and renewing certificates for the sale of exciseable liquors within the bounds of such burghs upon the second Tuesday of April and the third Tuesday in October in each year; . . . and it shall be lawful for such magistrates and justices respectively to adjourn such meetings from time to time as they shall think fit during the period of one month next after the day of their first meeting, but no longer." Section 4—"If any certificate shall be granted contrary to the terms and provisions of this Act, the same shall be null and void to all intents and purposes." Section 8—"If any person shall be desirous of keeping an inn and hotel, public-house, shop, or premises for the sale therein of spirits, wine, beer, or other exciseable liquors, whether to be consumed on the premises or not, he shall, previous to the granting to him of a certificate for that purpose, or the renewal of any such certificate already granted, truly fill up an application for such certificate in the form contained in the first part of Schedule (B) to this Act annexed, and shall truly answer the several queries therein contained; . . . and every such application shall be filled up in a fair and legible hand, and shall be signed by the applicant or his agent thereunto authorised, and shall be lodged by the applicant with such clerk of the peace or town-clerk, as the case may be, fourteen days at least before the general meeting of the justices of the peace or magistrates for granting and renewing certificates.' Section 10—"The clerk of the peace of every county or district, and the town-clerk of every burgh shall, at least ten days before the general meeting of the justices of the peace or the magistrates, as the case may be, for the granting and renewal of certificates for the sale of exciseable liquors, make out and advertise, at least twice in one or more newspapers printed or generally circulated in the district, a complete list in the form, or as nearly as may be in the form, set forth in Schedule (C) to this Act annexed of all applications for certificates within their respective bounds for premises not at the time certificated, and of all applications by new tenants or occupants of premises at the time certificated, and also of all applications for renewal of certificates which have been transferred during the currency of the previous half-year."

The Home Drummond Act (9 Geo. IV. c. 58) enacts as follows:—Section 7—"At such general or district meetings, or at any adjournment thereof within the respective periods aforesaid, it shall be lawful for the said justices and magistrates respectively to grant certificates for the year next ensuing, commencing as after mentioned, to such and so many persons as the justices or magistrates then assembled at such general or district meeting, or the major part of them, shall think meet and convenient, to keep common inns, alehouses, or victualling-houses within which ale, beer, spirits, wine, and other exciseable liquors may, under Excise licences, be sold by retail, to be drunk or consumed in the premises within their respective counties, districts, or royal burghs." Section 9—"Every such certificate as aforesaid shall be in force for one whole year commencing at the term of Whitsunday, or for six months from Martinmas respectively, according to the period of the year at which such certificate was granted, and no longer." Section 11—"It shall be lawful for the justices or magistrates respectively assembled at any such general or district meeting as aforesaid, to make such regulations and rules as they shall think fit, not being inconsistent with the provisions of this Act, as to the manner of making such applications, as well for ascertaining the character of the applicants as whether it be expedient to grant such certificates in the places in which they are sought to be obtained, and also as to the mode of proceeding in transferring certificates as hereinafter mentioned."

The facts sufficiently appear from the opinion of the Lord Ordinary (KINCAIRNEY), who on 3rd November 1899 pronounced the following interlocutor:—"Finds that it was not *ultra vires* of the Magistrates of Glasgow to grant the certificate in favour of the defender William Curtis Teacher, as partner of the firm of William Teacher & Sons, which is sought to be reduced: Therefore repels the pleas-in-law for the pursuers, and assoilzies the defenders from the conclusions of the summons, and decerns: Finds the defenders entitled to expenses, of which allows accounts to be given in," &c.

Opinion.—"At a general meeting held on 28th April 1898 the Magistrates of Glasgow granted a certificate to William Curtis Teacher, a partner of the firm of William Teacher & Sons, for behoof of that firm, for a public-house at 55 and 57 Clyde Street, Anderston, Glasgow, and the question now raised by this action of reduction, at the instance of parties whose title has been sustained, is substantially whether the certificate is valid or whether it was *ultra vires* of the Magistrates to grant it.

"There are no disputed facts, and there is no reason why the case should not be now decided. The circumstances are very simple. The late Adam Teacher, a partner of the firm of William Teacher & Sons, held for that firm a certificate and licence for the public-house in question, which would in ordinary course expire at Whitsunday 1898, and if a renewal of that certificate and licence for the year from Whitsunday 1898 to Whitsunday 1899 was desired, it was necessary for Adam Teacher to make an application for a renewed certificate; and under section 8 of the Act 25 and 26 Victoria, cap. 35, it was necessary that the application should be lodged with the town-clerk 'fourteen days at least before the general meeting of the Justices of the Peace or Magistrates for granting and renewing certificates.' If he did not lodge his application within that time, his certificate and licence would be lost.

"Accordingly Adam Teacher lodged an application on 28th March 1898, which was in name of Adam Teacher 'for William Teacher & Sons,' and was 'for renewal in applicant's name.'

"If Adam Teacher had lived until 12th April 1898 he would have got his licence, supposing the Magistrates to follow the usual course, because applications for renewed certificates are in several particulars favoured by the statutes, and are in practice granted more readily than applications for new certificates, the difference between these two forms of application being, that in the former cases the premises are licensed at the date of the application, and in the latter they are not. If that had happened, and if Adam Teacher had died afterwards, the benefit of the licence might have been retained until its natural expiry by means of an application under section 19 of the Home Drummond Act, which provides for the transfer of a certificate 'to the executors, representatives, or disponees of' a licensee dying while holding a certificate and licence.

"But Adam Teacher died on 31st March 1898, just within the fourteen days prior to the statutory meeting; and William Teacher & Sons had to consider how the certificate could be renewed, and how they could keep open the shop after Whitsunday 1898. If he had died some days sooner an application might have been made under section 19 of the Home Drummond Act; and if a transfer were obtained then the transferee might have presented, fourteen days before the court-day, an application for a renewed certificate, just as the deceased might have done. But the difficulty was that it was impossible to comply with the 8th section of the Act of 1862 and lodge the application within the time required by that section.

"A case occurred in England where in such circumstances a certificate was issued in name of the licensee who had died, but that was held incompetent and of no avail whatever—*Cowles* v. *Gale*, 1871, L.R., 7 Ch. 12.

"I have been informed from the bar that in such circumstances there had been a practice to obtain the consent of the magistrates to a license by the Excise authorities, which these authorities were, on such consent, in use to issue. This practice is noticed in Purves' Scotch Licensing Acts, p. 33, and it came under the notice of the Court in *Miller* v. *White*, 18th July 1892,

19 R. (J.C.) 104. That course was not followed in this case, because the Excise authorities, as I am informed, have come to think it illegal, and have refused to grant the licences.

"The question therefore for William Teacher & Sons came to be, whether there there was any other remedy, or whether they were bound to submit to the loss of their licence and to close their doors for half-a-year at least at Whitsunday 1898. The present case refers only to one shop, but Teacher & Sons had several shops, and the question bore upon each of them, although I understand that their certificates have not been challenged in any other case.

"The Magistrates apparently were willing to give their assistance, and the course followed was this:—On 12th April they adjourned consideration of the cause until the 13th, when by a majority they sisted the defender William Curtis Teacher as a party to the application of the deceased Adam Teacher; they also authorised the Town-Clerk to receive a supplementary application by William Curtis Teacher, directed public advertisement of it for ten days prior to 28th April, and adjourned the meeting to that day, when, on considering both applications on their merits, they granted them. I understand that William Curtis Teacher was a partner of the firm of William Teacher & Sons. That I understood to be admitted.

"The question is, whether the procedure and the certificate granted as the result of it were outwith the powers of the Magistrates. As matters now stand, this is of little or no practical consequence, because the term of the certificate granted on 28th April 1898 expired half a year ago, and perhaps it may not signify much now whether it was a good or a bad certificate. If the defender holds a licence now, as I suppose he does, it must be in virtue of a renewed certificate issued in April 1899; and it is not clear that the pursuers could now take any practical benefit from success. The case has been somewhat delayed on account of the dependence of the case of *Black* v. *Tennent*, January 24, 1899, 1 Fraser 423, which involved several of the questions raised in this case. When the action was raised, however, the pursuers could qualify an interest, and the defenders did not maintain in argument that the action should be dismissed because the pursuers' interest had fallen. Both parties asked a judgment, and while I feel reluctant to decide an important and narrow question without practical necessity, I am disposed to think that I am not entitled to refuse to decide it.

"Substantially and fundamentally the question seems to be, whether it was in the power of the Magistrates to grant this certificate in name of a party who was not an applicant for it; whether their powers were so rigorously limited that they could not grant the certificate to anyone but the applicant. The deviation from the prayer of the application was the slightest imaginable, yet the question remains, whether the statutes authorise it. The question is rather as to the power of the Magistrates than as to the procedure adopted. It is not a question of process. If it was wholly out of the power of the Magistrates to deviate even to this extent from the prayer of the application, I do not think it signifies by what ingenious devices they endeavoured to reach an illegal end. If it was within their power, then I do not think much objection could be taken to the procedure adopted—whether it was necessary or superfluous—and in any case I do not think that it could be competently challenged.

"The question depends on the statutory powers of the magistrates to grant certificates. The powers are contained chiefly in the 7th section of the Home Drummond Act, and also in the 1st and 2nd sections of the Act of 1862. I have found these provisions far from distinct or clear; but the powers granted, especially as they are expressed in the 7th section of the Home Drummond Act, are of a very general kind Section 7 empowers the justices to grant certificates to such and so many persons as the justices or magistrates shall think meet. That wide power is not expressly narrowed by any other clauses of either Act, and therefore so far as concerns the clauses of the statutes conferring power, the power is abundant, and the question is, whether that power is inferentially restricted by the provisions as to the forms of applications, the date when they require to be lodged, and the advertisement of them by the town-clerk or clerk of the peace. The object of these requirements is no doubt to bring the names of the applicants before the public, and from these provisions the inference is drawn that the magistrates have no power to appoint anyone but the applicant whose name is thus advertised. But the power given to the magistrates is quite general, and this limitation sought to be put upon their power is inferential only. I am not persuaded that the magistrates are left wholly without discretion, and it seems possible to maintain that magistrates who grant a licence to the representative of an applicant who has died, truly grant the application, and that they do so without violation of the intention and policy of the Act if they take due means to inform the public of the proposed deviation from the application. It is provided (section 4 of the Act of 1862) that 'if any certificate shall be granted contrary to the terms and provisions of this Act it shall be void to all intents and purposes.' But a certificate granted in favour of the representative of a deceased applicant would not, in my judgment, be contrary to the terms and provisions of the Act.

"But that is not precisely the point raised here, and I do not require to decide whether a certificate in favour of the representative of Adam Teacher would be good. I incline to think it would, but what the Magistrates did in this case seems to have been a narrower exercise of power than that would have been. They granted a certificate for behoof of the company for whom the application had been made, but substituted the

name of a different nominee of or trustee for the company. I have not been able to bring myself to think that this act was in excess of an authority so comprehensively expressed as power to appoint such persons as the Magistrates thought meet, having reference to the provisions about applications and notice. I therefore am of opinion that it was not *ultra vires* of the Magistrates to grant the certificate now sought to be reduced.

"If the substitution of a new representative of William Teacher & Sons in place of Adam, who had died, was not beyond the power of the Magistrates, I am not sure that it signifies much whether the methods they adopted were well chosen or not. I doubt whether any formal steps of process were necessary. I hesitate to apply the ordinary rules of process to a proceeding of this kind. I see, however, no incompetency in the sist, but I do not clearly see the necessity for it. It was argued that it was quite incompetent because it was said that the application lapsed and was wholly extinguished by the death of Adam Teacher, and reference was made to certain dicta in a case *Cook* v. *Grey*, December 3, 1891, 29 S.L.R. 247. The decision was about a totally different matter, and is not at all in point, and the dicta were upon a different matter also. They referred to the effect of the death of a licensee on his licence and certificate, but that is quite different from a question as to the effect of the death of an applicant for a licence. In ordinary questions of process the death of a pursuer or petitioner does not put an end to the process, and in such cases representatives are always sisted. I see no objection to following the analogy in this case of ordinary legal procedure, although I do not affirm the necessity for it. Further, it was argued that the supplementary application was incompetent because it was not lodged in the time prescribed by the 8th section of the statute; and the pursuers referred to a judgment of Lord Rutherfurd Clark in the case of *M'Intyre* v. *Cameron and Macleish*, July 14, 1876, in which a certificate was suspended because the application on which it was granted had not been timeously lodged. The case is not reported, but it is noted in Purves' Licensing Laws, p. 24. I have been furnished with a print of the record, but no note of his Lordship's opinion has been found. That case, however, differs from this. There had been nothing to prevent timeous presentation of the application. It was only a case of neglect and bad practice. Here the applicants did their best, and it is possible that the Magistrates may have some power to dispense with the exact fulfilment of the statutory requirements in a case for which the statutes do not provide, and in order to avoid what might be held to be injustice or hardship. But I do not profess to decide that point. I prefer to hold that the supplementary application was unnecessary, and I am inclined to hold that the purpose of William Teacher & Sons might have been served by merely lodging a minute in the original application."

The pursuer reclaimed, and argued—The question here was whether the Mag:strates were entitled to make provision for a *casus improvisus* to meet a case of apparent hardship. They were not. The terms of the statutes must be complied with strictly and literally, and not merely substantially. The Magistrates could only validly exercise the powers conferred upon them if they did so in the ways and subject to the conditions as to procedure and otherwise laid down in the statutes. If the statutory requirements as to notice were not complied with they had no jurisdiction —*Reg* v. *Nicolson* [1899], 2 Q.B. 455; *M'Intyre* v. *Cameron and Macleish*, July 14, 1876 (not reported) — Dewar's Licensing Laws, p. 185. It was not enough to say that the procedure adopted was equivalent for all practical purposes to that required in the statutes—*Laceby* v. *Lacon & Co.* [1899], A.C. 229, *per* Lord Halsbury, L.C., at p. 229. Where a remedy was given by statute it was only available upon the statutory conditions—*The Queen* v. *Armitage* (1872), L.R., 7 Q.B. 773. Omissions in the statute could not be supplied by the action of the Magistrates. There was no provision in Scotland for the case of an applicant dying between the date when notice had to be given and the date of the general meeting. That contingency had been provided for in England by the Act 9 Geo. IV. c. 61, sec. 14. See *Cowles* v. *Gale*, 1871, L.R., 7 Ch. App. 12, *per* James, L.J., at p. 16. But in Scotland there was no corresponding enactment. In this case the certificate must have been granted either upon the supplementary application or upon the original application of Adam Teacher. In either case it was *ultra vires* of the Magistrates to grant it. The Magistrates were not entitled to entertain any application which was not lodged fourteen days before the general meeting—The Public-Houses Acts Amendment (Scotland) Act 1862, sec. 8—and which if a new application was not advertised ten days before the general meeting—The Public-Houses Acts Amendment (Scotland) Act 1862, sec. 10. It was quite impossible for the "supplementary application" to comply with either of these conditions, and the Magistrates were not entitled to consider it. The difficulty could not be got over by adjourning the meeting and ordering advertisement in the meantime. The adjourned meeting of 28th April was still in law the meeting of 12th April—*The Queen* v. *Armstrong* (1896), 65 L.J., Mag. Cas. 35. Notice or advertisement fourteen or ten days before the date upon which the certificate was granted at the adjourned meeting was not enough. The time for lodging applications and making advertisement could not be extended by adjourning the meeting. It might be that practically one period of fourteen days or ten days was as good as another, but that was irrelevant. The Magistrates were not entitled to be satisfied with equivalents. They were therefore acting *ultra vires* if they granted a certificate upon the supplementary application. On the other hand, if they proceeded upon the original

application their action was equally illegal. Upon the death of a licence-holder his licence expired, and in strict law no-one after his death was entitled to carry on the business until he had got a transfer under sec. 19 of the Act 9 Geo. IV. c. 58. A licence was personal, and fell on the death of the grantee—*Cook* v. *Gray*, Dec. 3, 1891, 29 S.L.R. 247, *per* Lord President Robertson, at p. 249. In practice, no doubt, this rule was not strictly enforced, and the business was allowed to be carried on for a reasonable time without a licence. The Court had refused to convict the person carrying on the business under such circumstances—*Rattray* v. *White*, Dec. 18, 1891, 19 R. (J.C.) 23; *Wylie* v. *Thom*, July 4, 1889, 16 R. (J.C.) 90; but these Justiciary decisions proceeded upon the ground that the prosecutions were oppressive, and they were therefore irrelevant here. *Quoad civilia* such trafficking was illegal, there being no licence in force at the time—*Cook* v. *Gray*, *cit.* A firm could not hold a licence or certificate, or be recognised in any way by the licensing authorities—*Clift* v. *Portobello Pier Co.*, Feb. 10, 1877, 4 R. 462. A certificate could only be granted to an individual. He was the holder of the certificate and licence, and the fact that he represented a firm or company made no difference. The position here therefore was that the licence granted to Adam Teacher expired when he died. The fact that it might have been transferred did not affect the question, because no transfer under section 19 was applied for. At the date of the general meeting, therefore, there was no licence in existence for the premises referred to in Adam Teacher's application, and no certificate for them could be granted to anyone except upon an application for a new certificate duly lodged and duly advertised. Adam Teacher's application was for a renewal of the certificate held by him as an individual in his own name. That application could not be granted for Adam Teacher was dead, and the Magistrates were not entitled upon that application to grant a renewal of the certificate formerly held by him to another member of his firm. They could only grant a certificate to William Curtis Teacher upon an application duly and timeously lodged and advertised as a new application. The fact that the former certificate had been held, and that its renewal was applied for by Adam Teacher, on behalf of his firm, did not entitle the Magistrates to allow William Curtis Teacher to be sisted as a party to an application made in name of Adam Teacher. There was nothing in the statutes which gave the slightest countenance to such procedure, and as the Magistrates' jurisdiction was strictly limited to carrying out the procedure authorised by the statutes, the course which they took with regard to this application was *ultra vires*, and the certificate which they granted upon it was null and void. If it was admitted that the substitution of the name of William Curtis Teacher in the original application required advertisement, that was fatal to the defenders' case for the reasons already stated with regard to the advertisement of the supplementary application. Counsel for the pursuers also referred to *Sharp* v. *Wakefield* [1891], A.C. 173; and *Lundie* v. *Magistrates of Falkirk*, October 31, 1890, 18 R. 60.

Argued for the defender Teacher—The pursuers only asked for a declarator as to the supplementary application and of the certificate as following thereon. Even if this were granted it would not avail them, as the supplementary application was not necessary. The original application as amended was quite sufficient. Notice of it had been given fourteen days before the general meeting, and it did not require advertisement. The certificate and licence held at the date of Adam Teacher's application was really held by the firm of William Teacher & Sons. It was their business which was carried on in the premises licensed. It was for a renewal of this licence that application was made. Adam Teacher's name was entered in the application merely as a nominee and trustee for his firm. The certificate was really applied for by and granted by the Magistrates to the firm, and was to be their property. The only alteration made upon the application was the substitution of the name of one partner of the firm in place of another. The Magistrates were entitled to allow that alteration to be made. If advertisement was necessary the alteration had been advertised; but this was not a new application. The former licence, which as already explained was really held by the firm, continued in force up to the date of the general meeting. By section 9 of the Home Drummond Act (9 Geo. IV., c. 58) the duration of the licence held by Adam Teacher for William Teacher & Sons was one whole year, ending Whitsunday 1898. It was the invariable practice to carry on the business of a deceased licenseholder after his death. That was no offence against the Licensing Acts—*Rattray* v. *White. cit.*; *Wylie* v. *Thom*, *cit.* The fact that the licence formerly held by the deceased licence-holder could be transferred, and that the transfer only justified carrying on the business until the date when the licence would have expired in ordinary course, showed that the licence continued to exist until that date irrespective of the death of the holder. At most, what the Magistrates had done here was to make a new rule as to a matter of process. They were entitled to do so—Act 9 Geo. IV. c. 58, section 11.

Counsel watched the case for the Town-Clerk as representing the Magistrates, but did not address the Court.

At advising—

LORD JUSTICE-CLERK—This case comes before us in somewhat extraordinary circumstances. As regards the particular case in question there is no interest whatever in the reclaimers to pursue the action, for its purpose is to render null a licence granted a considerable time ago, and which, whether good or bad, has long ago become inoperative by lapse of time. The licence

in question could only last for one year and would fall absolutely on the expiry of that period. On the other hand, the case is one which, if decided in favour of the contention of the reclaimers, involves this result, that where any similar case occurs great injury to private interests, and great inconvenience possibly to public interests, may follow. For a licence issued to meet the proper requirements of the locality for which an application is made, and the preparation of an applicant to meet those requirements, is an expensive matter. Therefore the decision which the reclaimers ask for is one which should not be pronounced unless it is impossible consistently with legality to avoid taking that course.

Under section 8 of the statute all applications for licences must be made fourteen days before the date of the statutory court for considering applications. I hold that the reclaimer's argument must be accepted that the fourteen days must be before the day of the statutory court, and that if the court is adjourned an application made fourteen days before the day to which an adjournment was made would not fulfil the statutory requirement.

In this case what happened was, that Adam Teacher applied in due course on behalf of his firm of William Teacher & Sons for a licence for the premises in question. That firm were the occupants of the premises, and the owners of the business which up to the time of the application had been carried on there under a licence then subsisting. But as the law requires a personal applicant, that there may be a responsible individual who must answer in any question as to the conduct of the business under the licence, one partner was put forward to represent the true party by whom and for whom the business was to be carried on, viz., the firm. Accordingly, the application so bore, and was so advertised under the statute. The words of the application are "renewal of certificate presently in name of Adam Teacher, and held by him for his firm of William Teacher & Sons."

Unfortunately Adam Teacher died between the lodging of the application and the holding of the Court, and the firm took the course of asking that another partner, William Curtis Teacher, should be sisted in his room, so that the application might proceed. This the licensing authority granted, and they ordered renewed advertisement of the application in the name of William Curtis Teacher, and adjourned the sitting of the Court to allow of this being done; and thereafter, no objection being stated, they granted the certificate. The question is, whether the certificate so granted—to use the words of the statute—was granted "contrary to the terms and provisions of this Act."

It is not, I think, to be held, unless there is no escape from it, that when the course of procedure in what is really a process is interrupted by a death unexpectedly occurring so as to prevent the exact carrying out of the procedure prescribed, the Court cannot prevent a practical miscarriage, and the doing of injustice to private interests or to public interests, by sisting another person in the place of the deceased, taking such precautions as may be necessary to prevent any substantial breach of statutory requirements, and to ensure that these are reasonably met. I agree with the Lord Ordinary that there is no good objection to following the analogy of ordinary legal procedure. And while for purposes of notice it may have been prudent to have a supplementary application and advertisement, I doubt if any such procedure was necessary. It is suggested that members of the public who might wish to object to the person put forward in place of the deceased applicant might not see the advertisement, as they might not look for it, the statutory time for advertising being past. But any persons who were interested that no licence should be improperly granted could attend the statutory court, and if they had done so in this case they would have been notified of the death which had occurred, and the proposed sist of another partner to represent the defenders' firm, and of the adjournment to give time for public notification. If they did not choose to attend the Court, I do not think they can complain against what was done on the ground of want of notice. Every notice that was possible was given, and if, as I hold, the Court was entitled to allow another representative of the company owning the premises to be sisted instead of the partner who, by the act of God, had failed between the date of application and the sitting of the Court, and so allow the process to proceed and prevent what would presumably be a wrong to the true applicants and to the public, then it lies on those who impugn the course that was taken, to show ground for holding that it was so irregular as to amount to a contravention of the statute. This, I think, the pursuers have failed to do. If a sisting of a substitute was competent, then I hold that the Court did everything that could be done to keep the procedure on the lines that would carry out the purpose and intention of the statutory enactments.

I would notice in passing that the case of a death occurring is of all cases the most favourable for not enforcing in a rigid manner rules which in all other cases should be so enforced. And this is illustrated in our criminal law, where rigidity of application is the almost invariable rule. Thus there is no rule more strict than that which relates to the tholing of an assize. Yet when a death occurs of a juryman or of the judge during the course of a trial the strict rule as to the tholing of an assize is set aside and an accused person may be remitted to another jury.

In the case of licensing there must be a personal applicant, in order that there may be a person responsible to the magistrates. But it is not because he is required personally to conduct the business. He may conduct it by a manager or other servant. Indeed, he may hold many licences, so that

it would be impossible for him personally to conduct the actual business done under them all. The business here was a company business, and the person to be licensed was a representative merely. Had the death of Adam Teacher occurred at any other time than just immediately before the Licensing Court, another could have been put in his place by transfer. I think it reasonable to hold that the Court were entitled, on a death occurring at the time at which it did, to do what was the equivalent of a transfer, viz., to sist another to take up the new application; and I hold that there is nothing contrary to the statute in doing that, but, on the contrary, that to hold that it could not be done would be to defeat the purpose of the statute, which is that the magistrates should consider applications duly lodged, and grant them where satisfied that the application was a proper one, and that the granting of a licence for the premises notified was proper for the public requirements of the neighbourhood. I cannot hold that in the conduct of such a process they are debarred from the power generally inherent in a court to sist one person in the place of another removed during the course of the procedure by death. It seems to me that it would be more properly contrary to the statute to refuse to do so, and thereby fail to do their duty in considering applications and granting such as the requirements of the locality call for. I think the Court could, in the circumstances in which they were placed by the accident of the death, competently act as they did, just as I think that if, through the error of a clerk of their own, some mistake had been made in the publication of the list of applications—as, for example, an error in a name, or in the omission of part of an address—they could have caused the error to be rectified and the correction published. It cannot be said that the procedure is so "ironbound"—to use an expression in an English case which was quoted to us—that the Court could not correct an error of their own clerk without acting contrary to the terms and provisions of the Act. I cannot think so. That would be to make an innocent applicant and the public suffer for the failure of the Court's own official. Here it was not a human error that created the difficulty, but an occurrence which no human care or foresight could prevent.

I am therefore of opinion that the interlocutor of the Lord Ordinary is right and ought to be adhered to.

LORD ADAM—I concur.

LORD TRAYNER—The main question in this case is whether the publican's certificate issued by the Magistrates of Glasgow to the defender Teacher in April 1898 was validly issued or whether it was issued, contrary to statutory provisions and therefore void. It is not doubtful that if the Magistrates issued that certificate under circumstances which amounted to a contravention, or even a disregard of the statutory provisions thereanent, the certificate is to all intents and purposes invalid and null. The statutes so provide. The statutory requirement which the Magistrates are said to have disregarded in this case is that provided for by the 8th section of the Act of 1862. It is provided that any person desirous of obtaining a public-house licence shall apply for it in a certain form, which application "shall be lodged" with the town-clerk fourteen days at least before the general meeting of the magistrates for granting and renewing certificates. That provision is imperative, and no licence certificate issued by the magistrates can be sustained the application for which had not been lodged fourteen days at least before the general meeting. Accordingly, if the certificate in question here was issued or granted in respect of the application (called in the proceedings the supplementary application) made by William Curtis Teacher on 12th April 1898—being the day on which the general meeting of the Magistrates was held—I am of opinion that it cannot be sustained, for the simple reason that the application then made had not been lodged fourteen days before the meeting. The view which was suggested, rather than seriously maintained, by the defenders that the supplementary application was lodged fourteen days before it was granted at the adjourned meeting of the Magistrates is not sound. The adjourned meeting was still the meeting of 12th April, but continued to a later date, and everything done at the adjourned meeting must be held as done at the general meeting. But even if this were not so, the statute is distinct that the application must be lodged fourteen days before the general meeting, and not fourteen days before any date to which that general meeting may be adjourned. This was not done, and therefore the supplementary application and anything that followed upon it must be disregarded as disconform to the statutory requirement.

But there was before the general meeting of the Magistrates on 12th April an application which had been duly lodged, and upon which a certificate might validly be granted if in the circumstances that application could be competently insisted in. It was an application, as it bears, by Adam Teacher "for William Teacher & Sons"—an application by a partner of a firm for behoof of his firm. Adam Teacher died on 31st March—that is, three days after the application was lodged, and less than fourteen days before the general meeting of the Magistrates. It was therefore impossible to make a new application which could be lodged with the Town-Clerk in the time prescribed by the statute. At their general meeting the Magistrates, on the motion of Mr William Curtis Teacher, another partner of the firm of William Teacher & Sons, sisted him as a party to the foresaid application, and thereafter (without following in further detail the subsequent proceedings, which had reference to the supplementary application, which I entirely disregard) granted the application. It is in these circumstances that the pursuers maintain the in-

validity of the licence certificate granted by the Magistrates, and they do so upon two grounds. They maintain (1) that the application fell on the death of Adam Teacher; and (2) that the Magistrates had no power to sist anyone as a party to the application, and could grant no licence except to the individual who appeared as the applicant on the face of the application. I agree with the Lord Ordinary in thinking that these grounds cannot be sustained as relevant to set aside the licence certificate in question.

If the licence certificate could be regarded as purely personal to the person who applied for it, and in whose name it is issued, conferring on him a personal privilege to deal in wines, spirits, &c., then something might be said in support of the defender's views. But the certificate has never been so regarded either popularly or in legal estimation. In popular language, indeed, it is the premises that are spoken of as licensed, not the man. But in illustration of what I have said, take the case of a hotel belonging to and carried on by a public company, say a railway station hotel. The licence is not granted in the railway company's name, but in name of the manager or servant whom they put forward as their representative. The licence which he gets enables the railway company to deal in wines and spirits without the risk of their being charged with shebeening—that is, dealing in wines and spirits without a licence. But if the licence certificate granted to the manager was strictly personal, then the railway company would be liable to prosecution for illegal trafficking in spirits, the company having no licence to do so, because it is the company that is carrying on the business of hotelkeeper, not the manager. The manager of the hotel is no more carrying on business as a hotelkeeper than the waiter—both are engaged in different ways and spheres in carrying on the business of their employers. Again, if the licence certificate was strictly personal it could not be transferred. A new one might be granted, but what is purely and strictly personal cannot be transferred. Yet these licence certificates may be transferred, not by the holder but by the same authority which issued it. The decision in *Clift*, 4 R. 462, shows that the licence certificate is not necessarily the property of the person in whose name it was granted. The Lord President there said—"The certificate was the property of the company although it was taken in the name of Clift"—that is, was the property of Clift's employers for the purpose of whose business (and not Clift's) the license was obtained. I conclude therefore that the licence certificate is not necessarily the property of the person in whose name it is issued, nor that it is granted to him only for his own interest, or to enable him to carry on a business of his own. The magistrates have under the statutes a very wide discretion in granting certificates, and it is certain that they take into view in granting a licence, not only the person who actually or nominally applies for it, but also the interest or concern for which and for whose behoof the powers under the licence are to be exercised. Now, in the case before us the application was made by Adam Teacher, but by him for William Teacher & Sons. That fact appears on the face of the application. Accordingly, what the Magistrates were concerned with was, whether a licence should be granted to that firm, and not whether it was applied for nominally by one partner of the firm or another. It was that application which they granted. It appears to me to be somewhat extravagant to say that an application by one partner made on behalf of his firm should not be allowed to proceed at the instance of the same firm, but in the name of another partner. There is nothing in any of the Public-Houses Acts to suggest to me that that is illegal or forbidden, and if not forbidden it seems only reasonable and proper in itself. The consequences which would follow from the adoption of the pursuers' view would plainly be both inconvenient and unreasonable. Take again the case of the railway station hotel. Fifteen days before the general meeting of the magistrates the railway company, in name of their manager, duly lodge an application for a renewal of the licence then held by them. In a week thereafter the manager dies, or is discharged for misconduct. The new manager, according to the pursuers, may not be allowed to prosecute the application lodged by his predecessor. Both represent the same interest—the railway company, which is to pay for the licence and be allowed to trade under it. But if this is not allowed, no new application can be lodged; it is too late to do so. The railway station hotel must be closed for six months before a new application can be made. If this happened to one hotel it might happen to a dozen; if to a dozen, to every hotel in the town. Such a result was certainly not contemplated by the statute. I admit that the argument *ab inconvenienti* is of no weight against a statutory direction or provision. But it has its weight in construing a statute or applying its provisions to a special case where the statutory direction is not absolutely clear or specific. I think it cannot be disregarded here. The analogy referred to by the Lord Ordinary appears to me to help the defenders' view of the case. An action raised in name of one person may be carried on in name of another sisted in his room where the person sisted comes to be vested in the right of the original party—pursuer or defender. Why should that not be done here? It is really a question of proceeding, or form of process, regarding which there is no statutory direction, and of which therefore there can be no violation. To give effect to the pursuers' view would, in my opinion, be to inflict (on a mere technicality) a positive injury on the defenders, with no corresponding or indeed any benefit on any other; for by what the magistrates have done no private interest is made to suffer. Nor does the public interest suffer. The public were made aware in the manner prescribed by

statute that a licence had been applied for "for William Teacher & Sons" to enable them to carry on their business in certain premises. What does it matter to the public whether that application was made for the firm by one partner or the other provided the magistrates are satisfied with the character and fitness of the person put forward as the person in whose name the certificate shall be issued, as the person who shall be individually answerable to them for the fulfilment of the conditions of the certificate. I am unable to see what interest the pursuers have in litigating on this question at all. As members of the public they have a title to question any violation of the statute by the Magistrates, but their interest is not discoverable, and has not been stated.

I think the application lodged on 28th March in name of Adam Teacher for his firm of William Teacher & Sons is not open to any objection—that it did not fall by reason of Adam Teacher's death—that the defender William Curtis Teacher was competently sisted as a party to the application in room of his deceased partner, and that the certificate granted by the Magistrates on that application is not subject to reduction on any ground stated by the pursuers.

LORD YOUNG and LORD MONCREIFF were absent.

The Court adhered, allowing additional expenses to the defender William Curtis Teacher, and a watching fee to the Town-Clerk as representing the Magistrates.

Counsel for the Pursuers—Guthrie, Q.C. —Salvesen, Q.C.—Lyon Mackenzie. Agent —A. N. Stephenson, S.S.C.

Counsel for the Defender Teacher — Solicitor-General (Dickson, Q.C.)—Clyde. Agent—James Purves, S.S.C.

Counsel for the Defender the Town-Clerk of Glasgow—A. O. Deas. Agents—Simpson & Marwick, W.S.

Friday, March 16.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

ANDERSON *v.* M'CRACKEN BROTHERS.

Mines and Minerals—Working Minerals—Conveyance of Minerals—Right of Support—Whether Right Granted to Bring Down Surface—Damage Clause—Extrinsic Evidence—Long-wall Working—Custom of District.

A disposition of minerals gave power "to work, win, and carry away the said minerals, and for that purpose to sink pits, erect machinery, make roads, railways, and watercourses, and to calcine the said ironstone, and coke the said coal, all on the foresaid lands, and generally to do every other thing for the profitable and convenient working, winning, and carrying away the said minerals before specified on payment of the annual surface damages for the ground occupied by such operations, and of all damages done to crops and grass," and to buildings then on the ground, or to any new buildings erected in lieu thereof, no damages being payable for moss ground, and subject to the declaration that no pit should be sunk within 100 yards of the farm-steadings except of consent. It was proved that the long-wall method of working, by which all the mineral is removed without leaving any pillars, and which necessarily brings down the surface, was the only method by which the minerals in question could be worked at a profit; that it was the method usually adopted in the district at the date of the disposition, and that these facts were known to the granters. The coal in the lands had not been worked prior to the date of the dispositions. In an action for interdict against the minerals being worked in such a way as to bring down the surface, *held* (*rev.* Lord Kyllachy, Ordinary) that the mineral owners and their tenants were entitled to work on the long-wall system, a licence to bring down the surface upon payment of damages being implied from the terms of the damage clause in the title as construed in the light of the circumstances proved to have existed at the date of the grant.

Expenses — Several Defenders — Separate Representation of Different Defenders with Same Defence.

Held (*diss.* LORD YOUNG) that where a pursuer has convened more than one defender, each defender is entitled to the expense of lodging separate defences under the assistance of his own counsel and agent, but that if it appears from the closed record that the interests of all the defenders are the same, the defenders ought to arrange for a joint defence by the same agent and counsel, and that if they do not do so the pursuer will only be found liable in full expenses after the closing of the record as for one defender and a watching fee as for the other.

Circumstances in which the Court (*diss.* Lord Young) *found* a pursuer liable in expenses as for one appearance from the date of closing the record, and in addition in a watching fee of £16, 16s., the amount of expenses found due being directed to be divided equally between the two sets of defenders.

This was an action at the instance of Thomas Anderson of Langdales, in the parish of New Monkland and county of Lanark, against (1) M'Cracken Brothers, coalmasters, and the individual partners of that firm; (2) the marriage-contract trustees of James Mitchell, banker, Auchengray House, near Airdrie, and his wife;