purpose of adjusting the rights between them and the petitioner—*Paterson* v. *Macfarlane*, March 2, 1875, 2 R. 490; *in re Anglesea Colliery Company*, 1866, L.R., 2 Eq. 379, *aff.* 1866, L.R., 1 Ch. App. 555. The case of *Paterson* ruled the present; the only difference between them being, that in *Paterson* a patent was given in exchange for paid-up shares, while in the present case the shares were given for services rendered. The present case was indeed *a fortiori* to that of *Paterson*, because the present respondents were not third parties who had become shareholders by purchasing shares, but were parties to the original agreement.

Argued for the respondents—The prayer of the petition should be refused. The Court was entitled to look behind the terms of the share certificate and see what was the true bargain between the parties. From the agreement it was quite clear that the bargain between the parties was that no calls were to be made upon the shares, and that all the shares were to be treated as on an equal footing. If the public company contemplated had been formed, each shareholder, in terms of article 6 of the agreement, would have been entitled to five fully paid-up shares in the new company, whether or not his shares in the present company were fully or partially paid up. Having regard to the plain agreement between the parties, the petitioner was not entitled to have a call made on the respondents—*in re The Holyford Mining Company*, 1869, Ir. Law Rep. 3 Eq. 208. Their view of the case was supported by considerations of equity. The petitioner's services had resulted in nothing, and he ought not therefore to be paid for them.

At advising—

LORD TRAYNER—We concur in the decision which was pronounced in the case of *Paterson* v. *Macfarlane*, and are of opinion that it governs the present case, which is not distinguishable from it. The case of the *Holyford Company* cited by the respondent (regarding the decision in which we express no opinion) proceeded upon a specialty which is here wanting. Our interlocutor will be practically the same as that pronounced in the case of *Paterson*.

LORD JUSTICE-CLERK—I concur; and LORD YOUNG, who was present at the hearing but is not able to be here to-day, desires me to say that he also concurs.

LORD MONCREIFF was absent.

LORD KINCAIRNEY was present at the advising in order to make a quorum, but not having been present at the hearing gave no opinion.

The Court pronounced this interlocutor:—

"Ordain the respondent William Lamont to make a call of as much per share upon all the shareholders of the company who have not paid more than 10s. per share, as will with the funds in his hands be sufficient to equalise the contributions of the shareholders, and thereafter to proceed in terms of the statute with the adjustment of the rights of the contributories among themselves, and decern: Find the expenses of the petitioner and of the said William Lamont payable out of the first of the funds, and remit," &c.

Counsel for the Petitioner—Salvesen, K.C.—J. D. Robertson. Agents—Simpson & Marwick, W.S.

Counsel for the Respondent—H. Johnston, K.C.—Aitken. Agents—Webster, Will, & Co., W.S.

Wednesday February 20.

FIRST DIVISION.

MATTHEWS DUNCAN'S TRUSTEES.

Succession—Faculties and Powers—Power of Appointment—Exercise of Power Partially ultra vires—Gift to Parties Not Objects of Power—Marriage-Contract—Election.

By antenuptial contract of marriage funds were conveyed to trustees to form a provision for "the children to be procreated of the marriage," to be "paid in such proportions as" the spouses "by any joint writing under their hands, failing which as the survivor by any writing under his or her hand, may direct and appoint." By his trust-disposition and settlement the husband, with the consent and concurrence of the wife, directed that the funds falling to the children under the marriage-contract should be apportioned "amongst our children equally, share and share alike, the issue of any of them predeceasing taking their parent's share, the share of any such child or his or her issue being held, managed, and dealt with as hereafter provided for my children's shares of my estate." The provisions with regard to the children's shares of the husband's estate were such as in the case of sons might, and in the case of daughters necessarily must, restrict the child's share to a liferent, with a fee to his or her children. The marriage was dissolved by the death of the husband, leaving five sons and four daughters. None of the children had predeceased him.

In a special case after the husband's death, *held* (1) That the provision in the clause of apportionment, whereby it was declared that the issue of a predeceasing child should take their parent's share, did not invalidate the apportionment, as being a gift to persons not objects of the power in respect that the circumstances thereby contemplated had not arisen, as none of the children had predeceased their father;

(2) that the conditions attempted to be imposed upon the children's shares of the marriage-contract provision were invalid, as *ultra vires* of the power reserved by the spouses; (3) that the apportionment was not thereby wholly nullified, but was effectual to the extent of giving to each child an equal share of the fund; and (4) that the children were not bound to elect between the provisions under the marriage-contract and those under the settlement, but were entitled to receive their shares of the marriage-contract provision free of all conditions, in addition to the provisions made for them by their father in his trust-disposition.

By antenuptial contract of marriage dated 20th August 1860, Dr and Mrs Matthews Duncan, then Miss Jane Hart Hotchkis, conveyed certain funds to trustees for, *inter alia*, payment of the sum of £4000 to the "child or children to be procreated of the marriage." With regard to this sum of £4000 the contract contained the following provisions:—"And the provisions in favour of the children shall be paid in such proportions as the said James Matthews Duncan and Jane Hart Hotchkis, by any joint writing under their hands, failing which as the survivor by any writing under his or her hand, may direct and appoint; and failing any such directions by both or either of the said James Matthews Duncan and Jane Hart Hotchkis, then to the said child or children, if more than one, share and share alike, the issue of those who may predecease their parents leaving issue drawing the share which would have fallen to their parent had he or she survived, and the share of each child being hereby specially declared to vest, if sons on their respectively attaining majority, and if daughters on their marriage, with consent of her father or mother, during their respective lives or majority, but such vesting being always subject to the liferent interests previously expressed in favour of the said James Matthews Duncan and Jane Hart Hotchkis respectively."

The marriage was dissolved by the death of Dr Duncan in 1890. He was survived by Mrs Duncan and by five sons and four daughters. No children had predeceased him.

By trust-disposition and settlement dated 8th November 1886, executed with the consent and concurrence of Mrs Duncan, after providing for payment of debts, legacies, and annuities, for implement of the provisions of the marriage-contract so far as in favour of his wife and not implemented from the marriage-contract trust funds, and *in the Fifth place*, for payment of the whole remaining free income of his estate to his wife during her life if she survived him, Dr Duncan, *inter alia*, provided as follows:—"*In the Sixth place*, On the death of my said wife, . . . *Fourth*, My said trustees shall divide my whole remaining free estate into as many portions as there are children of me and my said wife who shall either be then alive or who shall have predeceased leaving lawful issue then alive, one of which portions shall be allocated to each of my surviving children, and one to the family of each of my children who shall have predeceased leaving lawful issue then alive, and shall be dealt with as after-provided: Providing always and declaring that in making such division there shall be taken into account any advances which I may hereafter make to any of my children, which advances shall be imputed towards the portion to be allocated to the child to whom they were made or to the family of such child in the event of his or her predecease, and we, the said James Matthews Duncan and Mrs Jane Hart Hotchkis or Matthews Duncan, hereby apportion amongst our children equally, share and share alike, the fund falling to them under our marriage-contract, the issue of any of them predeceasing taking their parent's share, the share of any such child or his or her issue being held managed and dealt with as hereafter provided for my children's shares of my estate. *Fifth*, If such free remainder of my estate shall not be more than sufficient to provide seven thousand pounds sterling for each of my surviving children, and for the family of each of my children who shall have predeceased leaving lawful issue then alive, inclusive of what such surviving children and the family of such children predeceasing may take under my marriage-contract, and of any advances which any of my children may hereafter receive imputed as provided in the preceding articles, then such division shall be equal, but if such remainder shall be more than sufficient for that purpose, then the surplus not required for that purpose shall go to increase the share of such remainder allocated to my eldest son William, whom failing to his issue: whom failing to my next eldest son or the family of my next eldest son who shall have either survived or have predeceased leaving issue then alive. . . . *In the Eighth place*, The portions of the remainder of my estate so allocated to each of my surviving children, and to the family of each of my children predeceasing leaving lawful issue, shall be held and applied as follows:—*First*, The portions allocated to my sons shall be held and invested by my trustees during the lifetime of my said sons, and the income of each son's share shall be paid to him by my said trustees as he may desire, but it shall be in the power of my said trustees, notwithstanding the terms of this provision, after any of my sons shall reach the age of twenty-five years, if they think it prudent to pay over the share of such son to him absolutely, in which case the discharge of such son shall be a complete discharge to my trustees for the portion of my estate so paid over to him, and shall free my said trustees of all responsibility thereanent. *Second*, The portions allocated to my daughters respectively shall be held and invested by my said trustees during the lifetime of the daughter to whom the same has been allocated, and the income thereof paid over to her by my said trustees as she may desire. *Third*, In the case of the families of those

of my children who may have predeceased my said wife leaving lawful issue, and of my children who survive my said wife and thereafter die leaving issue, and whose portions are held by my said trustees at their death, I provide that my trustees shall apportion the share of such child so predeceasing my said wife, or dying having survived her, among the children of such child equally, shall hold the share of each of such children during his or her minority, paying the income thereof to or for behoof of such child, and shall pay over the principal apportioned to each child on his or her attaining majority. *Fourth*, In the case of any of my children who shall survive my said wife and shall thereafter die without leaving issue surviving him or her, and whose portion of my estate is held by my said trustees at the time of such child's death, I provide that the portion allocated to such child and so held by my said trustees shall be allocated equally *per stirpes* among my children then surviving and the families of such of my children as shall have predeceased leaving lawful issue, and the same with the income thereof shall be held and applied by my said trustees in the same manner as is above provided for the portions of my free estate and with the same powers."

By codicil dated 21st March 1900, Dr Duncan made certain alterations with regard to the disposal of the residue, which are not material for the purposes of the present report, and empowered his trustees during the lifetime of his wife, and not without her consent, to pay over part of their shares to sons who had reached the age of twenty five.

Questions having arisen as to the interpretation of this settlement, the present special case was presented for the opinion and judgment of the Court. The parties to the case were—The marriage-contract trustees, first parties; the trustees under Dr Duncan's settlement, second parties; Mrs Matthews Duncan, third party; Miss Isabel Matthews Duncan and the other daughters, fourth parties; and William Matthews Duncan and the other sons, fifth parties.

The first, third, and fourth parties maintained "that on a sound construction of the said marriage-contract and trust settlement no valid apportionment had been made of the said sum of £4000 provided by Dr Duncan for the children of the marriage or of the estate conveyed by the third party to the first parties as trustees of the contract." . . . And the fourth parties further maintained that they were not bound to elect between the provisions under the power of appointment and the other provisions made in their favour in the trust-disposition and settlement.

The fifth parties maintained that a valid apportionment had been made, and that the fourth parties could not claim the fee of a share of the said sum of £4000 and also accept the provision for them in terms of the trust-settlement, as their taking the fee of a share of the £4000 would be antagonistic to the purposes of the settlement.

The questions of law were, *inter alia*, as follows:—"(1) Is the apportionment of the marriage-contract provisions contained in the said trust-disposition and settlement and codicil void *in toto*, or is it effectual to any, aud if so, to what extent. (7) If the apportionment in the trust-settlement is void in whole or in part, are the children of the marriage entitled to take (*a*) the shares apportioned to them by Dr and Mrs Duncan of the marriage-contract funds free of the trust created by the settlement, or (*b*) the shares of the said funds that may be apportioned to them by Mrs Duncan as the survivor of the spouses, as well as (*c*) their shares of residue under the settlement, or are they bound to elect betwen the said provisions or any of them?"

There were also other questions relating to the construction of the marriage-contract and trust-disposition and settlement, which it is unnecessary to narrate for the purpose of the present report.

Argued for the first, third, and fourth parties—(1) The apportionment was ineffectual, because it was *ultra vires* both in restricting the daughters' share to a liferent and in conferring a benefit on persons who were not objects of the power, *i.e.*, the issue of predeceasing children. The cases before the Apportionment Act (37 and 38 Vict. c. 37), though the exact points decided were altered by the provisions of that Act, were authorities for the proposition that if a power is exercised improperly in one respect the whole is vitiated, because it was impossible to say what the appointer would have done had the limits of his power been present to his mind—*Watson* v. *Marjoribanks*, February 17, 1837, 15 S. 586, *per* Lord Mackenzie at p. 591; *Baikie's Trustees* v. *Oxley and Cowan*, February 25, 1862, 24 D. 589, *per* Lord President, p. 595; *Gillon's Trustees* v. *Gillon*, February 8, 1890, 17 R. 435. The present case was distinguishable from the cases where it had been held that the exercise might be good in substance though clogged with *ultra vires* conditions — *Lennock's Trustees* v. *Lennock*, October 18, 1880, 8 R. 14; *Wallace's Trustees* v. *Wallace*, June 12, 1891, 18 R. 921—because in these cases it was not certain that the condition prescribed would be operative. In *Macdonald* v. *Macdonald's Trustees*, June 17, 1875, 2 R. (H.L.) 125; and *Wright's Trustees* v. *Wright*, February 20, 1894, 21 R. 568, it was held that the gift might be extricated from the conditions attached to it. That, it was submitted, was not the case here—*Muir's Trustees* v. *Muir's Trustees*, March 19, 1895, 22 R. 553. (2) The fourth parties were not put to their election between taking the provision made for them as apportioned by their father and repudiating the whole settlement including the other provisions in their favour therein made. No case of election arose—*Macdonald* v. *Macdonald*, November 1, 1876, 4 R. 45; *Douglas' Trustees* v. *Douglas*, June 27, 1862, 24 D. 1191. The other side relied on *Bonhotes* v. *Mitchell's Trustees*, May 27, 1885, 12 R. 984, but that case was decided on the ground that the will disclosed an

intention to put the children to their election, and no such intention could be gathered from the settlement in the present case. The English and Irish cases on election supported this view—*Carver* v. *Bowles*, 1831, 2 Russ. & My. 304 at p. 308; *Woolridge* v. *Woolridge*, 1859, Johnson's Reports 63; *King* v. *King*, 1864, 15 Ir. Ch. R. 479; *Churchhill* v. *Churchhill*, 1867, L.R., 5 Eq. 44.

Argued for the second and fifth parties—The fifth parties did not desire to challenge Dr Duncan's apportionment, but were prepared to admit that, if challenged, it could not be supported *in toto*. But even if the attempt to restrict the children's provisions to a liferent went beyond the power given in the marriage-contract, yet the appointment was good as an apportionment amongst the children equally. The general rule, as laid down in Sugden on Powers (8th ed.), p. 670, and Jarman on Wills (5th ed.), p. 421, was summarised by the Lord Chancellor in *Macdonald* v. *Macdonald's Trustees*, 2 R. (H.L.) 125, at p. 132, to the effect that where you have a gift to the object of the power, and nothing is alleged to invalidate that gift but conditions which are attempted to be imposed as to the mode in which that object of the power is to enjoy what is given to him, then the gift may be valid and take effect without reference to the condition. The gift to the issue of predeceasing children, as a gift to parties not objects of the power, might have created a difficulty had such issue been in existence, but a mere provision for circumstances which did not occur did not vitiate an appointment — *Macdonald's Trustees*, *cit. sup.* Assuming that element in the case to be eliminated, the power was exactly of the character which had been held to be good in substance though bad in respect of certain conditions, in the cases of *Lennock's Trustees*, *Wallace's Trustees*, and *Wright's Trustees*, cited *supra* by the fourth parties. Further authority in the same direction was to be found in *Mackie* v. *Mackie's Trustees*, July 4, 1885, 12 R. 1230. *Gillon's Trustees* v. *Gillon*, February 8, 1890, 17 R. 435, was distinguishable as an extreme case in which there was really no gift to the object of the power. (2) The daughters could not approbate and reprobate, they were bound to elect whether they would take all their provisions as Dr Duncan gave them or insist on their right to a fee of the marriage-contract provision, and thereby forfeit the other provisions in the trust-disposition and settlement. There was no reason to suppose that Dr Duncan, who had the terms of the marriage-contract before him, did not know that he was exceeding his power, and if he did, the intention to put the daughters to their election was as clear as in *Bonhotes* v. *Mitchell's Trustees*, May 27, 1885, 12 R. 984. That case could not be distinguished from the present.

At advising—

LORD ADAM—[*After stating the facts, and dealing with another question in the case, which it is not necessary to report*]—The next question which arises for consideration is, whether the provision settled on the children has been validly apportioned, in whole or in part, by a joint writing under the hands of Dr and Mrs Matthews Duncan?—a question which I think is one of difficulty.

The question arises in this way. By the marriage-contract the trustees are directed to pay the provisions in favour of the children in such proportions as Dr and Mrs Matthews Duncan, by any joint writing under their hands, failing which as the survivor by any writing under his or her hand, should direct or appoint.

Dr Matthews Duncan by his trust-disposition and settlement, executed with consent of his wife, after providing for payment of certain legacies and annuities, directed his trustees on the death of his wife to divide his whole remaining free estate into as many portions as there were children of the marriage then alive, or who should have predeceased leaving issue then alive, one of which portions was to be allocated to each such child or the issue of a child, and should be dealt with as thereinafter provided. The deed then contains a clause in these terms—"And we the said James Matthews Duncan and Mrs Jane Hart Hotchkis or Matthews Duncan hereby apportion among our children equally, share and share alike, the fund falling to them under our marriage-contract, the issue of any of them predeceasing taking their parent's share, the share of any such child or his or her issue being held, managed, and dealt with as hereafter provided for my childen's share of my estate."

The manner in which the shares of his own estate provided to his children were to be dealt with will be found in the eighth purpose of the settlement, and was as follows—The portion allocated to a son was to be held by the trustees during his lifetime, and the income paid to him as he might desire, but power was given to the trustees, if they should think it prudent, to pay over to him his share absolutely.

The portion allocated to a daughter was to be held by the trustees during her lifetime, and the income paid to her as she might desire, but no power was given to pay over the share absolutely.

It is obvious that the share of a son might at the date of his death be still held by the trustees, and that the shares of the daughters would be so held at their deaths; the truster accordingly directed, by the fourth sub-section of the eighth purpose, that in case any of the children should survive his wife, and should thereafter die without leaving issue surviving him or her, and whose portion of the estate was held by the trustees at the time of such child's death, such portion should be allocated equally, *per stirpes*, among the children then surviving, and the families of children who had predeceased leaving issue.

The result appears to me to be that in the case of a son whose share was held by the trustees at the time of his death, his right or interest in his share was reduced to a mere liferent and that the fee was destined

to his issue, and failing issue, to the surviving brothers and sisters and the issue of a predeceasing child; and that in the case of daughters their right or interest in their shares was also reduced to a liferent with a similar destination of the fee; and in neither case had the children a right to dispose of their shares by will or otherwise.

Turning again to the terms of the writing under the hands of Dr and Mrs Matthews Duncan, it will be observed that the apportionment is not limited to the children of the marriage, but includes the issue of a child who may have predeceased. It is said that the power reserved to Dr and Mrs Matthews Duncan was merely to apportion the provision among the children of the marriage, that the giving of a share to the issue of a child is the introduction of a stranger to the power, and that therefore the whole apportionment is vitiated. I do not think it necessary to determine how that might have been had the facts of the case raised the question. But no child has predeceased, and the apportionment is in fact solely among the children of the marriage. I do not see that the attempted giving of a share in an event which has not happened should militate against an apportionment which is in fact limited to the proper objects of the power, and I think authority for that is to be found in the case of *Macdonald* v. *Macdonald's Trustees*, 2 R. (H.L.) 125.

It will be next observed that a child's share of the settled fund is to be held, managed, and dealt with, in the same way as his or her share of Dr Matthews Duncan's own estate is to be held, managed, and dealt with. I have explained what these conditions are. Now, Dr Matthews Duncan was entirely master of his own estate, and could impose such conditions as regards it as seemed good to him. But Dr and Mrs Matthews Duncan were in a different position under the marriage-contract. They had thereby settled a provision of £4000 on the children of the marriage, and they had only a reserved power to divide or apportion that sum among the children. The question, accordingly, arises whether they were entitled to impose such conditions as those in question on a child's right to a share of the provision so settled on them.

It does not appear to be clear whether it was intended that the shares should be held and managed by the trustees of the contract or by the trustees of the settlement, but however that may be, I do not think that Dr and Mrs Duncan could competently impose conditions, which, as I have said in the case of sons might, and in the case of daughters would, have the effect of reducing their right in a share to a mere liferent, and in both cases without the right to dispose of it by will or otherwise. In my opinion the conditions are *ultra vires* and invalid. I do not think that the cases of *Lennock's Trustees*, 8 R. 14, and *Wallace's Trustees*, 18 R. 921, are authorities to the contrary. In both of these cases power was reserved or given to apportion under conditions and limitations, and in both the appointee had power to dispose absolutely of the share appointed. I do not think that the principle of these cases should be carried further.

If I am right in this, the question then arises, whether the effect is merely to nullify the conditions, leaving the apportionment itself still valid, or whether the effect is to nullify also the whole apportionment?

The general principle is thus stated in Sugden on Powers at p. 526—"Where conditions are annexed to the gift not authorised by the power, the gift is good and the condition only is void, so that the appointee takes the fund absolutely."

The Lord Chancellor in the case of *Macdonald's Trustees*, to which I have already referred, thus states the rule of law applicable to such cases. After referring to various cases he says—"From all these cases the plain rule is to be derived that if you cannot disconnect that which is imposed by way of condition or mode of enjoyment from a gift, the gift itself may be found to be involved in conditions so beyond the power that it becomes void. But where that is not so, where you have a gift to the object of the power, and where you have nothing alleged to invalidate that gift but conditions which are attempted to be imposed as to the mode in which that object of the power is to enjoy what is given to him, then the gift may be valid and take effect without reference to those conditions."

In this case I think that we have a clear apportionment among the children equally, share and share alike, of the provisions settled upon them by the marriage-contract. It is a gift of one-ninth of the fund to each of the children who are the objects of the power. No doubt the gift is attempted to be qualified by conditions, but I think the conditions may be disconnected from the gift, and only amount to an attempt to regulate the mode in which the gift shall be enjoyed by the objects of the power.

Turning now to the questions put in the case—If I am right in the conclusions at which I have arrived, the result is that question 1 will be answered to the effect that the apportionment is effectual to the extent of giving to each child an equal share of the fund.

. . . . (Question 7) The question which arises is, whether the children are entitled to take the shares of the marriage-contract funds apportioned to them free of the trusts of the settlement, as well as their shares of the residue under the settlement, or whether they are bound to elect between the said provisions.

Vice-Chancellor Wood, in the case of *Woolridge* (1859), Johnson 63, at p. 69, stated the principle applicable to such cases in terms which seem to be very pertinent to the present case. He says—"Where there is an absolute appointment by will in favour of a proper object of the power, and that appointment is followed by attempts to modify the interest so appointed in a manner which the law will not allow, the Court reads the will as if all the passages in which such attempts are

made were swept out of it for all intents and purposes, *i.e.*, not only so far as they attempt to regulate the *quantum* of interest to be enjoyed by the appointee in the settled property, but also so far as they might otherwise have been relied upon as raising a case of election."

And the Lord Justice-Clerk, in the second case of *M'Donald*, 4 R. 45, said "that where, in the exercise of a power of appointment, an attempt is made ineffectually to attach limitations to the appointment, the appointee may both take the fund absolutely and other gifts contained in the same deed without thereby giving force or vitality to the inoperative directions, on the principle of election."

This being the rule of law, it is clear that no case of election arises in this case. If the settlement is to be read as if it contained none of the conditions attempted to be imposed on the children's shares of their provisions, then they are only claiming what the settlement gives them.

I do not think that the case of *Bonhotes* v. *Mitchell's Trustees*, in 12 R. 989, is an authority to the contrary. In that case the provisions given to the children by the father's settlement were declared to be in full satisfaction of all claims competent to them under his marriage-contract; so that, clearly, if they took the provisions under the settlement they could not claim the provisions under the contract.

It is sufficiently clear that Dr Matthews Duncan did not know that he had no power to impose the conditions he has attempted to impose on the children's shares under the marriage contract, and naturally, therefore, the settlement contains no clause of forfeiture in the event of the children repudiating these conditions. But there is nothing in the settlement to indicate, and no presumption, that had he known he would have put the children on their election. I think, therefore, that question 7 should be answered to the effect that the children are not bound to elect between the provisions under the marriage-contract and under the settlement.

The LORD PRESIDENT, LORD M'LAREN, and LORD KINNEAR concurred.

The Court found, in answer to question 1, "that the apportionment in the settlement of the trust fund is effectual to the extent of giving to each child an equal share of the fund;" and in answer to question 7, "that the children are not bound to elect between the provisions under the marriage-contract and those under the settlement, but are entitled to receive their shares of the said sum of £4000 free of all conditions, in addition to the provisions made for them by their father in his trust-disposition."

Counsel for the First, Third, and Fourth Parties — W. Campbell, K.C. — Grainger-Stewart. Agents — Boyd, Jameson, & Kelly, W.S.

Counsel for the Second and Fifth Parties — Guthrie, K.C. — Crole. Agent — F. J. Martin, W.S.

Friday, February 22.

SECOND DIVISION.

[Lord Stormonth Darling Ordinary.

DOUGAN'S TRUSTEE *v.* DOUGAN.

Trust—Fiduciary Relation—Purchase by Trustee of Beneficiary's Interest in Trust-Estate—Inadequate Price—Concealment of Valuation.

Two brothers, A and B, acquired on their mother's death vested rights each to an equal share in the trust-estates under the marriage-contract of their parents and the will of their father. A was one of the trustees under both the marriage-contract and the will. Before the mother's death, B, who was in impecunious circumstances, had offered to sell his *spes successionis* to A in consideration of A paying certain of B's debts and giving him £400 in cash. After this offer was made, but before it was accepted, the mother died. Notwithstanding the change of circumstances, A accepted the offer and attempted to hold B to the bargain, but the latter refused to carry out the transaction. Some months after, B having become still more embarrassed again approached A with a view to a sale of his interest. Negotiations resulted in B assigning his vested interest in the trust estate to A in consideration of A undertaking to pay the debts of B formerly specified, and paying the latter £450 in cash. When the bargain was made, A had before him a valuation of his own share of the trust estate. According to this valuation the value of each share was £3500, and this, if correct, showed a profit to A on the transaction of over £600. A admitted that he expected when carrying out the transaction to make a profit of a few hundreds of pounds, and that he did not disclose the valuation to B. After receiving the £450, B left the country, and his estates were sequestrated.

In an action brought by B's trustee in bankruptcy against A, for reduction (1) of the offer and acceptance, and (2) of the assignation, *held* (*aff.* judgment of Lord Stormonth Darling, *diss.* Lord Young) that on payment of £450 to A, the trustee was entitled to decree of reduction.

James Macpherson, C.A., Edinburgh, trustee on the sequestrated estate of James Gibson Dougan, lately residing at 66 Elm Row, Edinburgh, conform to act and warrant in his favour dated 11th April 1899, raised an action against John Dougan, consulting engineer, Glasgow, in which he concluded for the reduction of (1) a pretended offer dated 12th April 1898, and a pretended acceptance thereof dated 19th April 1898, bearing that the said James Gibson Dougan offered to sell, and the defender purchased, at the price of £400 sterling, the interest of James Gibson