evidence of Mr Morton and the documents produced by him seem to me to go far to prove that the window was inserted about 1870, two years prior to the severance.

3. With reference to the third question, I think the rule is well established in the law of Scotland that a negative servitude can only be constituted by express grant, and that the pursuer must fail because there is no express grant in the present case. The pursuer relied strongly upon the decision in *Heron* v. *Gray*, 8 R. 155, and if that decision could only be supported upon the view that it determined that a negative servitude, such as is pleaded in this case, could be created by implication from such circumstances as are relied upon here, without any written grant, I do not think that it would constitute a binding authority. But it appears to me that the true view of *Heron* v. *Gray* was stated by Lord President Inglis in *Dundas, &c.*, v. *Blair*, 13 R. 759, where his Lordship, in the course of the argument, said in regard to *Heron's* case and the case of *Boswell*, "The principle of these cases is a principle of the law of tenement; it is not a question of servitude. There is no resemblance between the two cases." This seems to me to be the true explanation of the decision in *Heron* v. *Gray*, and if so, it has no bearing upon the present case.

4. But whatever view may be taken of the first three questions, I am of opinion that the ground upon which the Sheriff-Substitute and the Sheriff have decided the fourth question is sufficient for the disposal of the case. I agree with both of them in thinking that the pursuer has failed to prove that the window in question is necessary for the reasonable enjoyment of his property. It is clear that when his property was originally built upon there was no window at that place, the kitchen being lighted by a window on the east side which was afterwards converted into a door. The part of the building where the window in question now is was originally a store, and it had no window on the west side. It afterwards came to be used as a kitchen, and when it was occupied by a draper he closed the east window and opened out the window in question, making a passage at the same time to prevent the necessity of his workmen passing through the kitchen. The fact that there was originally no window at the place in question, and that the subjects were occupied and enjoyed down to the year 1870 without any window being inserted there, founds a strong argument against the contention that the window in question is neeessary for the comfortable occupation of the property, and I think it is sufficiently proved that the kitchen could easily be lighted from above without the necessity of having any window at the place in question.

For these reasons I am of opinion that the judgments of the Sheriff-Substitute and the Sheriff should be affirmed.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court pronounced this interlocutor:—

"Dismiss the appeal: Find in terms of the findings in fact and in law in the interlocutors of the Sheriff-Substitute and of the Sheriff dated 17th January and 18th June respectively: Affirm said interlocutors: Of new assoilzie the defender from the conclusions of the action, and decern: Find the defender entitled to additional expenses since 18th June 1901, the date of the interlocutor of the Sheriff appealed against, and remit the accounts of said expenses, both in this and in the Sheriff Court, to the Auditor to tax and to report."

Counsel for the Pursuer and Appellant—Wilson, K.C.—Hunter. Agent—Marcus J. Brown, S.S.C.

Counsel for the Defender and Respondent—Campbell, K.C.—Cullen. Agents—Sturrock & Sturrock, S.S.C.

HOUSE OF LORDS.

Friday, February 14.

(Before the Lord Chancellor (Halsbury), Lord Ashbourne, Lord Macnaghten, Lord Shand, Lord Brampton, and Lord Lindley.)

DOUGAN'S TRUSTEE *v.* DOUGAN.

(*Ante* February 22, 1901, 38 S.L.R. 406; and 3 F. 553)

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

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. After their mother's death B, being in embarrassed circumstances, approached A with a view to a sale of his interest. B ultimately assigned his share in the trust-estates to A in consideration of A undertaking to pay certain debts due by B and to pay £450 to B in cash. When the negotiations for this bargain were proceeding A had before him a valuation of his own share of the trust-estate which he had obtained for his own purposes, and which showed the value of each share to be such that if the valuation was correct A would make a profit of £600 upon his transaction with B. This valuation was not disclosed by A to B. A admitted that he expected when carrying out the transaction to make a profit of a few hundred pounds; and in his cross-examination said he did not see that "fairness had anything to do with it." After receiving the £450 B left the country, and thereafter his estates were sequestrated.

In an action brought by B's trustee in bankruptcy against A, *held* (*aff.* judgment of the Second Division) that, on payment of £450 to A, the trustee in bankruptcy was entitled to reduction of the assignation.

This case is reported *ante ut supra.*

John Dougan, the defender and reclaimer, appealed to the House of Lords.

Counsel for the pursuer and respondent were not called upon.

At delivering judgment—

LORD CHANCELLOR—I cannot help saying that I feel somewhat surprised at the persistent argument that has been placed before your Lordships in this case in spite of the, to my mind, perfectly clear rule of equity which cannot be departed from, and upon which, for the first time I believe, we are asked to place a different construction. Arguments have been addressed to your Lordships as if this were a question between two persons perfectly independent of each other, each man having a right to make the best bargain he can for himself. Undoubtedly that was the view taken by the defender here, for he frankly says so—"I do not see that fairness has anything to do with it; if a man sells at his own valuation and another man buys it has nothing to do with fairness." He had no conception of the duty he himself owed as trustee to the person with whom he was dealing as beneficiary and *cestui que* trust.

The result to my mind is manifest. The defender acted in pursuance of what his own belief was that he had no such duty at all, and that if he had secret information in his possession of what the value was he might by concealing that information obtain £300 or £400 more than if the person with whom he was dealing had been acquainted with the value which had been placed by a skilled valuer upon this property. Certainly it is to my mind an absolute novelty to hear it gravely argued that such a transaction as that can stand. I think every learned judge who has dealt with this question has always said that a court will regard with great suspicion such a transaction, and will call upon the trustee to show that he has given full information, that he has kept back nothing, and that he has given an adequate price. Both these things fail here. The trustee did not give an adequate price. We know now that the price was too little in any view of it. He certainly did not communicate the information he possessed; and when I say that, it is not for those who are impeaching this transaction to prove negatively—it is for the trustee to prove affirmatively that the information was given.

To my mind it is perfectly manifest that the information was not given, and I say so for two reasons. In the first place, when the defender is challenged in cross-examination to show that he did give it, he never suggests that he did or that he had taken any means to do it, or that he had taken care that the information should reach his brother. On the contrary, he says if they wanted to find out let them go to their own agents and not come to me. That is the line he takes. Therefore, I assume from his own statement that he could not prove that the knowledge was imparted to his brother. There is another reason, applying one's common sense to it. Seeing the view that he took of his rights and of his own position, namely, that he was perfectly independent, that he was transacting business with a person to whom he owed no obligation at all, am I to suppose that he went out of his way to do what no ordinary person dealing with another would do—to show him something which would enhance the value of the property he was buying? That is not the ordinary course of mankind. Although these were brothers they do not seem to have been on particularly good terms with each other, and he himself repudiates the idea that he was giving anything out of the way to his brother. He says if he does not know let him ask his own agents. Under these circumstances it seems to me that it is burning daylight to say that this transaction cannot stand. It is perfectly obvious to my mind that it must be set aside.

The only further observation I wish to make is that I am a little surprised to find that Lord Young in his judgment uses two phrases and never gives any exposition of the sense in which he uses them. He says—"There is no legal objection to a trustee under a settlement purchasing the interest of a beneficiary so long as the trustee acts uprightly and fairly;" and later on he says—"The transaction will be held to be legal if it is proved that the trustee has acted fairly and honestly;" then the transaction will stand. That is quite true; but the whole question is, upon what facts does his Lordship rely to justify the use of those adverbs, "uprightly," "fairly," and "honestly?" To my mind it was neither honestly, fairly, nor uprightly done, and the transaction must be set aside.

I therefore move your Lordships to dismiss the appeal with costs.

LORD ASHBOURNE—I entirely concurr. I think it is impossible to conceive a clearer case. It was the absolute and obvious duty of the defender in this case, if he thought he could maintain the transaction upon which he had entered, to have present to his mind the distinct duty which he owed to his brother. In his evidence he says:—"I do not see that fairness has anything to do with it." I think that governs his entire conduct. He was thinking of the best kind of bargain he might obtain for himself. In common with all your Lordships who have taken part in this hearing, I am of opinion that that is not dealing fairly; that keeping back and non-disclosure, non-bringing forward of Binnie's valuation, is a circumstance that cannot be explained and cannot be got over, and makes the case an overwhelming one for affirming the decision of the Court below.

LORD MACNAGHTEN—I entirely concur. I must say I am surprised that this action was ever defended, and I am astonished that after two adverse decisions the appellant should have had the courage to come to this House.

As far as I am aware there is no difference whatever between the law of England and the law of Scotland in relation to the duties and obligations of trustees when they are dealing with their *cestui que* trusts. I do not find that the law is stated anywhere more concisely and clearly than it was in the judgment of Lord Cairns, which I referred to. I will not read the passage again, because I have read it twice already in the course of the argument; it is in 2 Appeal Cases, at page 236.

Now, did the appellant in this case give full value? Clearly not. Did he give all the information he possessed to his brother? Most certainly he did not. He had in his pocket a valuation showing exactly what according to the opinion of a most experienced valuator this property was worth. He had it in his room at the time when his brother called, and he did not show it to his brother—he did not even give it to the agent, the person to whom he says his brother might have gone. That was keeping back information which it was his bounden duty to have conveyed to his *cestui que* trust. And it does not matter in the least how or under what circumstances the information was gained; if he had that information he was bound to place it at the disposal of his *cestui que* trust with whom he was dealing.

LORD SHAND—I am of the same opinion, and I would not add a word to what has been said by your Lordships if it were not that the case is one coming from Scotland. With regard to the law of Scotland, I have only to emphasise what has fallen from my noble and learned friend who has last spoken. It has not been suggested that any distinction in the law of trusts applicable to such a case as this exists between the law of England and the law of Scotland. The fiduciary relation is the same—the duties and obligations of trustees in such cases are the same in Scotland as they would be in England.

Here the trustee plainly did not realise or appreciate the duty which lay upon him to give the beneficiary full information as to his position in entering into this transaction. He makes this quite clear by his own evidence. He had in his possession—I do not care how he acquired it—the valuation which has been so much spoken of. That is a fact, and that fact he was bound to disclose when he came to transact with reference to a proposed acquisition of the share of a beneficiary. He failed to do so, and the failure is fatal in the question of the validity of the transaction.

With regard to what Lord Young said, and the expressions which have been referred to in the judgment of his Lordship the Lord Chancellor, I will only say that it might have been possible to suggest that there was integrity, uprightness, and honesty on the part of the appellant if it had been a transaction between strangers, and if there had not been the relation of trustee and beneficiary subsisting between them; but the moment you bring into the case the circumstance that the appellant was a trustee, having the duties lying upon him as a trustee in dealing with a beneficiary and transacting or negotiating for the purchase of that beneficiary's share of the estate, the question of integrity and honesty drops out of the case. I do not say that he was acting fraudulently, but certainly he was acting in violation of the duty which he owed to his brother in his character of a beneficiary under the trust. I have therefore no hesitation in saying that the case is an extremely clear one, and in concurring in the judgment proposed by your Lordships.

LORD BRAMPTON—I concur in the judgment, and I cannot help saying that I think the appeal is a frivolous and vexatious one.

LORD LINDLEY—I am of the same opinion. I will only add that no equity lawyer reading page 40,* and being told that that valuation was not disclosed by the trustee to his *cestui que* trust, could uphold this transaction for a moment.

Interlocutors appealed from *affirmed*, and appeal dismissed with costs.

Counsel for the Pursuer and Respondent—Lord Advocate (Graham Murray), K.C.—Munro. Agents—Almond & Company, for St Clair Swanson & Manson, W.S.

Counsel for the Defender, Reclaimer, and Appellant—Crabb Watt—George Joseph. Agents—Salaman, Fort, & Company, for Clark & Macdonald, S.S.C.

COURT OF SESSION.

Thursday, February 6.

FIRST DIVISION.

[Dean of Guild Court, Glasgow.

NEILSON *v.* DOUGLAS BOAG & COMPANY.

Police — Advertisement Licence — Advertising Vehicles—"Moveable Structure"—Police Offences—Building Regulations—Street — Burgh — Dean of Guild—Glasgow Building Regulations Act 1900 (63 *and* 64 *Vict. cap.* 150), *sec.* 119.

The Glasgow Building Regulations Act 1900 (63 and 64 Vict. cap. 150), sec. 119, enacts:—"(1) No person shall erect, exhibit, fix, maintain, retain, or continue any advertisement, whether existing before the passing of this Act or

* The passage referred to by his Lordship is quoted *ante* vol. 38, p. 408, second column.