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

Dougan in the estate disposed of by the antenuptial contract of marriage of their parents John Dougan, surgeon, Glasgow, and Mary Gibson or Dougan, his wife, dated 14th October 1850, and also in the estate disposed of by the said John Dougan, surgeon, Glasgow, by his will and codicil thereto, dated respectively 21st February 1881 and 12th February 1884; and (2) an assignation dated 16th January 1899, whereby James Gibson Dougan pretended to convey to and in favour of the defender all rights and claims of every description then competent, or which might at any time thereafter belong or be competent to him under the said contract of marriage, so far as relating to the estate thereby conveyed by the said Mary Gibson or Dougan, and in particular his share or shares of the feu-duties and of the other subjects vested in the trustees now acting under the said contract of marriage, and derived from or through the said Mary Gibson or Dougan; as also all claims competent to him through or on account of the death of his said father and mother; as also with consent and concurrence of Mrs Jamesina Williamson or Dougan, his wife, and the said Mrs Jamesina Williamson or Dougan with consent and concurrence of her said husband—a certificate or policy of assurance on the life of the said James Gibson Dougan, granted by the Standard Life Assurance Company in favour of her the said Jamesina Williamson or Dougan, marked No. 42,319H, and dated 15th July 1892, for the sum of £1600 sterling, and held by the Standard Company in security of the bond mentioned *infra;* or, as an alternative to the reductive conclusions applicable to the offer and acceptance, for declarator that the offer and acceptance did not constitute a competent or valid contract binding on James Gibson Dougan or the pursuer as his trustee, and that the pursuer's claims to the estate falling to the bankrupt under the contract of marriage and will and codicil above mentioned were not excluded or affected by the said offer and acceptance.

The pursuer pleaded (1) that the offer and acceptance should be reduced, or otherwise decree of declarator should be pronounced upon various grounds which he stated; and also pleaded as follows:—"(2) The pretended assignation should be reduced in respect that (*a*) it formed a part of a scheme to defraud the creditors of James Gibson Dougan, and was entered into by him and by the defender in the knowledge of that fact; (*b*) it was entered into by the defender when a trustee under the estates condescended upon, with James Gibson Dougan, a beneficiary under the said estates, and was to the advantage of the former; (*c*) it is contrary to the provisions of the Act 1621, c. 18."

The defender admitted that the offer and acceptance did not form a contract between the parties to the same.

The defender pleaded, *inter alia*—"(4) The assignation sought to be reduced being a valid assignation, decree of reduction thereof ought to be refused, with expenses."

Proof was led which disclosed the following facts:—James Gibson Dougan had been for years in a state of continuous impecuniosity. In 1893 a decree of cessio was awarded against him and the trustee therein was still in office. His sole estate consisted of his interests under the marriage-contract of his parents and the will of his father mentioned in the summons. The defender was a trustee under both the marriage-contract and the will. No right vested in James Gibson Dougan under either of these deeds until the death of his mother on 17th April 1898. On that date there vested in each of James Gibson Dougan, the defender, and the four other children of the marriage, one-sixth share of the trust-estates under the deeds, which estates consisted chiefly of properties in Great George Street and Great Western Road, Glasgow, and feu-duties from properties in Great Kelvin Terrace, Glasgow Street, Smith Street, and Bank Street, and other places there. As early as 1893 James Gibson Dougan attempted to sell his *spes successionis* but without result. In 1897 an abortive attempt was made to sell it to the defender, who admitted that he was anxious to secure it. In 1898 negotiations were resumed on the basis of the defender taking over the debts in the cessio and certain other debts and paying down a sum in cash. These resulted in the offer of 12th April 1898 specified in the summons, in which the sum to be paid by the defender in cash was stated at £400. This offer was accepted by the defender on 19th April; but in the meantime, on 17th April, the mother had died and the expectancy had been converted into an undoubtedly vested right. Thereupon James Gibson Dougan refused to carry out the transaction. The defender at first tried to hold his brother to his offer, but after taking counsel's opinion and being advised that it was not binding he desisted from the attempt. About this time the defender wished a loan over his own one-sixth of the trust estates, and a valuation of his share was obtained from Messrs Binnie & Sons, valuators, Glasgow, on behalf of the proposed lenders. Messrs Binnie & Sons' valuation dealt with the whole of the feu-duties and properties belonging to the trust estates. One-sixth of the net value as shown by this valuation, being the defender's share, and also James Gibson Dougan's share, amounted to £3518. This valuation was communicated to the defender, but the defender never made it known to James Gibson Dougan. On 12th January 1899, James Gibson Dougan being in greater pecuniary straits than ever, again approached the defender's agents, Messrs Clark & Macdonald, S.S.C., with a view to having the transaction carried out. They advised him that he must have an agent of his own and recommended a friend of their own, Mr Robert Fleming, S.S.C., Edinburgh. James Gibson Dougan went to Mr Fleming and told him of the offer and acceptance and said he wished to make the best of it. Mr Fleming acted on the understanding that he had been employed simply to carry

out a transaction settled with the defender's agents on the terms of the offer and acceptance, except that if possible he was to get a larger sum in cash. The sum ultimately fixed was £450. Mr Fleming deponed that when he agreed to the terms he understood that John Dougan would make a profit of £200 or £300. The result was that on 16th January 1899 the assignation now sought to be reduced was executed, and £450 in cash was handed over to James Gibson Dougan. The assignation was granted in consideration of (1) the cash payment of £450, and (2) the defender freeing and relieving James Gibson Dougan of (*a*) the sums contained in a bond and disposition and assignation in security dated 3rd August 1892, granted by James Gibson Dougan to the Standard Life Assurance Company, which sums amounted to £1600 or thereby; (*b*) all debts due as at 12th April 1898 by James Gibson Dougan to Mr St Clair Swanson, writer, Glasgow, which debts amounted to £200 or thereby; and (*c*) all debts due by James Gibson Dougan under the cessio above mentioned. After receiving the £450, James Gibson Dougan left the country, leaving debts amounting to about £200 unprovided for. His estates were sequestrated on 20th March 1899, and the pursuer was appointed trustee on 11th April 1899. Although the trustee was the nominal pursuer, Messrs St Clair Swanson & Manson, who had an untaxed account of £136 or thereby against the bankrupt, being practically *domini litis*, had agreed to pay the expenses if the action was unsuccessful. Evidence was led for the pursuer to show that if Messrs Binnie & Sons' valuation was accepted as correct the value of James Gibson Dougan's share, less the amount of the debts to be paid by the defender, as at 16th January 1899 was about £1100. Two valuators were also examined as witnesses for the pursuer, who deponed that Messrs Binnie & Sons' valuation of the feu-duties and properties was too moderate, and that James Gibson Dougan's share was worth over £100 more than the value brought out by Messrs Binnie's valuation. On the defender's behalf evidence was led to show that feu-duties were an investment liable to depreciate, that they were falling in market value, that too high a value had been placed on them by Messrs Binnie & Sons, and by the valuators examined for the pursuer, that there were certain other debts which the defender would require to pay if the assignation was held valid; that these had not been taken account of by the pursuer's witnesses, and that James Gibson Dougan's share of the trust estates was only worth £2133, while the consideration given by John Dougan under the assignation, including the £450 paid in cash, amounted to £2846.

The defender in cross-examination deponed, *inter alia*, as follows:—(Q) When you heard of your mother's death did you think that the interests of the beneficiaries sustained any change?—(A) I did not consider the question. (Q) Did you know that till your mother's death vesting did not take place in the beneficiaries?—(A) That was the only disputed point. When I offered the price of £500 in August 1897 it was in the knowledge of that disputed point. I have no doubt that I received the offer of 12th April 1898 in due course. I did not accept it till the 19th. I cannot remember if there was any particular reason why I did not accept it sooner. When I heard of my mother's death I was anxious the offer should be accepted without delay. (Q) Why?—(A) So as to get the transaction completed. (Q) Why did you want it completed?—(A) Because there was an offer made. (Q) Didn't you realise that the death of your mother made a great difference in James' interest?—(A) Certainly not; I understood the offer was open under any circumstances till the 2nd of May. On 18th April I telegraphed to my agents that Mrs Dougan had died yesterday—'Complete payment immediately.' (Q) Why were you in such a hurry that you telegraphed to Clark & Macdonald in these terms?—(A) To get the transaction finished; I was at liberty to close it any time before the 2nd of May. (Q) Was the reason simply this, that you knew your mother's death increased enormously the value of James' interest?—(A) It changed a reversion to a certainty, and did away completely with the speculative element. (Q) You knew that? (A) Yes; everybody would know that. I understood that the offer was open till 2nd May under all circumstances irrespective of my mother's death. . . As regards the price which I was to pay for the reversion, I knew generally what debts I undertook to pay. I understood the value of James' interest to be about £3000. The sum was payable immediately upon realisation, but the properties have not yet been realised. I had Mr Binnie's valuation before me. I had no reason to doubt it was correct. (Q) Is it the case that you have made a profit of between £800 and £900 out of the transaction?—(A) I am not aware. I am afraid I will make no profit—absolutely none. When I concluded the bargain I estimated that I would make a few hundred pounds. I was taking a considerable risk because it was unvested property. At the date of the assignation I thought I would make perhaps £200 out of the transaction. (Q) If you were told it was between £800 and £900, would that alter your opinion as to its fairness? (A) I simply would not believe it. 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. James was not an executor under our father's settlement or a trustee under the marriage-contract. I did not personally at any time submit to him a statement of his interest under either deed; I was not called upon to do so, because I was never asked. (Q) Didn't you think it was a duty upon you as a trustee, and holding a fiduciary relation to your brother, to disclose to him the extent of his interest in the trust-estate?—(A) Certainly not, when he could get all the information from the law-agent of the trust." . . .

On 18th July 1900 the Lord Ordinary (STORMONTH DARLING) pronounced the following interlocutor:—"Finds that the transaction complained of was entered into by the defender when a trustee on the estates condescended on with James Gibson Dougan, a beneficiary on the said estates, and was to the material advantage of the defender: Finds therefore that on repayment to the defender of the sum of £450 the pursuer will be entitled to decree of reduction as concluded for," &c.

Note.—"This is an action by the trustee on the sequestrated estates of James Gibson Dougan against the brother of the bankrupt, and the purpose of it is to reduce a transaction whereby the bankrupt conveyed to his brother his whole rights under the marriage-contract of his father and mother and under the will of his father. The interests represented by the pursuer cannot be described as very substantial, because he is truly only the hand of a firm of solicitors who have an untaxed account against the bankrupt of £136. There are a few other creditors in the sequestration whose claims are of trifling amount, but Messrs St Clair Swanson & Manson are admittedly the true *domini litis*. At the same time the title of the pursuer is undoubted, and I cannot say that the questions involved are without importance in the eye of the law.

"It appears that the bankrupt has for many years been in a state of chronic impecuniosity. He has in his time played many parts, from that of medical student to that of tramway car conductor. In 1893 a decree of cessio was awarded against him, and the trustee is still in office. His sole estate consisted of his interest under the marriage-contract of his parents and under the will of his father, who was a surgeon in Glasgow. But counsel agreed in representing that no right vested in him under either of these instruments until the death of his mother on 17th April 1898. The defender is a trustee both under the marriage-contract and the will. As early as 1893 the bankrupt seems to have endeavoured to sell his *spes successionis*, but at first without result. Again in 1897 an abortive attempt was made to sell it to the defender, who admits that he was anxious to secure it. In 1898 negotiations were resumed on the basis of the defender taking over the debts in the cessio and some other specified debts, and paying down a sum in cash. These resulted in an offer by the bankrupt on 12th April 1898 in which the sum to be paid in cash was fixed at £400. This offer was accepted by the defender on 19th April, but in the meantime (*i.e.*, on 17th April) the mother had died and the expectancy had been converted into a vested right. In these circumstances I am not surprised that the bankrupt refused to carry out the transaction, and it is undoubtedly an ugly feature of the case that both the defender and his agent Mr Watson, contrary to what I should have thought the most obvious notion of fair dealing, maintained that the contract was binding on the bankrupt until they were advised by counsel that it was not. Some months passed, and the bankrupt being in greater pecuniary straits than ever, again approached the agents for the defender with a view to having the transaction carried out. They properly enough advised him that he must have another agent, and they recommended a friend of their own, Mr Fleming. I have nothing to say against his part in the affair except that the relation of the parties as trustee and beneficiary ought to have put him on his guard, and to have led him to scrutinise the transaction with more than ordinary care in the interests of his client. His own view of his duty was simply that he had been employed to carry out a bargain, the heads of which had already been arranged, and all he did was to obtain for the defender an increase of £50 in the sum to be paid in cash. The result was that on 11th January 1899 the assignation now sought to be reduced was executed, and the cash consideration of £450 was paid to the bankrupt, who immediately absconded with it. His estates were sequestrated on 20th March following.

"I have come to the conclusion that this transaction cannot stand; but I do not thereby affirm all the grounds of reduction stated on record, some of which I think have been put forward rather recklessly. There is nothing to show that the defender had any idea of the bankrupt's intention to leave the country, or that he conspired with him to defraud his creditors. It is proved, I think, that the two brothers, so far from being in each other's confidence, were on rather distant terms, and all that can fairly be charged against the defender is that he took advantage of his brother's urgent necessities to make a decidedly advantageous bargain for himself.

"The first ground of challenge—that of fraud at common law—is therefore, in my view, disproved. The second is laid on the Act 1621, cap. 18, but that also fails. Some of the conditions required by the Act are no doubt present. The grantee of the deed was a conjunct person; the granter was insolvent at the date of raising the action; and upon this latter fact being proved there arises a legal presumption that he was insolvent at the date of granting the deed. But that is a presumption which is capable of being rebutted by proof, and here such proof is clearly forthcoming. James Dougan's financial position is of course to be tested as at the time when the transaction was completed, and undoubtedly the transaction left him with £450 in his pocket, and debts to pay of certainly not more than £200. That being so, it is of no consequence, so far as the Act of 1621 is concerned, whether the price was a just one or not, because a solvent man is perfectly entitled to make as bad a bargain as he likes.

"But then the third ground of challenge is that the transaction was one between a trustee and beneficiary, and that such a transaction cannot stand if it is materially advantageous to the trustee. Now, I quite concede that there is no ground for charging the defender with having taken advantage of his position as a trustee to misrepresent anything or to conceal anything

with reference to the condition or value of the estate. I think that James Dougan had full opportunities of knowing, and did know, the nature of the estate and the approximate value of his interest in it. If there had been either misrepresentation or concealment the transaction could not have stood even as between strangers. But the position of a trustee towards a beneficiary is a fiduciary one, and the law views with extreme suspicion any transaction whereby the trustee acquires the interest of the beneficiary in the estate. There are cases, no doubt, in which such a transaction may be upheld, as where the beneficiary has urged it upon the trustee, and has received a full and fair consideration. But I think all such cases postulate not only that the parties are dealing with each other at arm's length, but that they stand upon an equal footing. If the trustee takes advantage of the known necessities of the beneficiary to procure from him a bargain which is prejudicial to him and correspondingly advantageous to the trustee, the transaction must, I think, be condemned by the law.

"Now in this case it is not denied by the defender that he expected to make 'a few hundred pounds' out of the transaction. He estimated his brother's share as worth £3000; I think, on the evidence, it was worth about £3250. He knew that the consideration which he was giving, over and above the £450 paid down, fell considerably short of £3000; I think, on the evidence, it fell short of the true value of the share by not less than £500. The share was not only fully vested, but it was capable of being realised in the ordinary course of administration at an early date; yet James Dougan was so absolutely reckless of his own interests, owing to his impecunious condition, that he was willing to sell an interest of that kind for substantially the same price as that at which a few months before he had offered to sell his share when it was only an expectancy. If the defender had realised the fiduciary relation in which he stood he could not have agreed to enter into such a bargain. The truth is that he did not realise it. Even at the proof he remained so completely unconscious of it that, in answer to a question in cross-examination, he said—'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.'

"I have said that the interests represented by the pursuer are not very substantial. I regret to add that I cannot applaud the conduct of the persons for whose behoof the action is truly raised. Messrs St Clair Swanson & Manson apparently saw no objection to a transaction between a trustee and a beneficiary when they had only the interests of their client to protect, but the moment that their own interests became involved they discovered that the transaction was objectionable. I cannot, however, on that account refuse to sustain a plea which is, I think, well founded on law and salutary in its effect. I shall therefore find that the transaction complained of was entered into by the defender when a trustee on the estates condescended on, with James Gibson Dougan, a beneficiary on the said estates, and was to the material advantage of the defender. Of course (as the pursuer's counsel admits) decree of reduction cannot be pronounced except upon condition of the pursuer repaying to the defender the sum of £450, and I shall find that upon this being done he will be entitled to decree of reduction as concluded for. The reduction when pronounced will include the offer and acceptance of April 1898 as well as the assignation of January 1899, because although the offer and acceptance were really superseded by the assignation, still the latter deed ratified and homologated the former."

The defender reclaimed, and argued—There was no good reason for reducing the assignation. The pursuer had admittedly failed on two of his grounds of challenge, viz., that the transaction was fraudulent and that it was contrary to the Act 1621, c. 18. His third ground of reduction, viz., that it was entered into by the defender when he was a trustee was also inadequate. Notwithstanding that one of the parties to a transaction of this kind was a trustee and the other a beneficiary, the transaction would stand if it were shown that a fair price had been paid. It was not necessary to prove that the highest price possible had been paid for the subject—Bell's Commentaries, 7th ed., ii. 179. The present transaction was a perfectly fair one. On both occasions the bankrupt had come to the defender, and at no time had any pressure been put on him. The two were on the same footing and had the same means of acquiring knowledge. The defender had kept back no knowledge that he had acquired in his capacity as a trustee. It was no reason for reduction that the bankrupt was in distressed circumstances at the date of the transaction. Even if the price paid were held to be inadequate, mere inadequacy of price had never been held to be a sufficient ground for reduction—*Buckner* v. *Jopp's Trustees*, July 16, 1887, 14 R. 1006; *Coles* v. *Trecothick*, 1804, 9 Vesey 234—opinion of L. C. Eldon, 246; *Morse* v. *Royal*, 1806, 12 Vesey, 355: *Luff* v. *Lord*, 1864, 34 Beavan 220.

Argued for the pursuer and respondent—The defender, before he could succeed in maintaining the transaction sought to be reduced must show (1) that he had paid a fair or adequate price, and (2) that the bankrupt was not insolvent at its date. (1) The defender had wholly failed to discharge the onus on him to show that the transaction was fair and proper. Indeed, the proof disclosed that the price paid was quite inadequate, that the defender had his brother completely at his mercy—as on account of the offer and acceptance and the attitude taken up by the defender no-one else would purchase the bankrupt's share; that although it was the defender's duty to communicate all information to

the beneficiary, and give him every possible security and advantage, he concealed from him the valuation of Messrs Binnie & Son, which would have disclosed to the bankrupt that at least double the amount of cash should have been paid by the defender. The price being inadequate, there being special knowledge on the part of the trustee, and the beneficiary being penniless, powerless, and at the mercy of the trustee, the transaction must be held invalid—*Denton* v. *Donner*, 1856, 23 Beavan 285; *Tate* v. *Williamson*, 1866, L.R., 2 Ch. Ap. 55; *Gibson* v. *Jeyes*, 1801, 6 Vesey 266. (2) The defender had also failed to prove that James Gibson Dougan was solvent at the date of the assignation. The Lord Ordinary no doubt said that James Gibson Dougan received £450, and that his debts amounted to not more than £200, and that therefore he was solvent, but he had neglected to consider what James Gibson Dougan might have done with the money. He might have paid off some of his debts with it, so that his solvency at the date of this transaction was not a certainty. On both grounds reduction should be granted.

At advising—

LORD JUSTICE-CLERK—The question in this case is, whether a bargain made by a trustee, by which he for a price purchased the interest of a beneficiary, can be allowed to stand on being challenged. The rights conveyed were those of a son, under his father's and mother's marriage-contract.

The facts are that the son who sold his interest was and had been for long in very impecunious circumstances. He is still under cessio, granted in 1893. On the death of his mother a share of his parent's estate came to him under the marriage-contract. While his mother was still alive he and his brother were negotiating for a sale and purchase of his prospective share, and £400 was offered and accepted; but before the transaction was carried out the mother died, and the brother who was the proposing purchaser, became trustee. The brother who was selling declined to carry out the transaction, and new negotiations were entered into which resulted in the share being purchased by the trustee for £450. The money was paid, and on receiving it the recipient left the country.

The Lord Ordinary has held that the transaction cannot stand as being materially advantageous to the trustee, he having benefited by the necessities of his brother to make a bargain for his own advantage. The trustee is quite frank on this matter, saying that he did not look upon it as a question of fairness, that "if a man sells at his own valuation, and another man buys, it has nothing to do with fairness." Thus his purpose was admittedly to gain an advantage for himself, and it appears that he did make a substantial advantage. That is demonstrated by the fact that an expectancy for which the trustee was willing to pay £400 was, after it became a fully vested interest, purchased by him for only £50 more, and also by the fact that he did not disclose to his brother the valuation he had obtained.

I have been unable to see any ground for altering the Lord Ordinary's interlocutor, and concur in the grounds he has stated for it in his opinion.

LORD YOUNG—This case struck me from the first as being very special, and in many respects a very peculiar one. The Lord Ordinary refers in his note to some of the peculiarities of the case, and at the same time does not indicate a very high opinion of the conduct of the real *domini litis*.

The reduction is brought upon three separate grounds—(1) That the assignation was obtained by means of fraud and wilful imposition; (2) that it was contrary to the provisions of the Act 1621, c. 18; and (3) the ground on which the Lord Ordinary and your Lordship have proceeded, that the transaction, although not fraudulent or in violation of the Act 1621, c. 18, is reducible because it happens to be between a trustee and one of the beneficiaries under the trust. I concur that this third ground is the only one to which attention need be paid, as I understand that we all assent to the Lord Ordinary's opinion that no case of fraud at common law has been made out, and that the Act 1621, c. 18, is totally inapplicable. The Lord Ordinary is of opinion that the two first grounds on which the action is brought "have been put forward rather recklessly." I think that is not a strong term to characterise the putting forward of unfounded charges of this nature.

But it is on the third ground that the judgment proceeds, so I shall confine my observations to that. According to our law 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. If, however, it is represented that the trustee has taken advantage of his position as trustee, and has used the knowledge acquired by him as trustee to make an unfair bargain with a beneficiary, the Court will make inquiry into the matter with considerable suspicion. I think from the language used in any decisions quoted to us, that while the Court is against a trustee dealing with a beneficiary, the transaction will be held to be legal if it is proved that the trustee has acted fairly and honestly, but otherwise the presumption will be that the trustee has taken advantage of his position as trustee, and of the knowledge which he has thereby acquired. If I understand the Lord Ordinary's views on the evidence they ought to have led to a different decision from that at which he has arrived. He says—"I quite accede that there is no ground for charging the defender with having taken advantage of his position as trustee to misrepresent anything or conceal anything with reference to the condition or value of the estate. I think that James Dougan had full opportunities of knowing and did know the nature of the estate, and the approximate value of his interest in it." That is in accordance with my own opinion of the evidence. This statement of what the Lord Ordinary considers the import of the evi-

dence negatives in my opinion the sole ground on which an otherwise legal transaction should be set aside. It negatives all ground of suspicion by showing that all the facts were equally known to trustee and beneficiary, and that the trustee did not take advantage of his position of trustee to the prejudice of the beneficiary. In my opinion that is the only ground on which the transaction could be found invalid. Here there was no purchase by a trustee of the trust estate of which he was the seller. It was a purchase by the trustee from a beneficiary of the latter's interest in the trust estate. That is quite a legal proceeding, although it may be regarded by the Court with suspicion, which suspicion, if the purchase is afterwards questioned by the beneficiary, will require to be negatived before the sale is held valid. The Lord Ordinary goes on to say "the position of a trustee towards a beneficiary is a fiduciary one, and the law views with extreme suspicion any transaction whereby the trustee acquires the interest of the beneficiary in the estate." I object to the qualifying word "extreme." "There are cases, no doubt, in which such a transaction may be upheld, as where the beneficiary has urged it upon the trustee and has received a full and fair consideration. But I think all such cases postulate not only that the parties are dealing with each other at arm's length, but that they stand upon an equal footing. If the trustee takes advantage of the known necessities of the beneficiary to procure from him a bargain which is prejudicial to him and correspondingly advantageous to the trustee, the transaction must I think be condemned by the law." I am of opinion that a case of fair dealing has been proved, that these two brothers were at arm's length, and that the impecunious brother approached the other and pressed him to purchase his interest in the trust estate, the true value of which he had better means of knowing than the defender. I do not attach any importance to the circumstance to which the Lord Ordinary and your Lordship have both referred, that after the defender had agreed to buy, the mother died and the other brother wanted to be released from the transaction, thinking that the death of his mother had increased the value of his share of the trust estate. I do not think it made it more valuable, and I am not surprised that the defender remonstrated against throwing up the agreement on that account. But I do not think it enters into the question, because it is proved that subsequently the impecunious brother came back and again asked the defender to purchase. The Lord Ordinary is of opinion that something like £500 more than the amount agreed on should have been given. I cannot say that an impression to that effect has been induced in my mind by the evidence. No one can be certain as to the exact value of a reversionary interest of the kind we are here dealing with, it depends on the value of the properties when they are turned into money, and they have not yet been turned into money. In my opinion the evidence that they are not likely to realise more than enough to provide the amount the defender gave is just as strong as the evidence that they are likely to bring more. The defender says—"I understood the value of James's interest to be about £3000. The sum was payable immediately upon realisation, and the properties have not yet been realised. I had Mr Binnie's valuation before me. I had no reason to doubt it was correct. (Q.) Is it the case that you have made a profit of between £800 and £900 out of the transaction? (A.) I am not aware. I am afraid I will make no profit, absolutely none. When I concluded the bargain I estimated that I would make a few hundred pounds. I was taking a considerable risk because it was unvested property. At the date of the assignation I thought I would make perhaps £200 out of the transaction. (Q.) If you were told that it was between £800 and £900, would that alter your opinion as to its fairness? (A.) I simply would not believe it." On the whole evidence I see no reason to doubt the perfect integrity of the witness in saying that although he expected at the time he concluded the bargain to make a profit, he was satisfied that he ran a considerable risk, and that he now is of opinion he will make no profit at all. But there is no authority for the proposition, and no reason to assume that, in order to uphold a transaction of this sort by a trustee, the Court must be satisfied that he has lost money through the purchase, or at anyrate made no gain. Every purchase is made with a view of getting some advantage from it.

I should have expected that if the defender had been relieved of this obligation which he undertook under the agreement, and had received back the £450 which he paid down, he would have been willing to renounce the transaction. But he could not do so if the position taken up by the pursuer in this action was adhered to without prejudicing his character, for he is here charged with falsehood, fraud, and wilful imposition. As long as his character was assailed he could not reasonably be expected to give up his claim.

I am of opinion that the conduct of the defender was consistent with perfect integrity and honesty, and that this action, which is only in name the action of the bankrupt's trustee, is unfounded, not only as regards the first and second grounds on which it is laid, but also in regard to the third ground on which the Lord Ordinary has sustained it.

LORD TRAYNER—I think the judgment of the Lord Ordinary is right and should be affirmed. I should like, however, to add that in my opinion the defender had knowledge acquired by him as trustee as to the value of the estate which he purchased from his brother which the latter had not. I will not say that the defender intentionally concealed that knowledge from his brother, but he certainly did not communicate it to him. This I regard as very material. A purchase by a trustee

of part of the estate under his administration from the beneficiary to whom that part belongs cannot be sustained unless it appears clearly that the beneficiary was possessed of all the knowledge regarding the value of what he was selling, which the purchasing trustee had, and which as trustee he had acquired. With this addition (if it be an addition) to what the Lord Ordinary has said, I concur generally in his Lordship's opinion.

LORD MONCREIFF—I agree with the Lord Ordinary. It is a wholesome general rule that there should be no trafficking between a trustee and a beneficiary in regard to the beneficiary's interest in the trust. There may be cases in which it so clearly appears that the trustee has intervened solely in the interests of the beneficiary, and with no view to his own profit that the Court will not set aside such a transaction. But it lies on a trustee who transacts with a beneficiary to vindicate his conduct; and when it appears that the trustee's motive in becoming a purchaser is not disinterested, but in order to make a profit by the transaction, especially where he has not made a complete disclosure of his means of knowledge as to the value of the interest to be sold, there is no reason why the usual rule should not be applied.

It must be admitted that the present case is very near the line which separates the two positions to which I have referred. James Dougan was anxious, indeed determined, to dispose of his interest, and was not without professional and skilled advice if he had chosen to take it; and I agree with the Lord Ordinary that if this had been a transaction between strangers it could not have been impugned on the ground of fraud or misrepresentation or inadequacy of consideration. But this is a case between a trustee and beneficiary, and I hold it to be proved (*first*) that John Dougan's motive and expectation in going into the transaction was to make a profit; (*secondly*) that he obtained from Mr Binnie and did not disclose to James Dougan a valuation dated 14th June 1898, according to which his profit on the transaction would be about £661, 10s. 6d.; and (*thirdly*) that in point of fact at the date of the transaction the reversion of James Dougan's interest was capable of yielding that or at least a substantial amount of profit to the defender.

The defender's motives become the more apparent on consideration of the position which he took up in regard to the offer made by James Dougan on 12th April 1898, while his mother, the liferentrix, was still alive. The mother died on 17th April, and thus James Dougan's interest became absolute. John Dougan accepted the offer on 19th April 1898, and although matters had changed so materially in the interval he did his best to hold his brother to that bargain.

Indeed, the defender from the first, and even in the witness-box, showed that he was quite unconscious that any duty lay on him as trustee in regard to the purchase of his brother's interest. Without reading the passage I refer particularly to his evidence in cross-examination.

Now, this is not a gross case, but I think that the defender has not cleared himself. There is sufficient evidence that he abused or at least neglected the duties of his position as trustee to justify us in adhering to the Lord Ordinary's interlocutor, of course upon the footing that the pursuer repays the defender the sum of £450.

The Court adhered.

Counsel for the Pursuer and Respondent — Salvesen, K.C. — Munro. Agents — St Clair Swanson & Manson, W.S.

Counsel for the Defender and Reclaimer — Jameson, K.C. — Baxter — Crabb Watt. Agents—Clark & Macdonald, S.S.C.

Thursday, February 28.

FIRST DIVISION.

[Lord Pearson, Ordinary.

LORD NAPIER AND ETTRICK'S TRUSTEE *v.* NAPIER.

Entail—Heir in Possession—Disentailing—Procedure—Petition for Disentail by Trustee in Sequestration—Intimation after Three Months to Heirs whose Consent required—Bankruptcy—Sequestration—Process—Entail (Scotland) Act 1882 (45 *and* 46 *Vict. cap.* 53), *sec.* 18.

Section 18 of the Entail (Scotland) Act 1882 provides that in an application for disentail at the instance of a trustee in a sequestration "the Court shall forthwith proceed in the same manner as is directed in this section with regard to the application of a creditor." In an application by a creditor the section provides that "the Court shall, if the said debt is not paid within three months after the date of the application, order intimation to the heirs whose consents would be required, or must be dispensed with by the Court in an application for disentail by the heir in possession, and in the event of any of the said heirs . . . refusing to give his consent, the Court shall ascertain the value in money of the expectancy or interest in the entailed estate of such heir." In a petition at the instance of a trustee in bankruptcy, intimation and advertisement, and service upon the heir of entail in possession and the three next heirs, were ordered by interlocutor dated the day after the presentation of the petition, and duly made, but no further intimation to the heir whose consent required to be obtained or dispensed with was ordered three months after the date of the application. *Held* that the procedure prescribed in the case of a creditor's application as above set forth must be followed in the case of an application