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Tuesday, May 31.

FIRST DIVISION.

[Lord Trayner, Ordinary.

INGLIS' TRUSTEES *v.* INGLIS AND OTHERS.

Error—Election—Legitim.

Under the trust-disposition and settlement of a person who died on 10th January 1884, survived by a son and daughter, the latter was entitled to a liferent provision of £3458 per annum, and a capital sum of £20,000. The whole moveable estate of the deceased amounted to £152,779. Both son and daughter were trustees.

On 28th January 1885 a letter was written by the daughter's law-agent, upon her instructions, to the law-agents for the trustees, stating that she had "now decided to claim her legal rights in place of the provisions under the settlement." In so making her election the daughter proceeded upon the assumption that she would be entitled to the whole legitim fund, or upwards of £70,000. The trustees at their meetings, when the son and the daughter were present, and in the written communications of their law-agents, had dealt with the matter upon this footing. After the daughter had made her election, the son, on 5th February 1885, for the first time, informed the trustees' agents that in April 1884 he had been advised by a separate agent, that in the event of his sister claiming legitim he would be entitled to one-half of that fund, without collation. According to this view the daughter would only have got about £35,000. Upon receiving intimation of this from the trustees' agents, the agent for the daughter at once wrote to them saying that the election must be held as "still in abeyance." *Held*, in a multiplepoinding raised to determine the rights of the son and daughter *inter se*, that the daughter had been under essential error in fact when she claimed her legal rights, and was not barred from claiming the provisions in her favour contained in the settlement.

Opinion (*per* Lord Shand) that the daughter would not have been bound by her election even if the error had been in law.

Anthony Inglis, engineer and shipbuilder in Glasgow, died at Partick on 10th January 1884, leaving a trust-disposition and settlement dated 8th August 1883, by which he conveyed to trustees his whole estate, heritable and moveable. He was survived by a son, John Inglis junior, and a daughter, Mrs Margaret Inglis or Breen, both of whom were trustees. The whole moveable estate left by the deceased amounted to £152,799. Under the provisions of the settlement Mrs Breen was entitled to an income of £3458 per annum in liferent, and also to a capital sum of £20,000. Shortly after the death of the testator a question was raised as to whether Mrs Breen would accept the provisions in her father's settlement or claim legitim, and information was furnished to her by the trustees as to the estate of the deceased to enable her to make her election.

On 28th January 1885, in consequence of a resolution of the trustees passed at a meeting on 14th January preceding, calling upon Mrs Breen to make her election, Mr Kidston, Mrs Breen's law-agent, wrote to the agents for the trustees stating that Mrs Breen had "now decided to claim her legal rights in place of the provisions under the settlement." The receipt of this letter was duly acknowledged by the agent for the trustees, and both letters were read at a meeting of trustees held upon 3d February following, and were engrossed in their minutes of meeting of that day. The trustees had up to this time, both at the meetings of trustees, at which Mr John Inglis, junior, and Mrs Breen were present, and in the letters written by their law-agents, dealt with Mrs Breen upon the footing that if she elected to take her legal rights she would be entitled to one-half of the moveable estate.

Upon 5th February 1885 Mr Roberton, the agent for the trustees, wrote to Mr Kidston in these terms—"As I believe that in electing to take at common law instead of under the trust-disposition and settlement, Mrs Breen has been going on the assumption that she is entitled to the whole of the legitim fund, I think it proper to acquaint you that Messrs Bannatyne, Kirkwood, M'Jannet, & France have advised Mr John Inglis junior that he is entitled to participate in that fund, and this without his being liable to collate the heritage." It appeared from the evidence *infra* that Mr Inglis had consulted Mr France in March 1884, but that he did not tell Mr Roberton of the advice Mr France had given him until 3d February 1885. To this letter Mrs Breen's agent replied upon the same day—"I have to-day your letters of yesterday and this date. With reference to the latter, you expressed an opinion to Mrs Breen in which I concurred—that she would be entitled to the whole of the legitim fund—and her intention to make the election was based upon the assumption that that would be the case. I am also informed by Mrs Breen that in September last, at a meeting of trustees, when both she and Mr Inglis were present, her legal rights were explained to her and Mr Inglis to be a claim to one-half of the moveable estate as legitim. Had Mr Inglis given earlier intimation of his claim to participate in the legitim without collating, I would not have written in the terms of my letter to you of the 28th ulto. The trustees will therefore be good enough to hold Mrs Breen's election as still in abeyance."

This was an action of multiplepoinding to settle the rights of John Inglis junior and Mrs Breen *inter se*. Mrs Breen claimed the provisions in her favour contained in her father's settlement, or alternatively one-half of the free moveable estate as legitim. She averred that her election was made in reliance on information communicated to her at various meetings of the trustees, at which the law-agents of the trustees, in the hearing and with the assent of her brother John Inglis junior, informed her that she was entitled under her legal rights to the full one-half of the free moveable estate, which was shown by the

inventory to amount to about £150,000.

Mrs Breen pleaded that the letter of 28th January 1885 was written under essential error, and was timeously withdrawn, and that it was not authorised by her husband as her curator.

John Inglis, junior, averred that Mrs Breen had elected to take her legal rights, and was barred from claiming the provisions contained in the settlement. He claimed, upon the footing that Mrs Breen had elected to take her legal rights, the whole fund *in medio* under deduction of the amount of her legitim, as the same might be ascertained—or alternatively, the provisions in his favour contained in the settlement.

The import of the proof taken appears from the opinions of the Judges.

On 15th December 1886 the Lord Ordinary (TRAYNER) found that Mrs Breen had made no election between her legal rights as one of the children of the deceased Anthony Inglis, and the provisions made in her favour by her father's settlement, and found that she was entitled to insist in the alternative claim made by her on the fund *in medio*.

"*Opinion.*—The claimant Mrs Breen claims to be ranked and preferred on the fund *in medio* in the present process alternatively for the amount of the provisions made in her favour by the settlement of her father the late Mr Anthony Inglis, or otherwise for the amount of her legal rights as one of Mr Inglis' children. The only other claimant, Mr John Inglis, junior (the brother of Mrs Breen), objects to this alternative claim, on the ground that Mrs Breen some time ago conclusively elected to accept her legal rights, and is now barred from claiming under the provisions of the settlement.

"The late Mr Inglis died in January 1884, leaving a settlement by which he conveyed to trustees the whole of his estate, heritable and moveable, for the purposes therein stated. Both of the present claimants were named as trustees, and accepted office and acted as such. Some time was occupied necessarily in obtaining inventories and valuations of Mr Inglis' estate, but in September 1884 Mrs Breen was put in possession of the inventory of her father's moveable estate, as given up by his executors for confirmation, which showed that the moveable estate was of the value of £152,799 sterling. It is not admitted by Mrs Breen that this sum represents the whole of her father's moveable estate, for she has raised the question with the executors whether there should not be added to the amount already stated the share of the profits due to Mr Inglis (as she contends) gained on the contracts held by his firm and current at the date of his death. The executors, as well as the surviving partners of Mr Inglis' firm, have their answer to this claim, and I am not concerned with it further at present than to say that if Mrs Breen should be found to be right a very considerable sum—between £20,000 and £25,000—will fall to be added to the amount of Mr Inglis' moveable succession.

"From a comparatively early date in the history of the trust the question was under consideration whether Mrs Breen would accept the provisions under the settlement or claim her legal rights. With a view to her determining upon this question information of various kinds regarding the deceased's estate was from time to time required by her from the trustees, and (as some question was raised about this I think it right to add) was furnished to her as fully as the trustees were able to do. No election by Mrs Breen having been made or intimated, the trustees at a meeting held by them on 14th January 1885, at which Mr John Inglis, junior, was present, and Mrs Breen was not, resolved that an intimation should be sent to Mrs Breen to the effect 'that in the event of her not declaring her election by 31st inst. the trustees will at once proceed to deal with and administer the estate in terms of the trust-disposition and settlement.' That resolution having been communicated to Mrs Breen, she had a meeting with her agent, Mr Kidston, on 28th January 1885, to which, as regards what took place at it, I will afterwards advert. In the meantime it is enough to say Mr Kidston, on the authority as he understood of Mrs Breen, wrote the letter of 28th January 1885 to Mr Roberton, the agent for the trustees, stating that Mrs Breen had 'now decided to claim her legal rights in place of the provisions under the settlement.' The receipt of that letter was acknowledged on 29th January by Mr Roberton, and both letters were read to the trustees at their meeting on 3d February, and are engrossed in their minute of meeting of that day. It is upon that letter of 28th January 1885 that Mr John Inglis, junior, now bases his objection to the alternative claim of Mrs Breen.

"It was maintained for Mrs Breen that the letter written by Mr Kidston was not binding because it was not holograph or tested. In fact the letter was written by Mr Kidston's clerk and signed by him. I think there is nothing in this objection. I am not aware that writing is essential to a final and conclusive election in such a case as the present, or indeed in any case. On the contrary, there are cases where election has been inferred from facts and circumstances, and from actings and conduct of the person having power to elect. If the election had been intimated verbally by Mrs Breen to a meeting of trustees, or verbally to the agent who acted for and represented them, that would have been sufficient. To have such an election declared in writing is convenient and proper, because it saves questions as to the terms in which the election is declared, and affords ready proof of the election having been made. But the law does not require writing as a solemnity in making an election, nor proof in writing that it has been made.

"It was further maintained for Mrs Breen that even if the letter was not open to the objection just stated, still Mrs Breen was entitled timeously to withdraw it so long as nothing had been done on the faith of it—so long as things were entire; and that Mrs Breen had withdrawn the letter of 28th January by another of date 5th February, in which Mr Kidston intimated that Mrs Breen's election should be held 'as still in abeyance."

"If an election was well made and intimated on 28th January, I am of opinion that it was beyond the power of Mrs Breen to withdraw it. The general rule of law is stated by Lord Blackburn in the case of *Scarf* v. *Jardine*, L.R., 7 App. Ca. 360—'When once there has been an election to do one of two things you cannot retract it and do the other thing; the election once made is finally made.' And obviously it must be so. For if the person who has the right of election, and

validly exercises it, is entitled to withdraw from the election and do something else, it is not then a right of election which he exercises—he makes two elections; and there is no reason why the second election should not give place to a third, and so on. Nor do I see any just distinction (as was argued on behalf of Mrs Breen) between the case of an election having regard to rights in a succession and an election with regard to rights arising under a contract. The rule of law is the same where a right of election arises, independent of the circumstances out of which it has arisen. It was said that Mrs Breen might withdraw or depart from her election because nothing was done on the faith of it; that things were entire, and nobody injured by her withdrawal. If it be sound law that an election once made is final, then the question whether things are entire or not makes no difference; the election having been made it must remain. But in this case it can scarcely be said that things remained the same after the election and before its withdrawal. For, if Mr Inglis junior's other contentions in this case are sound (on which at present I offer no opinion) there were rights which at once emerged in his favour of the value of between £30,000 and £35,000. It might appear at first sight as if some countenance was given to Mrs Breen's contention by what was said by Lord Young in the case of *M'Fadyen*, 10 R. 285. But that was a very special case, and the precise point here raised does not seem to have been argued.

"The point therefore remaining to be disposed of is whether, on 28th January 1885, Mrs Breen validly exercised her right of election in such a way and under such circumstances as to bar her from now challenging it or setting it aside. To make an election valid and binding it is necessary that the person making the election shall have before him clearly the two alternatives between which he is to choose. He must also have before him all the information necessary to enable him intelligently to make his choice. In short, he must have before him clearly what the two things really are between which he is to elect. Now, to see whether these conditions were fulfilled in the present case it is necessary to advert to some facts of which notice has not yet been taken. It appears that on several occasions in the year 1884 Mr Roberton, the agent of the trustees, had told Mrs Breen that if she resolved to take her legal rights rather than her conventional rights she would be entitled to the whole legitim fund—the half of the personal estate—which he estimated at between £70,000 and £72,000, adding that, all things considered, if he were in her place he would 'take the provisions at common law rather than the provisions under the settlement.' This opinion as to the extent and value of Mrs Breen's rights at common law was one, I think, which Mrs Breen was entitled to accept at least as information on the subject to which it referred. So far as regarded its legal aspect it was the opinion of a person eminently qualified to give it, and as regards the value of the provisions in money it was an opinion or statement from the best authority. On that information therefore the state of Mrs Breen's knowledge was this, that if she elected to take her legal provisions she would get £70,000 or £72,000. A similar statement was made by Mr Roberton at some of the meetings of trustees before 28th January 1885, and was repeated at the meeting of 3d February when Mrs Breen's letter of election was read. At all these meetings of trustees Mr John Inglis junior was present, 'and did not utter a word upon the subject.' I accept that as the fact on Mr Roberton's statement. Mr John Inglis junior, no doubt, says that he did say something on the subject, but I am satisfied he never said anything by way of objection or dissent from Mr Roberton's views—(1) because Mr Roberton could not have forgot it if such a thing had taken place; and (2) because the other trustees, so far as they have been examined, were at the time and are now distinctly under the impression that Mr Roberton's view was accepted by the meeting. The whole trustees had the idea conveyed to them (and whatever Mr Inglis may have said he did not distrust the trustees' belief and lead them to any doubt) that Mrs Breen's legal rights entitled her to the one-half of the moveable succession—that is, the whole legitim fund.

"Mr Roberton's view was repeated by his partner Mr Low at a meeting of trustees held on 9th September 1884. The proceedings at that meeting deserve particular attention. Mr John Inglis, junior, was applying to the trustees for a payment to account of his provisions under the settlement of his father, and a calculation was made at the meeting—Mr Inglis and Mrs Breen being both present—of the amount of the estate and the claims upon it to enable the trustees to determine what sum they were in safety to pay Mr Inglis. One of the claims mentioned at that meeting was the possible claim of Mrs Breen for legitim, and this was put down at £70,000, the estimated value of one-half of the moveable estate. No objection or dissent from this was stated by Mr Inglis, and it was decided to make him a payment to account on the basis of the calculation then made. That Mrs Breen's claim for her legal rights, as a possible claim against the estate, was distinctly and prominently before that meeting cannot be doubted. It is referred to in the minute of that meeting, which concludes in these words—'Mrs Breen is requested to declare her election with as little delay as possible.'

"On the evidence, so far, I think it is established that not only was Mrs Breen informed by Mr Roberton, the agent for the trustees, but also heard it stated over and over again at meetings of trustees, without objection or dissent from her brother, that her right at common law was to the whole *legitim* fund, estimated at £70,000 or £72,000. It is also ascertained that in April 1884 Mr John Inglis junior had been advised by his law-agent that this view so reported was erroneous; that he meant to contest his sister's right to the whole *legitim* fund; and that he concealed both the advice he had received and his intention to act upon it until after his sister had made her election—which he with the other trustees was pressing her to make. I come now to the meeting which Mrs Breen had with her own agent on 28th January 1885, after receiving the notice from the trustees already alluded to, to the effect that her election must be declared by the 31st of that month. At this meeting Mr Kidston submitted a draft letter which he proposed to send to Mr Roberton. Mrs Breen made some difficulty about the terms of the letter, but ultimately, to quote her own words, 'I said I had

not got sufficient information, but if Mr Kidston thought it would settle matters and put an end to all further trouble, I was quite willing to accept the half of the personal estate, as I had been advised. I asked him to state that.' 'I am quite positive that I asked Mr Kidston if he thought that by accepting the half of the personal estate it would end the matter. He thought so, and that was my reason for agreeing.' It appears plain therefore that the election which Mrs Breen was making was between the one-half of the moveable succession and the provisions under the settlement. I am not surprised that Mr Kidston should have communicated Mrs Breen's choice in the language of the letter in question, for up to that time he, in common with Mr Roberton and every other person concerned (except Mr Inglis, junior), regarded the half of the moveable estate and Mrs Breen's legal rights as equivalent expressions. They had in a manner been diverted from a consideration of the question whether Mrs Breen's legal rights could in any case be less than one-half of the moveable succession, by the general acquiescence in the repeated statement of Mr Roberton that one-half of the moveable succession was the amount of her right. It was certainly the *prima facie* view of her right; and if Mr Inglis, junior, had desired to give his sister fair play and get from her a declaration of her election formed under a consideration of the subject in all its aspects, he should not have concealed the advice he had received nor the question he meant to raise. Apart from this, however, I think it cannot be doubted that if the expression in Mr Kidston's letter, 'legal rights,' means something different from 'the half of the personal estate,' then that letter was not authorised. It was the half of the personal estate and nothing else which Mrs Breen authorised him to accept for her; it was that she elected in place of her 'provisions under the settlement.'

"It was maintained on behalf of Mr Inglis, junior, that the question on which Mrs Breen decided was her legal rights on the one hand and her settlement provisions on the other, and that error in law on her part as to the extent of her legal rights did not affect the election she had made. I am not prepared to adopt that view as stated. If a legal question affected the pecuniary value of her rights Mrs Breen could not elect between the opposing claims until she had had that legal question, with its possible result one way or other, explained to her. For, after all, it was between two sums of money or money's worth that she was choosing, and not between two abstract legal rights. But in my opinion the argument maintained has no place in the present case. The mistake, if there was one on the part of Mrs Breen, was in fact. But I think there was no mistake even in fact. Mrs Breen was, according to my view, electing between £70,000 or £72,000—the half of the moveable estate, and her rights under the settlement.

"I come therefore to this conclusion—If Mr Kidston's letter is to be held as expressing Mrs Breen's election of her legal rights as something different from the one-half of the moveable estate, then it was not authorised; it was not Mrs Breen's election. If, further, the letter is regarded as Mrs Breen's election, it was an election made under essential error—an error induced among other things by the conduct of Mr Inglis junior, and therefore not binding.

"It need scarcely be said that if Mrs Breen on 28th January elected to take her legal rights rather than the settlement provisions, before the amount of the *legitim* fund was at least approximately known, or in the knowledge that the amount of the *legitim* fund falling to her, if she so elected, might only be one-half of what she expected or was advised would be hers—if she elected to take her legal rights in the knowledge that her view of what those amounted to in money value was to be contested by her brother—her election made in such circumstances would have been binding. She then, in the knowledge of all the facts affecting or which might affect her choice, took the risk and responsibility of making it. But the case I am dealing with is the very opposite of this. Indeed, it appears to me that Mrs Breen, better informed now than she was on 28th January, is not yet in a position to make her election. Whether she is to get £35,000 or £70,000 if she elects to take her legal rights, is a consideration which, I should suppose, would very materially affect her choice. But which of these sums represents the value of her legal rights is not yet ascertained. And although it is comparatively a small matter, it is yet in itself sufficiently important for her to know whether the moveable succession of her father, and consequently the legitim fund, is to be increased or not by the addition of a share of the profits made on contracts current at his death.

"On the whole matter I shall find that Mrs Breen is entitled to insist in her alternative claim, not having validly elected between her legal and conventional rights."

John Inglis junior reclaimed, and argued—Mrs Breen at the time she made her election was in full possession of all necessary information. There was nothing of the nature of a contract in the transaction; it was a choice solemnly made after the fullest consideration, from which she could not resile. Mrs Breen had taken separate advice from the first, and there was no duty or obligation upon the trustees or upon Mr Inglis in any way to influence her choice. If any mistake had been made it was one of law, and not of fact; and against such a mistake, if it existed, Mrs Breen could not be reponed. Further, there could be no valid objection to the letter of 28th January 1885, upon the ground that it was not authorised by the claimant's husband as her curator, because under the marriage-contract Mr Breen had renounced his *jus mariti* and right of administration, and by so doing he gave up all right over his wife's estate. Under all the circumstances Mrs Breen's election must be held as final, and she was barred from now claiming the provisions in the settlement.

Authorities—*Johnston* v. *Paterson*, November 29, 1825, 4 Sh. 234; *Baird's Trustees* v. *Baird*, July 10, 1877, 4 R. 1005; *Monteith* v. *Monteith's Trustees*, June 28, 1882, 9 R. 982; *Cooper* v. *Phibbs*, 2 Eng. and Ir. Apps. 149; Jarman on Wills, vol. ii, p. 58; Williams on Executors, p. 1280; *Bryce's Trustees* v. *Bryce*, March 2, 1878, 5 R. 722; *Biggart* v. *City of Glasgow Bank*, January 15, 1879, 6 R. 470; *Beauchamp* v. *Winn*, L.R. 6 H.L. 223.

Replied for Mrs Breen—The letter of 28th January 1885 was open to several objections—(1)

it was written under essential error, because at that time it was understood by all parties except Mr John Inglis, who concealed his information, that in the event of Mr Breen claiming her legal rights she was to get one-half of the fund *in medio*, and this error was so essential as to render the letter void. (2) The letter was open to the objection that it was not concurred in by Mrs Breen's husband as her curator—*Millar* v. *Galbraith's Trustees*, March 16, 1886, 13 R. 764; *Primrose*, March 9, 1850, 12 D. 916, and 22 Jur. 240; *M'Fadyen* v. *M'Fadyen's Trustees*, December 2, 1882, 10 R. 285; *Donaldson* v. *Tainsh's Trustees*, June 11, 1886, 13 R. 967; *Blacks* v. *Girdwood*, November 25, 1885, 13 R. 243; Fraser on Husband and Wife, i. 815. (3) The letter was timeously withdrawn—*Panmure* v. *Crokat*, February 29, 1856, 18 D. 703; *Mercer* v. *Anstruther's Trustees*, March 6, 1871, 9 Macph. 618. There was here an error in fact as well as in law, and of such a kind as to make the election void; the parties were here in the position of having made a contract which had not been fulfilled.

Authorities (in addition to those cited by the Lord Ordinary)—*Kintore* v. *Kintore*, June 28, 1884, 11 R. 1013; Benjamin on Sales, 375; Bell's Prin. sec. 11; *Hope* v. *Dixon*, December 17, 1833, 12 S. 222.

At advising—

Lord President—The fund *in medio* here consists of the estate of the late Mr Anthony Inglis, shipbuilder, Glasgow. The testator died in January 1884, and he left two children, Mr John Inglis junior, the reclaimer, and Mrs Breen. The estate consists of a very considerable amount, the moveable estate alone, according to the inventory, reaching £152,000. The daughter, Mrs Breen, had to consider, before taking any decided steps, whether she would accept the provisions made in her favour by her father's settlement, or whether she would claim her legal rights; and, of course, in so large a succession as this, that was a matter of great importance to her and her husband. She and her brother were among the trustees, and there were several others, particularly Mr Napier, Mr Alexander, and Mr Nowery, all of whom seem in some degree to be connected with Mr Anthony Inglis.

The election of Mrs Breen between her testamentary provisions and her legal rights was made the subject of conversation at many of the meetings of the trustees, and also apparently in private conversations during the year which had nearly elapsed between the death of the testator and the election in January 1885. There was a meeting of the trustees held on 14th January 1885, at which the trustees resolved that intimation should be sent to Mrs Breen to the effect that in the event of her not declaring her election by the 31st inst. the trustees would proceed to administer the estate in terms of the trust-disposition and settlement. This was not the first time Mrs Breen had been asked to make her election, but she and her agent were hesitating as to what the election should be, and it was not until this peremptory intimation was sent that she at last instructed Mr Kidston, her agent, to write and inform the trustees, as he did by letter of 28th January 1885, that she had now decided to claim her legal rights in place of the provisions under the disposition and settlement. The long delay which occurred in coming to this conclusion obviously arose from the doubt in the mind of Mrs Breen and her agent, which was the more profitable choice to make—whether she would be better with her testamentary provisions or with her legitim; and the state of the funds being as he had said, it was pretty plain that the question which they were considering and hesitating about, was one under which the two sums—the sum to be got by claiming her legal rights, and the sum or benefit to be got by taking the testamentary provisions—were pretty nearly equal in value. There must have been considerable ground for hesitation, or this delay would not have taken place in the face of the repeated suggestions that some decision should be come to.

Now, the view Mrs Breen and her agent took of the matter was this. They assumed she was entitled in name of legitim to one-half of the entire moveable succession, which, of course, would amount to £70,000 or £72,000; and, on the other hand, she would have got from the settlement an income of £3458 per annum by way of liferent, and also a capital sum of £20,000. Now, looking at the case in that view, there was undoubtedly ground for hesitation. The testamentary provision would certainly give Mrs Breen a larger income than she would possibly have by betaking herself to her legal rights; but, on the other hand, if she claimed her legitim, then she got her provision in the form of a capital sum, and that was the subject of great consideration. It is said now by her brother, Mr Inglis, that she is not entitled to one-half of the moveable succession in the name of legitim, but only to one-fourth. Now, one-fourth of the moveable succession would be £35,000 or £36,000, and it might very fairly be asked whether, in deciding between an annual income of £3500, in addition to a capital sum of £20,000, or, on the other hand, £35,000 or £36,000, there was any room for hesitation at all. No sane person who had to deliberate upon the subject would prefer to take the £35,000 instead of the testamentary provision. It would not require a year, or a month, or a week to decide between these two things, and therefore, *prima facie*, it seemed exceedingly improbable, and it turned out in the end not to be so, that Mrs Breen or her advisers ever for one moment imagined they were making an election between £35,000 or £36,000, and the testamentary provisions. That is the first point in this case which seems to me to be entirely clear.

Now, the next question is, if this was a misapprehension, which is not at all improbable, under which Mrs Breen was labouring, how was the misapprehension brought about. Of course we are not here to decide whether she would be entitled to one-half of the moveable succession, or one-fourth; we are here to decide whether she has made an election by which she is bound, and nothing else. That is the subject of the Lord Ordinary's interlocutor, and I think the Lord Ordinary has quite properly decided this question before going any further, because if decided in the way the Lord Ordinary has done it puts an end to all further litigation. It is quite plain that this misapprehension, if it was one, was brought about by the conduct of the trustees and of the claimant's brother, Mr John Inglis, junior.

As to the evidence, I will come to that by-and-by, but undoubtedly Mrs Breen was acting under the belief when she made this election that she was choosing between £72,000 and the testamentary provisions. It is contended that whatever might have been her state of mind or her mistake about the law of the case, that she has finally elected by the letter of 28th January, and that she cannot possibly withdraw that letter or go back upon the choice she has so made.

In that state of matters I consider it of some consequence to observe in what form this election was made. It was not made in the form of a written instrument, because this letter is not such in any sense. It is a mere letter written in the ordinary course of business in the handwriting of Mr Kidston's clerk, and subscribed by Mr Kidston. That letter, in my estimation, is nothing more than a piece of evidence of a parole election, because in order to make that writing binding on Mrs Breen, it must be proved in the first instance that Mr Kidston signed it, and it must be proved in the second place that he was authorised to sign it. That being so, it has none of the characteristics of an instrument at all, and it is just nothing more than a thing which, along with other parole evidence, establishes that such an election was made. But then it was said that the misapprehension under which Mrs Breen laboured—if it was a misapprehension—was an error of law and not an error of fact. I do not think there was an error of law here at all, but I do think there was an error of fact. I am not going to give any opinion upon the question whether Mrs Breen is entitled to one-half or one-fourth of the moveable estate as her legitim, but what I desire to say is that there was no error in law. I mean that Mrs Breen never took into consideration the question of law at all, nor was she advised about the question of law by her law-agent, and in order to make out that there was an error of law it would be necessary first to establish that she was only entitled to one-fourth of the moveable succession. That has not yet been established, and until this is established there is no error of law in the case, but there is a very clear error in fact. The error consists in this, that she believed, and was led to believe, that neither the trustees nor her brother disputed or doubted that if she took her legitim she was entitled to £70,000. That was a very plain error, and it was an error in fact under which she laboured when she made the election by the letter of 28th January.

Let us see what Mrs Breen in her evidence says upon this matter—"On 27th January 1885 I went up to Glasgow to meet Mr Kidston, in consequence of a resolution of the trustees of 15th January calling upon me to make my election. I called at Mr Kidston's office on 28th January. He read over the draft of a letter which he had prepared, and which he proposed to send to Mr Roberton. No. 270 is a copy of that draft. In consequence of what took place between Mr Kidston and me he altered the draft in the manner shown by the red ink markings. I still disliked it, and in consequence I arranged to have another meeting with him at the St Enoch's Hotel that afternoon. He called there. My husband was in the room during part of the time. Mr Kidston again read the letter. I said I did not like it. I did not feel comfortable about it. I was not satisfied. I felt as if I was being forced into saying something I did not want to say. I said I had not got sufficient information, but if Mr Kidston thought it would settle matters and put an end to all further trouble I was quite willing to accept the half of the personal estate as I had been advised. I asked him to state that. Mr Kidston made some pencil alterations upon the draft, and took it away to his office . . . I am quite positive that I asked Mr Kidston if he thought that by accepting the half of the personal estate it would end the matter. He thought so, and that was my reason for agreeing. (Q) If you had thought that by writing that letter you were embarking in a litigation or dispute with your brother would you have allowed it to go?—(A) No. My brother had never spoken to me at all on the subject of my right to the half of the personal estate. He was present at meetings of the trustees when the subject came up. He must have heard Mr Roberton explaining his views upon that matter to the trustees. Mr Roberton throughout explained that if I took my legitim I would get the half of the personal estate. Until after the letter of 28th January was sent my brother never hinted at any intention on his part to dispute that—neither at the meetings nor to me personally."

Mr Kidston corroborates this. He says—"I am the law agent of the claimants Mr and Mrs Breen. On 16th January 1884 I waited upon Mr Roberton, who explained to me that he wished me to become their agent. He told me that a valuable succession had opened to Mrs Breen by the death of her father, and he thought it advisable a separate agent should be employed on her behalf. He mentioned she would be entitled to the provisions under the settlement or to her legal rights, and that it would be necessary to be very careful to see that everything was properly explained and made clear to her. I had meetings with him next day and the day afterwards, and on one or other of these days he stated that the amount of her legal rights would be a very large sum—that it would come up to between £70,000 and £80,000, so far as he could then judge—that being the half of the personal estate. He distinctly conveyed to me his opinion that she was entitled to the half of the personal estate. That was my own opinion also—that is, failing collation with her brother. That was the view on which throughout these proceedings I acted, and on which I advised Mrs Breen. I never hinted to her any doubt as to her right to half the personal estate failing collation." Then in reference to the letter of 28th January 1885 he says—"I have no doubt that in authorising me to send that letter it was in Mrs Breen's mind that she was entitled to the half of the personal estate. It never entered my mind or hers, so far as I knew, that there would be any difficulty or dispute about the matter . . . . In the election which I advised Mrs Breen to make, and which she did make, I was proceeding upon the view that she was to get the half of the whole personalty, whatever it was."

Now, this evidence proves most satisfactorily to my mind that both Mrs Breen and her adviser were under the distinct impression induced by the information they had received from Mr Roberton, the law agent of the trustees, or from the trustees themselves, that the election which she was to make was between half of the moveable estate

and the testamentary provisions and that no dispute would ever be raised upon that question. Now, turning from this to Mr Roberton, who certainly gives very distinct and impartial evidence in the case, I think he very distinctly shows that this is his view also—"I had three separate meetings with Mrs Breen in the course of 1884. At these meetings the subject of her legitim came up for communication between us. The dates of these meetings were 21st January, 5th March, and 16th April. I had a subsequent meeting with her and her husband in either December 1884 or January 1885. On all the three occasions I told Mrs Breen that, according to my opinion, she was entitled to the whole legitim fund, which I estimated at between £70,000 and £72,000—I mean the half of the personal estate. I told her that, all things considered, were I in her shoes I would take the provisions at common law rather than the provisions under the settlement, but I did not advise her to take them. It would certainly not have been her interest to take her provision at common law unless she had been entitled to the whole amount. The question of Mrs Breen's legal rights was mentioned by me certainly at two meetings of the trustees. One of these would be early in 1884, and probably there were two occasions in the course of 1884, and on 3d February 1885 I repeated what I had said at former meetings on that subject. At the 1884 meeting or meetings, if there were two, I brought up the matter casually, and mentioned in an offhand way, 'This will be a good thing for Mrs Breen; she will get the whole of the legitim fund, which I estimate at about £70,000 or £72,000.' At that meeting all the trustees were present, including John Inglis and Mrs Breen. I mentioned that subject on only two occasions in 1884, but I mentioned it again at the meeting of 3d February 1885. At the time I made that statement at the meeting of trustees no exception was taken to it by anyone. John Inglis did not utter a word upon the subject. On 28th January 1885 Mr Kidston addressed a letter to me intimating the election. There was a meeting of trustees on 3d February, at which John Inglis was present. I submitted Mr Kidston's letter of 28th January to that meeting. Something was said as to the question of Mrs Breen's legitim. My impression is that the statement regarding that was not volunteered by me, but was given by way of answer to a question thrown out either by Mr Napier, who acted as a kind of leading trustee, or by Mr Fergusson, another of the trustees. It came out very much in this way:—'What will this lead to?' And I said, 'She will get a very considerable sum; she will get the whole of the legitim fund.' Nothing more was said about it. John Inglis was present, and took no exception to my statement. My natural inference was that as he was not expressing dissent he was to be assumed as assenting. (Q) Was it your understanding at the time that everybody was agreed upon that?—(A) I did not understand anything to be agreed about that. (Q) But did you understand there was any difference of opinion as to the amount of the legitim?—(A) I did not understand there was any difference."

Then another witness, Mr Low, says—"In the absence of Mr Roberton I attended one meeting of the trustees of the late Anthony Inglis in the year 1884, viz., on 9th September. That meeting was called to consider as to a payment by A. & J. Inglis towards the sum due by them to the trustees, and it was agreed to make a payment of £80,000 to account. Then a question was raised by Mr John Inglis junior, I think, as to whether or not he should have a payment to account of the sums due to him under his father's settlement. The trustees, after some conversation, agreed to make a payment to him, and they were anxious to make him as full payment as they could, keeping themselves safe. That question depended a good deal upon the sum to which Mrs Breen was entitled as legitim. The matter of legitim had never been considered by me before; but I explained to them that the half of the moveable estate was the legitim fund, after deducting expenses. It was then mentioned in the meeting, I forget by whom, that Mrs Breen was entitled to the whole of the legitim fund; whereupon, in making up the calculation for Mr John Inglis, I deducted a sum of £70,000 as her share of the legitim—in fact the whole legitim fund, before making any division—as I said that if there was to be a question raised about it, and it was to be decided against Mr John Inglis, they would have to pay the whole £70,000, and they could not make him any payment out of that sum."

Further, the evidence of the trustees is all to the same effect, although very naturally their recollection as to what actually passed at the meetings, or as to the particular time at which certain things were said, is not so accurate as that of the two legal gentlemen to whose evidence I have already referred. Mr Alexander says—"I have been present at almost all the meetings of the trustees which have been held. Amongst others I was present on 9th September 1884, when Mr Low appeared for Mr Roberton. At that meeting Mr Low said something about £70,000 to £72,000 being what Mrs Breen would be entitled to under her legal rights—that that was the half of the personalty. I made a note at the time upon the circular calling the meeting as to the amount which was stated as the probable amount of the legitim. I produce that jotting. The free moveable estate is there noted as £141,892, of which Mrs Breen was entitled to from £71,000 to £72,000. On the other side there is this written, 'If Mrs Breen takes her legitim—£70,000 a half.' That note was made at the same time, and it refers to the same sum. . . . I was present at the meeting of trustees of 3d February 1885, when Mr Kidston's letter of 28th January was submitted. (Q) At that time what was your understanding as to the amount of Mrs Breen's claim for legitim?—(A) I always understood it was the same amount—£70,000 odds, being the half of the personal estate. The whole of the trustees understood that at all the meetings. It was talked of at several of the meetings, although I cannot name the precise dates. It was after the meeting of 3d February—how long after I cannot say—that I first heard Mr John Inglis was making an objection to his sister being paid out on that footing."

But Mr Nowery in his evidence makes this statement—"I attended all the meetings of trustees except one. I was present at a meeting in February 1885, at which the amount of Mrs Breen's

legitim was spoken of. Probably it had been spoken of in my presence at a previous meeting. I knew Mrs Breen was entitled to claim her legitim if she chose. I heard that expressed at a meeting of the trustees by Mr Roberton. He also explained what was meant by her legitim—that she would be entitled to half of the personal estate. I believe that was said in presence of both Mrs Breen and Mr John Inglis. I think Mr Inglis took exception to that statement. I am not certain as to the date of that. I think the statement to which I have alluded was made at a meeting comparatively early in the trust. (Q) At that first meeting was any exception taken to it by Mr Inglis?—(A) My impression is that he took exception all along. I think he did say something indicating objection at a meeting. (Q) When did he first in your presence, at a meeting of trustees, make any statement of that nature?—(A) I think it was after Mrs Breen's election was declared in February 1885. (Q) Is it your belief that prior to that date he never indicated that her legitim would not be the half of the whole personal estate?—(A) If a discussion took place I think he did. I cannot positively say he stated that before the election; he may, but I cannot say positively. I cannot recal any occasion on which he did so prior to her election."

Now, this evidence by Mr Nowery is really the only piece of evidence that seems at first sight to throw some doubt on the statements of the other witnesses, but it turns out in fact to be just a loose want of recollection on the part of Mr Nowery as to the precise date at which this statement by Mr Inglis was made. I think the conclusion that Mr Nowery comes to on thinking over the matter and recalling the events which he had witnessed is this, that prior to the time when Mrs Breen made her election no statement of the kind, and no objection of any kind was made by Mr Inglis to the universally accepted statement that the choice Mrs Breen was to make was between the entire legitim fund and her testamentary provisions.

In the meantime Mr Inglis was in a very different state of knowledge and understanding from everybody else. He had consulted an agent of his own, and had received advice from him so far back as April 1884, and the advice he had received was that if his sister elected to take her legitim she would be entitled only to one-half of the legitim fund, or one-fourth of the moveable estate, but that he kept to himself, and never mentioned it to anybody concerned—not to Mrs Breen, his sister, nor to her husband, nor to Mr Roberton, who was acting for the trustees, nor to any of the trustees. He kept it locked up in his own breast until his sister had made her election, but immediately upon that event he disclosed it. In his evidence he says—"I did not tell him (Mr Roberton) of the advice I had got from Mr France until 3d February 1885, and then at the private meeting I had with him after the meeting of trustees. I had not mentioned it to any of the trustees. I think the meeting at which Mr Roberton stated in Mrs Breen's presence that if she took legitim she would be entitled to half of the whole moveable estate was early in 1884. I did not at any meeting state the contrary advice which I had got, because I was not asked, and I did not see I had any business to volunteer information or advice to Mrs Breen." But upon the 3d February 1885, at the meeting at which Mrs Breen's election was announced, Mr Roberton tells us that Mr Inglis stayed behind, and this was what then took place—"Mr John Inglis remained after the meeting of 3d February, and sitting down, he said, 'I do not wish you to assume that I am a consenting party to the views you have been expressing at the meeting of the trustees.' I said, 'Hallo, what's up now?' and he said, 'I have been advised by Bannatyne and Kirkwood, or rather by Mr France, that Mrs Breen is not entitled to the whole of the legitim fund.' Until he made that communication I did not know that he had been consulting other agents. My firm had been throughout agents for the firm of A. & J. Inglis, and are so still. Something passed between John Inglis and me in January 1884 on the subject of his having a separate agent. . . . . When I got the intimation from John Inglis on 3d February 1885, which I have mentioned, I considered it imposed a duty upon me with regard to Mrs Breen. I thought that as she and her agent had been going upon the assumption got from me that she was entitled to the whole of the legitim fund, it was only fair and reasonable to give her agent the earliest possible intimation." Mr Roberton thereupon wrote to Mr Kidston upon 5th February 1885 in these terms—[*His Lordship here read the letter of this date quoted above*]. And on the same day Mr Kidston wrote in reply as follows—[*His Lordship here read Mr Kidston's answer, also quoted above*]. Now, this communication which Mr Roberton most properly made to Mr Kidston seems to have given great offence to Mr Inglis, because in a letter by him to Mr Roberton on the 9th of February there is this passage—"Thinking over the matter, it occurred to me that as the question of division of legitim did not arise at a meeting of trustees, but in a subsequent conversation, Mr Kidston was not bound to have it communicated to him any more than I should ask their intentions. I would not have anything shabby done in my interest, but I shall keep them at arm's length if I can, and take every advantage I can with due regard to what is honourable." And in his evidence Mr Inglis says—"Being referred to my letter of 9th February to Mr Roberton, and to the paragraph beginning, 'Thinking over the matter,' &c., I meant, by 'the question of division of legitim,' the manner how legitim would be divided. (Q) Did you mean the question whether Mrs Breen would be entitled to half of the whole estate under legitim, or only the fourth?—(A) The manner of division. (Q) Did you mean the question whether Mrs Breen would be entitled to the half or to the fourth of the moveable estate as legitim?—(A) Well, I suppose so. I did not object to Mr Roberton informing Mrs Breen that there would be any question of that nature. (Q) Looking at the paragraph referred to, did you not intend by that paragraph to find fault with him for having communicated to Mr Kidston that there was any question as to the proportion of the estate which would be Mrs Breen's legitim?—(A) I did not object to his communicating to Mr Kidston that I had a different opinion from him. I objected to Mrs Breen being told the grounds of that opinion. (Q) If you were advised in April 1884 that Mrs Breen was entitled only to one-fourth,

why did you not communicate that fact to the trustees or Mrs Breen before February 1885?—(A) Because I was not asked or called upon. I was a party to the minutes of the trustees calling upon her to elect. (Q) Did you wish her to elect in ignorance of the fact that you had been advised that her legitim was only one-fourth instead of a-half?—(A) She must have been in ignorance. (Q) Did you wish her to elect in ignorance of that fact?—(A) In ignorance of the advice I had, Yes. I had no motive for withholding the advice I had received other than that I was not called upon to give it. If I had been asked for advice I would have offered it. I regarded the letter of 3d February as a final election. (Q) Was it because you thought Mrs Breen had finally elected and was bound that you then for the first time communicated to Mr Roberton your position?—(A) I thought it was time to communicate, because otherwise payment would have been made. When I made that communication I thought she was bound. (Q) Did you choose that time to make that communication because you thought she was by that time bound?—(A) I thought that was the proper time to make it, because otherwise the trustees would probably have proceeded to give her the money."

Now, taking Mr Inglis' evidence and his letters together, I think they prove this—and I do not want to state the case against him more strongly than necessary for the purpose of deciding the question before the Court—that Mrs Breen, and the trustees, and Mr Roberton, being all at one in their opinion that the amount of Mrs Breen's legitim would be half the personal estate of the deceased, Mr Inglis took advice from a law-agent as to whether that would be so as early as April 1884. Subsequent to that time, and having received advice that she was entitled to only one-quarter of the whole estate instead of one-half, Mr Inglis attended meetings of the trustees at which the subject of Mrs Breen's legitim was discussed, when he found everybody assuming as a matter of course that one-half of the personal estate was to be Mrs Breen's legitim if she took her legal rights, and he never said a word against them; he kept to himself entirely the advice he had received, but as soon as he thought that his sister had finally committed herself to the choice of her legal rights in preference to the testamentary provisions, he then comes out with his great law point, and announces that she is not to have more than one-fourth of the moveable estate, that he held her to her election, and that she could not go back. Taking the evidence of Mr Inglis with the other evidence in the case, I think we have it very clearly proved that Mrs Breen had elected to take her legitim because she believed it to be half of the moveable estate, and that she was induced to that by the trustees and by Mr Inglis, her brother. We have it proved also that nobody ever raised any question, or suggested the slightest doubt that that was so, and yet all the time Mr Inglis had in his pocket the advice of his law-agent that it was not so, and he kept up that advice until Mrs Breen was induced into an erroneous belief that there was to be no dispute about the matter—that her taking her legitim was to end all dispute. He kept up that advice, and allowed her to go on in that belief to make her election, and the moment that was made he then insisted that she should be held to it, notwithstanding the plain error in the matter of fact upon which she made her election—that error being that she took her legitim to put an end to all dispute in the sure belief derived from the trustees, the agent to the trustees, and Mr Inglis himself, that there could be no doubt or difficulty if she took that course. I think that her election was made in such circumstances as fully to entitle Mrs Breen to withdraw, and to claim, as she has now done in this multiplepoinding, the provisions settled upon her in the trust-disposition and settlement. The ground of fact upon which she proceeded is proved to be no fact—that is to say, Mr Inglis has challenged that which everybody held to be settled, and so the belief under which Mrs Breen acted is an erroneous belief brought about very much by the conduct of Mr Inglis himself—certainly by no fault of herself, but I think to a very great extent by the fault of her opponent, her brother.

I am therefore for adhering to the Lord Ordinary's interlocutor.

Lord Mure concurred.

Lord Shand—This is a very clear case, and one very easy of decision; indeed it is so clear that I cannot believe that either Mr Inglis, or his advisers, could think that any court of law would give effect to his pleas, or that he could possibly succeed in cutting down his sister's rights to one fourth of the executry estate.

It is, I think, abundantly clear on the evidence as read by your Lordship that Mrs Breen made her choice in the full belief that she was entitled to one-half of the personal estate—that is to say, to £70,000; and it was not until by her agent's letter she had announced her election that any proposal was made to restrict her to one-half of the sum she thought she was to receive. Even if it had been shown by Mr Inglis that his sister had finally elected, the parties are not decided what the result of such a state of matters would be. It is only necessary to look for a moment at the figures showing the position of this estate to see how absurd is Mr Inglis' suggestion that Mrs Breen was in any way aware of what she was doing when, as he alleges, she gave up her provisions under the settlement for one-fourth of the personal estate. If she took under the settlement, then she received £22,000 in cash, and she could test upon £10,000, in addition to which she had the life-rent of one-half of the residue of her father's estate, which latter provision was equivalent to £3200 a year; and yet it is said by Mr Inglis that in lieu of all this she consented to take a sum of £35,000. I do not propose to resume in any way a consideration of the evidence in the case after the very full manner in which your Lordship has dealt with it. The result of it is to make it very clear to my mind that there has been such an error in fact as to entitle Mrs Breen to go back on the letter of 28th January 1885, and that she is still entitled to make her election.

The question between the parties is undoubtedly one of fact, but even if it had been one of law the result in my opinion would have been the same. It is both law and justice that when a

choice is made in circumstances like the present the law should give redress. For we have nothing in this case of the nature of a *condictio indebiti*; we are simply dealing with certain actings of this lady entirely voluntary in their character, and so long as matters remain entire, it does not appear to me that there is anything to prevent her resiling. The result I think would have been the same even though Mr Inglis had not been a trustee, and had not in any way been a party to his sister's decision; much more is it so when it has been made out that as in the present case Mr Inglis was a trustee, took part in the meetings, and contributed to a considerable extent to the mistake into which his sister has fallen. When anyone so manifests his intention to another as to induce that other party to act upon it, the party advising is barred from afterwards maintaining that the intention which he indicated was not his true intention. This principle was laid down in the case of *Stewart's Trustees* v. *Hart*, 3 R. 192. In the present case Mrs Breen was induced to act as she did on Mr Inglis' avowed intention that the sum which she was to be entitled to receive was £70,000.

I am therefore of opinion that we ought to adhere to the Lord Ordinary's interlocutor. As to the passage in the Lord Ordinary's note in which he says, "If an election was well made and intimated on 28th January, I am of opinion that it was beyond the power of Mrs Breen to withdraw it," I desire to reserve my opinion on that point. In the absence of anything turning upon that election, it is not necessary for us to decide the point. My opinion at present on the matter is, however, contrary to that of the Lord Ordinary. As it is, all I desire to say is that I am not to be held as concurring in the view upon this point expressed by his Lordship.

Lord Adam—In my opinion nothing is clearer than that upon the 28th of January 1885, when Mr Kidston's letter was written, Mrs Breen was in the full belief, and no one interested had disputed the point, that she was entitled to one-half of the executry estate. That was the state of her mind, and it has been urged that her error was one in law and not in fact, because she believed that she was entitled to one-half instead of, as is now contended for by Mr Inglis, only one-fourth of the personal estate.

As to which of these contentions is the correct one, nobody at present seems exactly to know, and we have been told that before we should have been in a position to determine the question a great deal of argument would require to have been submitted to us. But her error lay in this,—she understood that it was undisputed that in the event of her claiming her legitim that was to be one-half of her father's personal estate. Her error was entirely one of fact, and to my mind it is so essential that she is entitled to be restored from the consequences of her election. I therefore concur with your Lordships.

With reference to the passage in the opinion of the Lord Ordinary referred to by Lord Shand, I would only desire to say that the point is one upon which I have not made up my mind, although at present I am inclined to share the opinion expressed by Lord Shand.

The Court adhered.

Counsel for John Inglis, junior—Pearson—Dickson. Agents — Webster, Will, & Ritchie, S.S.C.

Counsel for Mrs Breen—D.-F. Mackintosh — Guthrie. Agents—H. B. & F. J. Dewar, W.S.

Tuesday, May 31.

FIRST DIVISION.

[Exchequer Cause.

THE NORTHERN INVESTMENT COMPANY OF NEW ZEALAND, LIMITED, *v.* SMILES (SURVEYOR OF TAXES).

Revenue—Property and Income-Tax Act 1842 (5 *and* 6 *Vict. c.* 35), *sec.* 100, *Sched. D, Fourth Case—Interest Received from Foreign Investments.*

A Scottish company which carried on the business of borrowing money in this country and lending it on securities in New Zealand, was charged with income-tax on the interest received from the securities under the fourth case of Schedule D. They objected to the assessment on the ground that the company was a trading company, and could only be assessed upon its profits under the first case of Schedule D. *Held* that the assessment under the fourth case was competent.

The Scottish Mortgage and Land Investment Company of New Mexico (Limited) v. *The Commissioners of Inland Revenue*, Nov. 19, 1886, *ante*, p. 87, 14 R. 98, *followed* and *explained.*

The Northern Investment Company of New Zealand, Limited, incorporated under the Companies Acts, was formed in 1880 principally for the purpose of borrowing money on debentures in this country, and lending it, along with the paid-up capital, upon securities in New Zealand.

The head-office of the company was in Edinburgh, with a managing board of six directors. There was a local board of directors in New Zealand with a manager there. Since its formation it had in each year been assessed on its profits and gains, and had paid duty thereon in terms of the *first* case of Schedule D of the Act 5 and 6 Vict. c. 35, sec. 100. For the year ending 5th April 1886 the Surveyor of Taxes made a surcharge of £236, 3s. 4d., being duty on the sum of £7085, the said sum representing the difference between the sum on which the company was assessed for the year 1885–1886 in terms of the *first* case, and the amount of the profits or gains from colonial securities computed in terms of the *fourth* case of the said Schedule D. The Surveyor and the company were agreed as to the figures.

Before the Commissioners it was maintained on behalf of the company that it, the company, was "an adventure or concern in the nature of trade," and that for the purposes of assessment to income-tax the profits of the company for the year of assessment should be estimated according to the rule contained in the *first* case of Schedule D, section 100 of the Income-Tax Act, 5 and 6