"fixing" the level. Then the reference to the plan, the notice of the meeting of the Commissioners, and the twenty-eight days' interval between the date of the notice and of the meeting, were all matters enjoined by section 394, but not by section 397. In the case of *Campbell* v. *Leith Police Commissioners*, Feb. 28, 1870, 8 Macph. (H. L.) 31—Feb. 28, 1870, 2 L.R., Sc. & Div. App. 1, it was held that notice under section 397 applied to private streets.

For the pursuer it was argued—In the case of *Campbell* it was conceded by the police commissioners that the notice there in question was not given under section 397, but under section 394, and the House of Lords only negatived the plea because they were of opinion that the road was a private street, to which sections 150 and 397 were applicable. *Esto* that the words "fixing" the level were used in the notice instead of the word "levelling," the succeeding words used to describe the work intended to be done were words descriptive of improvements under section 150 as to private streets, and not under section 394 as to public streets. As regarded the reference to the plan and the notice of meeting, no special injunctions on these points being contained in section 397, it was natural to adopt the procedure of section 394.

At advising—

The opinion of the Court (Lord Justice-Clerk, Lords Young, Craighill, and Rutherfurd Clark) was delivered by

Lord Craighill—[*After concurring with the Sheriff that the road was a private street, and that there had been sufficient publication of the notice*] —The next question is, whether or not the notice which was given was such as was required by the statute? The 397th section, under which, as the pursuer says, the notice was given, prescribes no special form. All that is required is that the Commissioners shall give notice of their intention to do or to perform or authorise to be done or performed such matter or thing in one of the ways specified. Now, what was intimated was that the Commissioners "intend to fix the level of the road leading from Scoonie Place westwards by Blackwood Place to the waggon road, to make the roadway thereof, and a footpath on both sides, with kerb and gutter." These are within the works which are authorised by section 150, and therefore it appears to me, as it did to the Sheriff, that the notice was all that was necessary. The defender says that the notice, such as it was, is as applicable to operations on a public street as to operations on a private street; but on a comparison of the provisions of section 394 with those of section 150, it will be found that a part of the works of which intimation was given occur in and are authorised by section 150 only, which relates to private streets. These things have been pointed out by the Sheriff, and I concur in the conclusion at which he has arrived.

The Court pronounced this interlocutor:—

"Find in fact (1) that the piece of ground now called Blackwood Place was at the date of the proceedings set forth in the fourth article of the condescendence for the pursuer a private road within the meaning of the General Police and Improvement (Scotland) Act 1862; (2) that the notice given by the Commissioners represented by the pursuer, of their intention to clear, level, macadamise, and form to their satisfaction the said piece of road, was in terms of said Act, and was published by handbills posted at the end of Blackwood Place, and in a conspicuous place in the High Street of Leven: Find in law that the Commissioners of Police were entitled to execute the said operation, and that the notice thereof was duly given: Therefore dismiss the appeal, affirm the judgment of the Sheriff appealed against, of new decern in terms of the conclusion of the petition: Find the pursuer entitled to expenses in this Court," &c.

Counsel for Appellant—Rhind—Hay. Agent—James Skinner, S.S.C.

Counsel for Respondent—Gloag—W. Campbell. Agents—J. & J. Galletly, S.S.C.

Saturday, July 16.

SECOND DIVISION.

[Lord Lee, Ordinary.

BUCKNER *v.* JOPP AND OTHERS.

Trust—Purchase of Trust-Estate by Trustee—Challenge by Beneficiaries—Mora.

The acquisition by a trustee of trust-estate under his control is regarded by the Court with great jealousy, and if it is challenged timeously by the beneficiaries it will be incumbent on the trustee to show that the arrangement which led to it was one entirely for the benefit of the beneficiaries, and that they had been fairly dealt with, and received full information with regard to it. If, however, the beneficiaries acquiesce in the arrangement, and only bring their challenge after a long lapse of years, the Court will require a very special case to be stated before granting an inquiry into the facts.

A truster died in 1844 possessed of considerable means, and leaving legacies to legatees, and the residue of his estate to persons named. The trustees found his affairs deeply involved by reason of liabilities which he had contracted in connection with certain mercantile firms, and they were compelled to delay paying in full the legacies, &c., until the value of the property of the deceased involved in this way was ascertained. The legatees becoming impatient to have the trust wound up, the trustees instructed their agent, who was a trustee, to send their whole accounts for audit and report to an accountant. The report of the latter showed, in the view of the trustees, that the realised funds were insufficient to meet the legacies, &c., and that the assets were doubtful, and would take some years to realise. It was sent to the agent of the beneficiaries, who, along with other men of business, made a careful examination of it. In the course of negotia-

tions, in which the report was fully discussed at meetings held between them and the trustees, a proposal for a settlement was discussed on the basis that the trustees should pay the beneficiaries their provision in full on condition of receiving from them an assignation of their whole interest in the trust-estate. While these were pending, the trustees, finding a newly-discovered liability, expressed a desire to resile from the settlement, but the beneficiaries, with advice of their agent, refused the request, with a threat of legal proceedings. Accordingly in 1852 a deed of assignation and discharge in terms of the proposal, and in which the above negotiations were fully narrated as the consideration of granting, was executed. It was duly signed by the beneficiaries under advice of their agents, and the provisions were duly paid by the trustees and accepted by the beneficiaries. In 1886, thirty-four years after the deed was signed, and when nearly all the parties to the deed were dead, the executor of one of the beneficiaries, who would have been entitled to a share of residue if there had been any, raised an action against the representatives of the trustees to reduce this deed, on the grounds generally of fraud, concealment, and misrepresentation. The Court *assoilzied* the defenders, on the ground that the transaction had not been timeously challenged—Lord Young and Lord Craighill being of opinion that no relevant ground of action had been stated.

Mr Harry Leith Lumsden of Auchindoir, Aberdeenshire, died on 27th March 1844 possessed of considerable means and estate, which, however, were deeply involved by reason of liabilities which he had contracted in connection with the mercantile firms of Duffus & Company, James Forbes & Company, and Forbes, Law, & Company, which had got into difficulties, and whose obligation he had undertaken on condition of each of these firms and the partners thereof executing trust-deeds conveying their respective estates to trustees in security of his advances. He left a trust-disposition and settlement, whereby he conveyed his whole estates, heritable and moveable, in favour of his wife Mrs Leith Lumsden, John Jopp, W.S., Edinburgh, Henry Paterson, manager of the North of Scotland Bank at Aberdeen, and Alexander Jopp, advocate, Aberdeen, as trustees, nominating them also his executors. The deed contained, *inter alia*, a direction to provide certain annuities and to pay a number of legacies, which included a bequest of £750 to be invested for behoof of Mrs Walker, his niece, in liferent, and her children in fee. The legacies amounted in all to some £17,000. There was also a direction to pay, divide, and dispose of the residue and remainder of his means and estate as he might appoint by any separate writing under his hand, but he left no such writing. The other legatees were the Rev. Harry Leith and the rest of the nephews and nieces of the truster.

The trustees entered on their office, but found, as they alleged, owing to the nature and extent of the obligations under which the deceased lay in connection with the mercantile trusts just mentioned, that great uncertainty existed as to the ultimate worth of the bequests made by him. In 1846 and 1847 they paid to the legatees one-half of the capital of their respective legacies, being to the extent of £8527, 2s. 6d., but in 1849 the legatees and beneficiaries having become impatient to have the trust closed, the trustees directed their agents Messrs Jopp & Shand, advocates, Aberdeen, the former of whom was one of their body, to send the whole accounts and vouchers thereof of the trust to Mr Donald Lindsay, accountant in Edinburgh, to be examined and audited. Mr Lindsay prepared elaborate reports, setting forth the details of the intromissions of the respective firm trustees with the funds of their firms from the commencement of the trusts in 1841 to 1850, and of Mr Lumsden's own trustees' intromissions with his own estates from his death in 1844 to 1850. Each of these reports was continued by Mr Lindsay down to 1851. He dealt not only with the assets of the various trusts in so far as then realised, but with the unrealised subjects, putting on them such value as he thought they might ultimately be worth. The view of this report taken by the trustees was that it and the accounts showed that the realised funds were insufficient to meet the legacies and other payments, and that the assets outstanding in the year 1851 were for the most part of doubtful value, and such as would take many years to realise.

On January 30, 1851, the trustees instructed their agents in the trust to intimate to the legatees and next-of-kin that the report could be seen by them, and on 25th January Mr Lindsay's first report was sent to Mr Lachlan M'Kinnon junior, advocate, Aberdeen, who acted for most of the legatees and next-of-kin. These were examined by him and by Mr Charles Morton, W.S., his Edinburgh correspondent. On 30th January there was a meeting of the trustees in Edinburgh, at which were present, besides the whole trustees, Mr Alexander Hunter, W.S., agent for Mrs Leith Lumsden, Mr Morton, Mr M'Kinnon, and Mr Bastard, husband of one of the legatees. The objections of the latter gentleman were heard, and it was resolved that these objections, and whole accounts of the various Lumsden trusts, should be sent to Mr M'Kinnon for full examination. He accordingly received the whole detailed accounts and vouchers necessary to instruct the abstracts of the accounts contained in Mr Lindsay's reports, and kept them in his hands till 28th April. On 2d May 1851, at a meeting of the trustees, Mr M'Kinnon and Mr Morton stated detailed objections to Mr Lindsay's reports. It was then mentioned that some of the legatees had declared their readiness to accept the balance of the capital of their legacies without interest if arrangements could be made to pay them this amount, and the meeting was adjourned to consider this proposal. On August 19th, 1851, Mr M'Kinnon wrote to Jopp & Shand saying that although a proposal for settlement had been promised within fourteen days after the last meeting, none had yet been made, and that unless a settlement was made within ten days he would declare off from an extrajudicial settlement, and raise an action for payment of the legacies. On the same day he wrote to the same effect to Mr John Jopp, W.S., and to Mr Henry Paterson, and sent to Mr Hunter, as agent for Mrs Leith Lumsden, a copy of his letter to the trustees, and stated that he had resolved to

bring matters to a point as his clients would not submit to be longer trifled with.

On 2d September 1851 Jopp & Johnston, W.S., Edinburgh, addressed letters to Messrs M'Kinnon and Duncan containing a proposal for settlement in the following terms:—"We are now authorised to submit to you the following proposal—(1) That the legatees under the settlement of the late Mr Leith Lumsden shall, upon receiving payment of the balance of the capital of their legacies, assign their claims, and the next-of-kin, and parties who might be entitled to residue, if any, renounce and discharge their claims, and all exoner and discharge the trustees and executors of Mr Leith Lumsden, and approve of the states of the affairs prepared by Mr Lindsay; (2) the money to be payable within three weeks after all the legatees intimate their acceptance of the above terms. The acquiescence of all the legatees and next-of-kin is, of course, a condition of the arrangement. You will allow us to add, with reference to the time which has elapsed since a proposal was suggested, that both Messrs Jopp & Shand of Aberdeen and ourselves understood that a proposition to the above effect had already been made to Mr Morton through Mr Hunter. . . ."

Mr M'Kinnon on 4th September 1851 wrote to Mr John Walker as follows:—"I beg to enclose copy of a letter received by me yesterday from Messrs Jopp & Johnston of Edinburgh, proposing terms of settlement by the trustees to the legatees of the late Mr Leith Lumsden. From this letter you will observe that the trustees propose to pay to the legatees the balance of the capital of their legacies, on the condition that the latter and the nearest-in-kin forego their claim to interest and residue, abandon all objections to the management, and assign their rights in the estate to the trustees. It is a condition of this offer that all the legatees and nearest-in-kin accede to it. I beg to be favoured with your instructions in this matter. I have taken the liberty of recommending the acceptance of the proposal to others, and I think that all who are immediately benefited by it should accept it. There is much ground for dissatisfaction with the management, but I think the terms proposed are preferable to going into Court, and being subjected to the delay attending an action, the result of which, besides being distant, may be considered more or less uncertain." On 8th September Mr Walker replied as follows:—"Received your letter upon the 6th. We are willing to do as the rest do, or what you think best." (Here follows a note of the names and ages of his five children). "(Signed) JOHN WALKER."

Mr M'Kinnon having obtained the consent of the other beneficiaries, on 20th September wrote to Jopp & Johnston duly accepting their offer for his clients.

At this stage of the negotiations the trustees discovered an additional liability affecting the trust-estate, of which no account had been taken by Mr Lindsay in his report, under a bond of caution for £1700 by Mr Lumsden. The question arose whether that sum was to be deducted from sums payable to the legatees. The trustees proposed that a sum should be consigned in bank to meet this liability, and the question about it be settled afterwards upon a construction of the terms of the compromise between the parties. Mr M'Kinnon and Mr Duncan, however, resisted this proposal, and threatened immediate legal proceedings if the compromise were not carried out according to its terms. The trustees ultimately yielded to this pressure, and consented that the legatees should receive payment in full of the balance of their legacies.

In January and February 1852 a deed of discharge and assignation giving effect to this arrangement was executed by all the legatees and beneficiaries under Mr Lumsden's trust-disposition and settlement and codicils, including Mrs Mary Leith or Walker and John Walker her husband, for his right and interest, and as taking burden on him for his said wife, in favour of Mr Lumsden's trustees, and Mr Alexander Abercrombie, who was an uncle of Mr Alexander Jopp, one of the trustees and one of the agents for the trust. This deed of discharge and assignation, after setting forth the purposes of the trust-disposition and settlement, proceeded as follows:—"And that the said trustees and executors having, by two several minutes, dated respectively the 21st day of November 1849 and 30th day of January 1851, remitted to Donald Lindsay, accountant in Edinburgh, to examine and audit the accounts of the intromissions of Messrs Jopp & Shand, advocates in Aberdeen, the cashiers and agents of the said trustees and executors with the deceased's means and estate, and the accounts of the trusts of James Forbes, Esq. of Echt, deceased, Messrs John Duffus & Co., James Forbes & Co., and Forbes, Law, & Co., on account of whom the said deceased Harry Leith Lumsden had prior to his death come under large obligations and engagements, and in which he and his trustees and executors are interested. And that the said Donald Lindsay, having examined and audited said accounts of the deceased's trust from the date of the deceased's death up to the 30th day of April 1851, and of the other trusts above mentioned from the dates of commencement of the same respectively to the said 30th day of April, framed reports wherein the payments or investments made on account of the legacies and provisions under the deceased's settlement and codicils are stated, a value is put on the outstanding debts due to the deceased's estate, and the other property still remaining unrealised, and by which reports it appears there will be a probable deficiency of trust-funds to meet the payment of the liabilities of the deceased, and to pay in full the legacies and provisions left and bequeathed by him, and make provision for the annuities above mentioned, which reports are dated respectively the 9th day of November 1850 and the 2d day of May 1851. And considering also that a considerable length of time may yet elapse before the remainder of the deceased's means and estate can be realised, especially as it is necessary before this can be accomplished that the various trusts above referred to should be wound up, and that therefore it has been deemed expedient to settle with the legatees and those interested in the deceased's estate in order to bring the trust to a speedier conclusion And whereas, upon the suggestion of the said Messrs Jopp & Shand, a proposal has been made to the legatees offering to pay to them the balance of the capital of their legacies without interest, which proposal has been accepted by the legatees

and beneficiaries under the deceased's settlement and codicils foresaid, and is to the following effect—[*Then follow the terms of the arrangement above quoted*]. And whereas we, the parties hereto, legatees and beneficiaries foresaid, have agreed to accept the offer, and to grant the discharge, exoneration, and assignation under written; and we, the next-in-kin of the deceased, and parties who would have been entitled to the residue, if any, have agreed to concur and join in said discharge, exoneration, and assignation. And whereas the annuities before mentioned, and other annuities which the deceased was at the time of his death under obligation to pay or provide for, have been secured by bond granted by Alexander Abercrombie, Esquire, residing in Aberdeen, and the said Messrs Jopp & Shand, as a company, and by Alexander Jopp and Robert Shand, both advocates in Aberdeen, the individual partners of that firm, as individuals, bearing date the . And now, seeing that the said Messrs Jopp & Shand have, in terms of the foresaid arrangement, and in consideration of granting these presents, instantly advanced and paid to us as follows. . . . And seeing that the said trustees and executors have, as aforesaid, invested in their own names, the one-half of the sums directed by said settlement and codicils to be invested for behoof of us . . . the said Mary Leith or Walker and family. . . And seeing that the said trustees and executors have, by the hands of the said Messrs Jopp & Shand, thus implemented their part of the arrangement above narrated. . . . Therefore we, the parties hereto who are legatees and beneficiaries under the foresaid trust-disposition and settlement and codicils, or representatives of legatees and beneficiaries, do hereby, in implement of our part of the arrangement above narrated, and for our respective rights and interests in the premises as legatees and beneficiaries foresaid, and with consents foresaid, exoner, acquit, and *simpliciter* discharge the said trustees and executors and all others, the representatives of the said deceased Harry Leith Lumsden deceased, of the whole actings, transactions, intromissions, and management of the said trustees and executors had by them or by their said cashiers and agents, or any of them, under or in consequence of the said trust, or in relation thereto, in any manner of way, but under reservation always in favour of the said Alexander Abercrombie, our assignee, of all claim, right, and interest competent to him under the assignation hereinafter written, . . . as we do hereby renounce and discharge, for ourselves, our heirs, executors, and successors, all claim competent to us, or any of us, as heir-at-law or as next-of-kin to the said deceased Harry Leith Lumsden, for the residue of his estate, heritable or moveable, if such there be, or should hereafter arise, after satisfying the purposes of his said settlement and codicils, or competent to us otherwise, in any manner of way, by and through his death; but under reservation always in favour of the said Alexander Abercrombie, our disponee and assignee, of all claim and right competent to him under the assignation and conveyance hereinafter written. And we, the whole parties hereto, do hereby, in so far as we are interested in the estates of the said deceased Harry Leith Lumsden under his said deed of settlement and codicils, or *ab intestato*, ratify, homologate, and approve of the foresaid reports and relative states by the said Donald Lindsay, and of the whole actings and intromissions of the said trustees, and of their cashiers and agents, as well detailed as not detailed therein, as also the whole subsequent management and transactions had and done by the said trustees and executors or their cashiers and agents foresaid under or by virtue of the said trust. . . . And we, . . . at the special request of the said Messrs Jopp & Shand, and with consent of the said trustees and executors, do hereby make and constitute the said Alexander Abercrombie and his foresaids our cessioners and assignees not only in and to the sums of money before mentioned appointed by said deed of settlement and codicils to be invested for behoof of us and of our said families to the extent of the amounts now advanced by the said Messrs Jopp & Shand, and invested for behoof as aforesaid, with all claim competent to us respectively for arrears of annual rent upon the foresaid sums so advanced and invested from and after the period at which the same ought to have been invested for behoof foresaid, in terms of the said trust-disposition and settlement and codicils, but also in and to the said trust-disposition and settlement and codicils, whole clauses, tenor, and contents thereof, to the extent of the said sums advanced and invested as aforesaid, to the end and effect that the said Alexander Abercrombie and his foresaids may recover payment of the foresaid sums respectively and arrears of annual rent thereon, out of and from the trust, means, and estate of the said deceased Harry Leith Lumsden. . . . And I, the said John Leith, as heir-at-law foresaid, at the special request and with consent foresaid, do hereby assign, dispone, convey, and make over from me, my heirs and successors, to and in favour of the said Alexander Abercrombie, his heirs, executors, and successors, all and whatever claim of property and right, title, and interest of a heritable nature, competent, or which may be competent to me, as heir-at-law foresaid, against the trustees and executors of the said deceased Harry Leith Lumsden, whether arising under the foresaid settlement and codicils, or falling to me as heir-at-law foresaid in any manner of way: And we, . . . make, constitute, and appoint the said Alexander Abercrombie, his heirs, executors, and successors, our lawful cessioners and assignees, in and to all and whatever claims are or may be competent to us as next-of-kin of the said deceased Harry Leith Lumsden, whether arising out of the foresaid deed of settlement and codicils, or *ab intestato* by and through his death; and we, the parties foresaid, granters of the before-written assignation and conveyance, do hereby surrogate and substitute the said Alexander Abercrombie and his foresaids in our full rights and place of the premises respectively, with full power to him and them to expede any titles that may be necessary for validating the assignation and conveyance before written, and rendering the same complete and effectual, to ask, crave, sue for, recover, and uplift the sums of money, principal and interest, hereby assigned, and upon payment to grant discharges or conveyances thereof, either in whole or in part, and generally to do every other thing concerning the premises that we or any of us might have done ourselves before granting hereof." The trustees were parties to the deed,

and consented to the reservation in favour of Mr Abercrombie.

The result of the deed was that Mr Abercrombie, in security of his claims of relief against Messrs Jopp & Shand, obtained a conveyance of the whole outstanding assets of the trust; and that subsequently upon Mr Abercrombie's claims of relief being satisfied, and on Mr Shand's death in 1862, these assets were conveyed by him, with the consent of Mr Shand's trustees, to Mr Alexander Jopp (of Jopp & Shand), then the sole surviving trustee of Mr Lumsden. Mr Abercrombie had previously obtained a conveyance from the trustees of the whole remaining trust-property, claims, and assets, in consideration of Jopp & Shand having relieved them of all outstanding claims against the trust. Mr Alexander Jopp thus acquired from the trustees, of which he was one, with the consent of the legatees and next-of-kin, the whole remaining trust-property and assets in consideration of the discharge and the payments therein recited. The various legatees, including Mrs Walker and her family, duly received payment of their legacies in terms of the deed of assignation and discharge.

This action was raised on the 22d June 1886 by Mrs Janet Walker or Buckner, with consent of her husband, in the capacity of legatee and next-of-kin, through her mother Mrs Walker, as being entitled to a proportion of the residue of Mr Lumsden's estate, against the representatives of the trustees acting under Mrs Lumsden's trust-deed, for the purpose of reducing and setting aside the deed of discharge and assignation of 1852. At the date of the action Mr Alexander Jopp was dead, having died in 1870, leaving a trust-disposition and settlement under which the trustees were Andrew Jopp, advocate in Aberdeen, and Alexander Jopp junior. Mr Henry Paterson had died in 1854, and Mrs Leith Lumsden in 1870. Mr Abercrombie, Mr Lumsden's trustee, and Mr and Mrs Walker were also dead.

The pursuers stated that Mr Lumsden's personal estate at his death amounted to £47,242, 19s. 9d.; that the proceeds of his heritable estate not specially destined fell to the moveable estate, and ought to have formed part of the residue divisible amongst the next-of-kin of the testator; that the legacies did not amount to more than £17,000, so that after payment of these out of the said personal estate a balance or residue of at least £30,000 was left, which fell to be disposed of according to the laws of intestate succession. With regard to Mr Lindsay's reports, they averred as follows:—"(Cond. 8) It is believed and averred that the said reports were materially inaccurate, and proceeded upon information supplied by the trustees and Messrs Jopp & Shand to Mr Lindsay in the full knowledge that it was erroneous, and with the intention of misleading him, and that in place of the estate being unable to pay the liabilities and provisions before referred to, it was not only able to do so, but there was a large surplus, which fell to be divided among the next-of-kin. It is believed and averred that, as the said trustees and Messrs Jopp & Shand well knew, the only interest which the said Harry Leith Lumsden had in the estate of James Forbes, Duffus & Co., James Forbes & Co., and Forbes, Law, & Co., was that of a creditor, whereas the said trustees and Messrs Jopp & Shand, in the said discharge and assignation, and in the proceedings and communings preliminary to the same, falsely and fraudulently represented to the grantors thereof that the estate was under heavy obligations and engagements for these parties, and thereby induced them under essential error to grant the same. . . . It is further believed and averred that the said trustees, or their law-agents, in place of devoting the estate of the said Harry Leith Lumsden, as they realised it, to the purposes of the trust, applied it to purposes not sanctioned by and of a nature contrary to the terms of the trust. It is believed and averred that if the estate showed a deficiency at the dates of these reports, the deficiency arose from the improper and illegal actings of the trustees, or the said Messrs Jopp & Shand, or one or other of them. . . . In the accounts produced by the defenders the trustees take credit for the sum of £20,600, as having been paid by them in satisfaction of obligations alleged to have been undertaken by the deceased Mr Leith Lumsden to the creditors of Mr Forbes and the said firms. It is believed and averred that no such obligations had been undertaken by him, or at all events, that they were not of such a nature as to warrant the trustees in continuing after his death to pay the said creditors, and that these payments were wrongfully and improperly included in the account. . . . Further, in the said accounts a sum of £4925 is debited against the personal estate as the amount of claims for meliorations made by the tenants of the lands of the deceased. It is admitted in said reports that the same were then disputed by the executor, and that no part thereof had been paid. It is averred that the personal estate was not liable for these claims, and it is also averred that no part thereof has ever been paid. The same were payable out of the lands of which the claimants were tenants. The testator held most of his lands in fee-simple. . . . In the report dated 2d May 1851 there is a statement made of the assets of the estate at that date, which are stated to be worth £14,542, 15s. 2d., but it is believed and averred that this list is grossly undervalued, and does not include all the assets of the estate. . . . There was no necessity for the said discharge and assignation as the trustees had, at the date thereof, more cash on hand and available for the purpose of paying the grantors of the said discharge and assignation the sums due to them as legatees and next-of-kin than was required to pay the outstanding debts and balance of legacies, &c. . . . If Mr Lachlan M'Kinnon, advocate, Aberdeen, attended on behalf of the female pursuer's father and mother before the reporter Mr Lindsay, and stated objections to them, he failed in stating objections thereto of the most obvious nature. . . . The first report of Mr Lindsay was made before Mr M'Kinnon professed to examine the accounts. That is the report which is of most importance, and which is subject to the objections before stated. (Cond. 9) Messrs Jopp & Shand were the law-agents of the trust, and Mr Alexander Jopp, one of the partners of the firm, was one of the trustees. The terms of settlement to which the said Mary Leith or Walker and husband agreed were, as disclosed by the discharge and assignation, suggested by the said Jopp & Shand. The said discharge and assigna-

tion bears that the legacies, or balance of the legacies, were paid by Messrs Jopp & Shand, and that it was at their request that the said Mary Leith or Walker and husband assigned all their interests in the said estate to the said Alexander Abercrombie. . . . The said Mary Leith or Walker and John Walker were not represented by any law-agent; at any rate they were not represented by a neutral agent. Mr Lachlan M'Kinnon, who is alleged to have acted for them, acted for a great number of other parties who were simply legatees, and whose interest conflicted with that of the pursuers' father and mother, as there was no difficulty in obtaining payment of the capital sums of these legacies if the pursuers' father and mother agreed to waive their claim for a share of the residue. Mr John Duncan, advocate, Aberdeen, who is stated to have acted for other beneficiaries, acted for legatees solely. If Mr M'Kinnon acted for the pursuers' father and mother, he acted on instructions given by the Rev. Harry Leith, who was a nephew of the testator, and who in terms of his settlement obtained in entail the estate of Balcairn. He had no interest in getting the reports altered, as under them he was relieved of the claims which the tenants on his estate alleged they had for meliorations. They did not understand the meaning of the discharge and assignation, and the signature of Mrs Walker was adhibited notarially. The said discharge and assignation was impetrated from them by fraud, and granted by them on misrepresentations and under essential error. It was entered into by them on the footing that it applied only to the legacy, and they were not at its date aware that they were interested in the residue, or that there was or could be any residue. The position of the estate was not explained to them, and the accounts of the trust were not submitted to them for consideration. They were kept entirely in ignorance of their rights, and of the true position of the estate. . . . The transaction alleged to have been entered into by the said discharge and assignation was a purchase by a trustee, and the law-agents of the trustees, of the estate under their charge, which was null and void. Further, the pretended purchase or acquisition was for a grossly inadequate consideration. It is believed and averred that the said Jopp & Shand realised a sum largely in excess of the sums they are alleged to have paid to the beneficiaries out of the estate assigned to them."

In their statement of facts the defenders stated —"No concealment of any kind was practised in regard to the position of the assets, the liabilities of the trust-estate, or the accounts. On the contrary, the fullest information was in the best of good faith afforded to all the beneficiaries, and more particularly, to the Rev. Harry Leith, and Mr M'Kinnon and Mr Morton, as representing the female pursuer's mother and father, who, in point of fact, on their behalf carefully investigated and made themselves fully acquainted with the exact position of the trust-estate. In conducting the investigations and the negotiations for the compromise Mr M'Kinnon had the co-operation of Mr Duncan, Mr Morton, and Mr Hunter, all men of the highest character for integrity and ability, and all men of exceptionally great experience in matters of important business. They all concurred with him in considering the compromise fair, reasonable, and just as regards the beneficiaries. No influence or pressure on the part of the trustees, or of Jopp & Shand, or anyone else, was used to induce the beneficiaries or any of them to enter into the compromise transaction. On the contrary, Jopp & Shand, who under the arrangement were the responsible parties, had a firm impression at the time that the arrangement might not be an advantageous one for them, and shortly after May 1851, and down to the end of that year, they were not only willing, but desirous that the legatees and next-of-kin should free them from the alleged agreement, and elect to stand upon their legal rights. In point of fact, the pressure came all from the legatees and next-of-kin; and the trustees, and Jopp & Shand in the end, agreed to the compromise transaction only under the pressure of a threat of immediate legal proceedings on the part of the agents for Mr and Mrs Walker and the other beneficiaries if the transaction were not carried out. In their revised condescendence the pursuers have for the first time made a general allegation to the effect that Mr Lindsay's reports do not include the whole assets of the trust, and they have been called upon to specify the properties which (as they allege, and state that they are prepared to prove) belonged to the trust, but were unknown to Mr Lindsay. The pursuers' remaining objections bear reference to what is contained in Mr Lindsay's reports, and in particular—(1) To the value then placed on the assets, and specially on the unrealised assets; (2) to the payment of debts and business accounts for which the trustees were allowed credit; (3) to the sum at which the contingent claims against the estate are estimated. It was obvious to the legatees and next-of-kin and their legal advisers that the expediency of the proposed compromise depended upon these three factors, and they were bound to satisfy themselves, and did satisfy themselves, as to the figure at which each of them should be stated. The whole facts necessary in order to the formation of a sound judgment on these points were within their reach. As a justification for raising the present action after a lapse of thirty-four years the pursuers do not aver that they have discovered any new matter which ought to have been considered by the legatees and next-of-kin, but which was fraudulently concealed from them." They also stated that they had been put to the greatest disadvantage by the lapse of time since 1852, and consequent loss of evidence by reason of the death of nearly all the original parties to the deed.

The pursuers pleaded—"(1) The said discharge and assignation having been granted truly in favour of one of the trustees, it is null and void. (2) The said discharge and assignation having been granted truly in favour of the law-agents of the trust, it is null and void. (3) The said discharge and assignation having been impetrated by fraud, misrepresentation, and concealment, decree of reduction ought to be granted as craved. (4) *Separatim*, the said discharge and assignation having been granted under essential error, decree of reduction ought to be pronounced."

The defenders pleaded—"(1) The pursuers have no title to sue, at least none such as is libelled. (2) The averments of the pursuers are not relevant or sufficient to entitle them to have the discharge and assignation of 1852 set aside. (3) In

the circumstances the action is barred by *mora* and taciturnity, and by the actings of the pursuers. (5) The defenders are entitled to absolvitor, in respect that the pursuers' averments are unfounded in fact, and that the discharge and assignation in question was granted by Mr and Mrs Walker after complete information and investigation, in the full knowledge of their rights, and of the nature of the transaction, with legal assistance and advice, and for a full and sufficient consideration. (6) So far as the trustees and executors of Mr Lumsden are concerned with the transaction, they became parties to it at the request of the beneficiaries, including the female pursuer's father and mother, and she cannot challenge their acts."

The import of the proof fully appears in the Lord Ordinary's note and the opinions of the Judges.

The Lord Ordinary (LEE) pronounced this interlocutor:—"Finds that the discharge and assignation in question was not obtained by fraud, misrepresentation, or concealment, and that the same was not granted under essential error: Finds that it was the result of a transaction to which the pursuers' authors were parties, acting under the advice of an independent law-agent, duly authorised to act on their behalf, and from whom no information regarding the trust-accounts was withheld: Finds that in said transaction no advantage was taken by the deceased Alexander Jopp, or by his firm of Jopp & Shand, of information acquired in a fiduciary character; and finds, further, that the said transaction was acted on and confirmed by the pursuers' authors: Therefore assoilzies the defenders from the conclusions of the summons, and decerns: Finds the pursuers liable in the expense of process, &c.

"*Opinion.*— . . . . . Mr Alexander Jopp thus acquired from the body of trustees, of which he was one, with the consent of the legatees and next-of-kin, the whole remaining trust-property and assets, in consideration of the discharge under reduction and the payments therein recited. I think that such a transaction could not have been maintained in law, as against any person interested, who was not a party to it or did not directly confirm it. For it is a well-settled and deeply-seated principle in the law of Scotland that a party in a fiduciary character cannot be *auctor in rem suam*. A tutor cannot buy from his ward, or from himself as tutor; and a trustee whose duty it is to administer an estate for others cannot enter into any contract, accruing to his own benefit with the trust-estate. It is quite unnecessary to refer to authorities upon this point. The case of *The Aberdeen Railway Company* v. *Blaikie Brothers*, 1 Macq. 461, is but an illustration of a principle previously well known in the law of Scotland. But it is equally well settled that such a transaction is not absolutely void but only voidable. It may be taken out of the reach of challenge by the direct confirmation of the party interested to object to it, or by such homologation, or such acquiescence and lapse of time, as must be held equivalent to direct confirmation. This is illustrated by the case of *Fraser* v. *Hankey*, 9 D. 415, and is not, I think, questioned in the opinions of the Judges in *Thorburn* v *Martin*, 15 D. 845. Indeed it is expressly assumed to be law in the opinion of Lord Wood. In a recent case in the Second Division of the Court, it does not seem to have been doubted that even a conveyance by a client to his agent, for certain good causes and considerations, but without value given, might be put beyond the reach of challenge by confirmation.

"Now, in the present case the only persons interested to challenge the deed were parties to it, and took benefit under it. The pursuer has no title or interest to sue, excepting only that of executor of one of them, viz., the testator's niece Mrs Mary Leith or Walker and her husband Mr John Walker.

"The fact that Mr and Mrs Walker were parties to the transaction, and that the transaction was one by which an adequate consideration was obtained by them as beneficiaries under the trust, might not have been sufficient to exclude challenge at their instance. I think that, so long as matters were entire, they would have had an option to set aside the deed, at least in so far as in favour of Mr Jopp, unless it were made clear that all knowledge of the value of the property acquired by him was communicated to them. If, however, it does appear that the beneficiaries were dealt with at arm's-length, and that there was a full disclosure to their agent of everything known to the trustees in respect of the property, and that the beneficiaries with this knowledge not only became parties to the deed but acted on it, took the benefit of it, and allowed the trustees to act on it for a long period of years, and until it has become impossible to restore matters to the condition in which they were at the time of the transaction, then I think that the beneficiaries must be held to have confirmed the deed, and to have abandoned their option of setting it aside.

"There is no doubt serious difficulty in reconciling with principle the doctrine that a purchase by a trustee from himself of subjects which he holds in trust for others, and as to which the duty undertaken by him is that of realising them for the best advantage of the beneficiaries, may be validated by the beneficiaries' consent. It is very difficult to say that a transaction which was illegal in the sense of being against a general principle of jurisprudence cannot be questioned at any time by the person interested to challenge it. Beyond all question such challenge could not be excluded if the illegal character of the transaction was concealed, if the beneficiary had reason to believe that the purchase was by a third party, and was ignorant of the fact that that third party truly represented one of the trustees (which seems to have been the case in *Thorburn* v. *Martin*), or if the beneficiary was not represented by a separate agent having access to all necessary information. But, on the other hand, it is not less difficult to allow a party to set aside a transaction who has by his own conduct made it impossible to restore matters to their original position, and who cannot say that he has been unfairly dealt with. Perhaps it is a sufficient solution of these difficulties to say that the transaction may be maintained if the trustee can show that everything was done with full knowledge on the part of the beneficiary, and provided it be ascertained that there was no fraud, no concealment, and no advantage taken by the trustee of information acquired by him in that character.

"In the present case the deed under reduction contains so full a narrative of the circumstances in which it was granted, that unless there is error in that narrative, or fraud, the question whether the transaction can be maintained admits of being decided almost entirely upon the terms of the deed itself. A proof has been taken, the result of which, in my opinion, is to show that the recital of the deed was substantially correct, and that the pursuers' allegations of fraud, misrepresentation, and concealment are unfounded. The attempt to repudiate or discredit the actings of Mr M'Kinnon, as agent for the pursuers' father and mother, has entirely failed. The genuineness of the letters written by John Walker on behalf of his wife to Mr M'Kinnon as such agent has been placed beyond a doubt, notwithstanding the somewhat unscrupulous endeavour of the female pursuer to dispute her father's handwriting. Mr M'Kinnon's evidence shows that no information was withheld from him. The reports of Mr Donald Lindsay on the trustees' accounts were fully before him, and were fully discussed by him and the other agents interested, including Mr Charles Morton, W.S., and Mr Alexander Hunter, W.S., of the firm of Hunter, Blair, & Cowan, than whom no more highly qualified advisers could be named. No doubt Mr Lindsay's reports were founded upon information obtained from Messrs Jopp & Shand, as agents and cashiers of the trust. But this appears on the face of them; and the beneficiaries' agents were thus invited, or at least prompted, to look behind these, and to test for themselves the statements they contain, and particularly the accuracy of the values placed upon the outstanding assets. I think that there can be no doubt upon the proof that they did so inquire into the accuracy of these reports; and that Mr M'Kinnon satisfied himself that they might be relied on as substantially correct is clear from his own statement. But even if Mr M'Kinnon had neglected his duty as an agent, the defenders could not on that account be held responsible. He admits that everything was placed at his disposal which he required, and that he satisfied himself that the transaction was a good one for his clients, and one which therefore he insisted on being carried out when Jopp & Shand desired to withdraw from it on the discovery of some additional liabilities.

"The letters of the Reverend Harry Leith, the brother of Mary Leith or Walker, the pursuer's author, prove that he believed and asserted that he had authority to employ Mr M'Kinnon on behalf of his sisters; and John Walker's letters prove that he and his wife knew and assented to such employment, and consented beforehand to the transaction.

"But it is said that there was an essential error in the deed in so far as it proceeds on the narrative that there would be a probable deficiency of trust funds to meet the liabilities and pay the legacies. I think that it may be taken as the result of the proof (although the matter is left extremely vague and uncertain) that the assets of the trust turned out on the whole somewhat better than was expected, and that Mr Jopp in the end proved to be a gainer and not a loser by the transaction. But it is certainly not proved that the beneficiaries would have got more than they obtained under this arrangement if they had insisted on their rights, and had made it necessary that the trustees should keep up the trust until all the annuities came to an end, and all the assets, including the complicated claims of the truster upon the estate of Mr Forbes of Echt, and the estates of Duffus & Company, James Forbes & Company, and Forbes, Low & Company, had been adjusted and settled. They might have got more, but it cannot be said on the proof that there was no risk of there getting less. Even the capital of the legacies could not have been recovered without an expensive and troublesome litigation, the result of which must have been very doubtful.

"The case, therefore, as it appears to me upon the evidence, is not one of an unexpected surplus accruing in the hands of a trustee who, in order to facilitate a winding-up, and the payment of legacies, has agreed to buy the trust-estate. It would be very difficult to hold that a trustee could plead a discharge obtained in this way as entitling him to put in his own pocket, free from the obligations of the trust, an unexpected and unlooked-for asset of the trust, or one which by some unforeseen accident proved to be of large value, instead of being of no value at all. That is not the kind of case, however, which is presented here. The case here is one where some of the assets no doubt appear to have yielded more than was expected, but where others yielded less; where some of the claims against the estate have not yet been established, but where others have turned out heavier or of longer continuance than was calculated. The proof does not show distinctly on which side the balance will ultimately be.

"On the whole, I am of opinion that even as against the trustees of Mr Alexander Jopp, into whose hands the whole remaining trust-estates appear to have come, no right to set aside the transaction belonged to Mr or Mrs Walker at the time of their death. Mr Walker survived his wife Mary Leith, and died in 1872. His wife died in 1871, and after her death her children, including the pursuer Mrs Buckner, obtained payment of the capital sum of the legacy which she liferented, and the amount of which had been made up and settled in the way provided by the deed under reduction. But I am not prepared to say that the discharge which they granted for that sum precludes them from maintaining the present action, or involved any personal homologation by them of the transaction entered into by their parents. The question is, I think, whether John Walker, as in right *jure mariti* of any claim possessed by his wife Mary Leith, as one of Mr Lumsden's next-of-kin, was possessed at the time of his death of a right to set aside the transaction, or must be held to have confirmed it. This question I answer in the way already indicated.

"If I am right in holding that John Walker could not have set aside the transaction as against Mr Alexander Jopp, who was a trustee as well as one of the law-agents of the trust, it follows *a fortiori* that no such claim could have been maintained against the firm of Jopp & Shand, or against the other trustees, who were only concerned in the transaction as concurring with their co-trustee Mr Jopp."

The pursuers reclaimed, and argued—(1) A trustee could not put himself in such a position a

would make his individual interests conflict with his duty to the trust—*Aberdeen Railway Company* v. *Blaikie*, July 20, 1854, 1 Macq. 461. (2) A trustee could not make profit to himself out of trust-funds—Snell's Eq. 565; *Hamilton* v. *Wight*. March 2, 1842, 1 Bell's App. 574; *Vaughton* v. *Noble*, May 23, 1861, 30 Beavan 34; *York Building Company* v. *Mackenzie*, May 13, 1795, 3 Pat. App. 378. (3) The whole circumstances of the case were so peculiar as to taint it with suspicion of fraud. The proposal originally in point of fact came from Jopp & Shand. It was proved that when they made it they held £22,000 in hand, and only had to pay £12,000. The fact that Mr M'Kinnon represented the pursuer's authors did not preclude them from setting aside such an unconscionable transaction. M'Kinnon was in fact in error induced by Lindsay's report and by Jopp & Shand—*M'Pherson's Trustees* v. *Watt*, Dec. 3, 1877, 5 R. (H. of L.) 9, *per* Lord O'Hagan; *Logan's Trustees* v. *Reid*, June 13, 1885, 12 R. 1094, *per* Lord Craighill, p. 1100. (4) The plea of *mora* ought not to be sustained. The real reason of the long delay in bringing the action was that the female pursuer believed that until the death of her aunt, when she became next-of-kin of the deceased, she had no right to challenge the deed. The plea could only be sustained where the circumstances amounted to payment, satisfaction, or abandonment—*Seath* v. *Taylor*, Jan. 21, 1848, 10 D. 377; *Cuninghame* v. *Boswell*, May 29, 1868, 6 Macph. 890, *per* Lord Cowan, p. 895; *Mackenzie* v. *Catton's Trustees*, Dec. 14, 1879, 5 R. 313, *per* Lord Deas, 317; *C. B.* v. *A. B.*, March 5, 1855, 12 R. (H. of L.) 36. (5) There was no consideration given for this surrender of rights to the trustees—certainly none was given to the next-of-kin, who gave up everything for absolutely nothing.

The defenders replied—The rule of law regarding the disability of trustees to transact with the beneficiaries in relation to the trust-estate was quite settled. While a trustee ought not so to transact either by himself or by the firm of which he was a partner, yet if he did the transaction was not void, but merely voidable, and it was in the option of the beneficiaries to challenge it or to abstain from challenging it. Accordingly, if they ratified it expressly, or by inference from long delay to challenge it, they must be held to have exercised their option, and it remained valid. The consent of the beneficiaries could validate even a purchase by a trustee of the trust-estate from himself, and a transaction between trustees and beneficiaries with reference to the trust-estate, which was the case here, was *a fortiori* good. The case here was one in which the trustee had transacted with the consent of the beneficiaries themselves, or what was the same, with the beneficiaries themselves with reference to the trust-estate. The transaction was merely exposed to an element of suspicion, and as to which there was an *onus* on the trustees to prove its propriety—M'Laren on Wills, p. 352, sec. 2040; *Luff* v. *Lord*, December 2, 1864, 34 Beavan's Ch. Rep. 220, and 11 L.T. (N.S.) 695, *aff.* 1 White & Tudor 141; *Hankey, &c.* v. *Fraser and Others*, January 13, 1847, 9 D. 416; Lewin on Trusts, 487; *Coles* v. *Trecothick*, January 27, 1804, 9 Vesey 234, *per* Lord Eldon 246; *Morse* v. *Royal*, March 8, 1806, 12 Vesey 355, *per* Lord Erskine *approving* Lord Eldon's judgment in *Coles* v. *Trecothick* (p. 373). Lord O'Hagan's *dictum* in *Macpherson's Trustees* was *obiter*. This was the law irrespective of any question of *mora*, because really the question was not one of *mora* at all or debt sought to be extinguished by *mora* or taciturnity. It was rather, what circumstances coupled with delay and long silence would be held to show that the beneficiary had exercised his option of abstaining from challenging a voidable contract. The trustee must show that all was fair and above board, that there was no fraud and no concealment and no advantage taken by him of the information acquired by him in the character of trustee. The evidence established these points—(1) That it was a compromise of a threatened action of count and reckoning in which the beneficiaries, who had been put at arm's-length, complained of the trustee's mal-administration of the trust, and the case was just as if, after a remit to the Accountant of Court, counsel for the parties had by joint-minute, to which the Court had interposed authority, made the present settlement. (2) It was a compromise extorted from Mr Jopp, he being at all events at the end unwilling, by threat of an action of implement. That was one of the main features in *Luff's* case. (3) The beneficiaries had throughout the negotiations the benefit of full information and independent advice of the best description. (4) The settlement was, in the opinion of all concerned at the time, and in fact, fair and advantageous for the legatees.

At advising—

Lord Justice-Clerk—This case has caused very considerable anxiety to myself, and I believe to your Lordships also, from the rather unusual features which it presents. The action, into the details of which I have no intention of entering, is at the instance of the residuary legatees of Harry Leith Lumsden, a gentlemen who died in 1844, and whose settlement gave rise to the proceedings in question. The pursuers are the representatives of the next-of-kin of Mr Lumsden, who were entitled to a proportion of the residue of the estate. The defenders are the representatives of the trustees under that settlement. The settlement was a detailed and somewhat complex and involved instrument. In addition to the heritable estate it left a considerable amount of legacies to special legatees and the residue to the persons named, of whom, as I have said, the pursuers claim to be some of the representatives. This action is brought against the representatives of a trustee under the will—a Mr Jopp of Aberdeen—and the allegation is that in the years 1851 and 1852 he concluded an agreement with the beneficiaries under the settlement at that time by which on the one hand provision was made for the immediate payment of the legacies, and on the other hand the residuary legatees handed over and conveyed and assigned substantially the whole of their rights in the residue to the trustee himself. The pursuers say that that itself on the face of it was a breach of trust—that a trustee had no right to acquire the estate of the trust even by an agreement of that kind, and that although a long time has elapsed since the transaction took place, they are still entitled to challenge it. In point of fact they contend that the arrangement was

not one for the furtherance of the trust purposes, but that after all the trust purposes had been fully completed the trustee entered into this transaction and made money—made profit—by the conveyance of the residue.

The case thus made was, I must say, a sufficiently serious one. I have myself gone carefully over the proof and examined the agreement in question, and I am bound to say that upon the face of that agreement I think it raises the gravest possible question in regard to the duties and powers of trustees under such a settlement. As a general rule a trustee cannot acquire any part of the trust-estate for himself. It was argued, in the very powerful speech of the Dean of Faculty when the case was heard, that this agreement after all involved no more than what happens when a trustee is found to have made a bad investment and to be liable to replace it. In that case it is said he takes the security. But I think no cases can be more different than the two I have just mentioned. When a trustee is obliged to take over a security which he has improperly accepted on behalf of beneficiaries he restores to the estate what he improperly invested. But here apparently, without any consideration whatever so far as we can see on the face of the instrument—in return for the obligation to pay the legacies to the residuary legatees—the trustee takes over what is substantially the whole of the residue for himself. I must own that if the question had arisen soon after the transaction took place — had been challenged within a reasonable time—I should have thought that the recipient of the residue—the grantee in the agreement to which I have referred being himself the trustee of the beneficiaries who granted the deed—was at all events put upon his vindication. I do not go any further than that, but I think he would have been put upon his vindication. On the face of it I am of opinion that the agreement discloses a transaction that was beyond his power. I will not say that in all cases beneficiaries and trustees may not bargain with each other, provided it be clear beyond all doubt that it is with a view to the benefit of the beneficiaries and of the trust-estate. I think however that that requires to be shown by the trustee. I am further of opinion that the cases are very exceptional in which such bargaining would be allowed, and therefore although I am not prepared to lay down as an abstract proposition that in no case can a trustee interpose his own personal credit or become himself the acquirer or purchaser of the trust-estate. I would put it that in the case where he does so it is rather a case which requires vindication.

Now, that substantially is the view that I am inclined to take. I form that view on the aspect of the transaction itself. It is a very singular transaction. It may have an explanation, but I must say the explanation does not appear on the face of it. It is said that the legatees had become clamorous for their legacies, and that the estate took a long time to wind up, and that there was no ready-money to pay the legacies for which the legatees had become clamorous, and that therefore it was desirable that there should be some settlement come to by which payment could be made of the sums due to the legatees whatever might otherwise become of or be produced by the residue. That may be the nature of the case, but it is very insufficiently shown in the proof. The legatees were impatient because seven years had elapsed since the death of the testator, and it seems to me that they were not unnaturally anxious for the payment of their money. There were questions also in regard to the personal liability of the trustee, and I daresay it was not unreasonable that they should have entertained doubts on the information they had or the representations made to them regarding the financial stability of that gentleman. That might have given an aspect to the whole arrangement very far from favourable to the trustee, but upon that I do not think it is necessary to elaborate. I have made these remarks because I should be sorry to be understood to say that it was a light or trivial matter to make an arrangement of this kind. On the contrary, as I have already said, I think it calls for vindication. As far as the proof has gone I am not satisfied that any vindication has been established, but then what of that when we come to consider the lapse of time? Five-and-thirty years have elapsed since all this was done. The parties entered into the arrangement with full information and with full advice. They acted under the advice of a very able man of business. They were all of them consulted and they all agreed to it. Therefore, while I say that the apparent aspect of the arrangement does require vindication, I do not on the other hand think there is any vindication for the parties having lain bye for thirty five years and allowed all the information that might have been available to be lost. Most of the parties are now dead, and no explanation can now be given by them upon a great many vital and important questions. It might have been otherwise but for that long delay. I will not say that five and thirty years would necessarily bar an action of this kind, but seeing that the whole question depends on the nature and legality of the transaction itself, I am not in the meantime to pass any judgment in regard to the length of time which might bar any such action. These are the general views I entertain of the case, and they are sufficient in my opinion to lead me to affirm the judgment of the Lord Ordinary.

Lord Young—I concur in the result, and generally in the grounds which your Lordship has stated for reaching that result.

The deed sought to be set aside is a deed of discharge and assignation, dated so long ago as the year 1852. It was acted upon at the time and stood unchallenged until the year 1886—thirty-four years after its date, and long after it had been fully acted upon. Of course if that deed was subject to a legal objection the mere lapse of time would not bar the reduction of it. By being subject to a legal objection, I mean that had it been invalid *ab initio* it might be challenged within the period of the long prescription, and upon certain grounds even after that. But here it is not challenged upon any ground of that kind. It is of this nature, although it is a discharge and assignation. It is really a transaction between testamentary trustees and beneficiaries who were dissatisfied with the conduct of those testamentary trustees. That was the nature of the trans-

action. The beneficiaries or legatees had only got one payment of one-half of their legacies. The testator died in 1840 or 1841, and in 1852 the legatees had only got payment of one-half of the capital of their legacies, and the residuary legatees had got nothing at all. They were not unnaturally dissatisfied, therefore, with the conduct of the testamentary trustees, and they therefore assailed that conduct. It is pretty hard, I must own, to understand how it came about that what was understood to be considerable estate had been so managed that only a half of the capital of the legacies was paid ten years after the testator's death. However, that collision between the dissatisfied beneficiaries and the trustees led to an arrangement. On both sides the parties were represented by men of business. The trustees themselves were men of of business, that is to say, Mr Jopp was a member of a firm of law agents in Aberdeen—Messrs Shand & Jopp. The dissatisfied beneficiaries had the advice and assistance of Mr Mackinnon, a most respectable man of business. Well, the beneficiaries being dissatisfied with the trustees and demanding what the trustees said they could not give, but what the beneficiaries thought they were entitled to, the position really amounted to this, that they must either come to a settlement or fight the matter out in a court of law. It is generally the more prudent course to come to a settlement, and I should not say that there was *prima facie* anything wrong in a settlement between dissatisfied beneficiaries and trustees who were declaring their inability to give what the beneficiaries were demanding. If any fraud was practised on the one side or the other, and if that fraud was detected after the lapse of thirty-five or even forty years, I think the transaction might be set aside; but it could not at the time, any more than it could now, have been set aside merely because it was an amicable arrangement between dissatisfied beneficiaries and trustees. Well, as I have said, the only alternative was to go into court and fight the matter out, if it was not possible to come to a settlement. Indeed, this very case affords an illustration of the remark I have made, because, after they had come to terms, with the assistance of men of business on both sides, something occurred which induced the trustees to draw back from the arrangement which they had made. They said—"We have ascertained facts that make this a most imprudent arrangement for us to make, and we wish to be off, as we have still *locus penitentiæ*." The answer to that was—"No, no, we hold you bound, and unless you implement your engagement to settle, we will bring you into court." The trustees said—"Rather than that, we will go on and carry out the arrangement, and you can have your settlement." Now, suppose that that had been the point, that the trustees had declined to enter into the arrangement and gone into court, and that the beneficiaries had enforced the settlement —they being *sui juris*—and that they had got judgment, such judgment could not have been set aside unless it was proved that there was fraud in the case. But they did not require the authority of the court in any such matter as that. They were entitled to enter into an arrangement which they thought was obviously for the benefit of the beneficiaries.

The feature which gives interest and difficulty to this case is that which your Lordship has noticed, namely, that the settlement involved the purchase and acquisition of the trust-estate by these trustees. Now, the acquisition by trustees of a trust-estate under their control has always been regarded by the Court with the greatest jealousy, and if it appears that the trustees have made a profit out of it, it will not be difficult as a general rule for the beneficiary coming timeously into Court to have it set aside; although even if such challenge is timeously made the trustee would according to law, as I understand it, be able to uphold an arrangement with the beneficiaries upon satisfying the Court that they had been quite fairly dealt with and had full information in regard to everything; and the case would be all the stronger if besides having full information the beneficiaries, being *sui juris*, desired the bargain which was made betwixt them and the trustees, the trustees taking no advantage of the position of the beneficiaries. That is all that the Court requires, and the burden of showing that would be on the trustees, in order to uphold such a transaction betwixt them and beneficiaries *sui juris*. I quite agree that at the time if the beneficiaries could have come forward and said—"Well, we were misled into it; we did not understand the case as the trustees did. They had knowledge and we had not, and the result is that they are making a large sum of money, or a considerable sum of money, at our expense." In that ease I think—not upon mere rules of ordinary law, but upon equitable considerations, which are indeed a part of our ordinary common law, and administered as such—we would or might have given relief. But when the beneficiaries *sui juris*, who made the arrangement and threatened reluctant trustees with an action to enforce it if they would not sign the deed giving complete effect to the arrangement—I say when these beneficiaries take implement of the agreement and stand by it for 35 years—I should require a very special case to be stated indeed in order to induce me even to inquire into the transaction. But I agree with your Lordship that such a case is not proved here.

I desire to add that in my opinion, after the best consideration I have been able to give to the case, such a case as I have figured in these last sentences is not stated in this record. Therefore after carefully reading and considering the case, I should have been satisfied with a judgment assoilzieing the defenders from the conclusions of the action upon the ground that no relevant grounds for reduction of this deed have been stated; for I think that after five-and-thirty years it is too late to appeal to those equitable considerations which induce the Court to make minute inquiry as to the whole circumstances of a transaction between trustees and beneficiaries. There is equity and manifest good sense in that view. The original parties are all dead, and what the present defenders are called upon to do is to defend as quite fair the action of people who have been dead for many long years, by showing that they acted fairly, and communicated to all parties all that they knew themselves. I think that it is quite clear that that was done. I therefore repeat that I agree in the result, and generally in the grounds for the result, which your Lordship has stated.

Lord Craighill—I also think that the defenders are entitled to be assoilzied. My reasons for this opinion are those which have been explained by Lord Young. With him I doubt whether there is a relevant case set forth in the record. I doubt, moreover, whether if this action had been brought long before the present time, so far as anything appears in the record, judgment must not necessarily have been given in favour of the defenders. But it is an overwhelming consideration that the action has not been raised till the lapse of five-and-thirty years after the arrangement between the parties was concluded by the agreement which has been challenged. If such an action had been timeously raised it would necessarily have involved minute inquiry, and now that such a delay has taken place it is impossible to get the information which would then have been available. On the whole matter it is not possible, in my opinion, that the reasons of reduction urged in this case can be sustained.

Lord Rutherfurd Clark concurred.

The Court adhered.

Counsel for Reclaimers—Rhind—A. S. D. Thomson. Agent—William Officer, S.S.C.

Counsel for Respondents—D.-F. Mackintosh—Graham Murray—W. Campbell. Agents—H. B. & F. J. Dewar, W.S.

Tuesday, July 12.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

GLASGOW PROVIDENT INVESTMENT SOCIETY *v.* WESTMINSTER FIRE INSURANCE COMPANY.

Fire Insurance—Rights of Preferable and Postponed Bondholders to Recover in respect of Damage by Fire to Security-Subjects.

Held, by a majority of the whole Court, that a postponed bondholder is entitled under a policy of insurance effected in his name, and that of his debtor in reversion, over the security-subjects, to recover indemnity in respect of fire damage to the subjects, although a prior bondholder similarly insured has in respect of the same fire already recovered, under the policy effected by him over the same subjects, a sum sufficient to reinstate the premises, but which he has not in fact applied towards reinstating the premises.

A policy of insurance over premises consisting of a grain mill, store, and machinery, burdened with first and second bonds, bore that the "G." Investment Society (who were in fact the second bondholders, though the policy did not so bear) and W. H. (the owner of the premises), "jointly and severally in reversion, hereinafter called the Insured," having paid the insurance company "for the insurance of houses and other buildings, rents, goods, and other property from loss or damage by fire, the sum of . . . for insuring against loss or damage by fire, . . . the property described in the margin hereof," the Company "agrees . . . that if the said property or any part thereof shall be destroyed or damaged by fire," the Company should make good the loss to a specified extent. The property described in the margin consisted of fourteen buildings, &c., set forth by detailed description, the sum applicable to each being placed opposite it. A fire took place which did considerable damage to the insured property. The first bondholders, who were secured under other policies with different offices, raised action against their insurers, and recovered under their policies a sum sufficient to reinstate the damaged property, but the money was not applied to reinstatement. Thereafter the postponed bondholders raised action against their insurers, under their policy, for recovery of indemnity in respect of the same fire damage. *Held*, by a majority of the whole Court (*diss.* Lords Mure, Young, Rutherfurd Clark, and Trayner), that the postponed bondholders were entitled so to recover, but (*per* the Lord President, Lords Shand, Adam, Lee, and Kinnear) that having recovered, the postponed bondholders must give the insurers the benefit for their relief of such portion of their claim against the debtors as might have been satisfied by payment of the indemnity.

Opinions (*per* the Lord President, Lords Shand, Adam, Lee, and Kinnear) (1) that it is not a sound doctrine of insurance law that all the insured persons or interests can never recover more in the aggregate from all the insurers than the amount of the damage by fire; and (2) that although the sum of the values of the separate interests in the subjects insured cannot exceed the entire value of the subject, there may nevertheless be cases where different persons having different interests may each insure for the full value of the property, and where, if the property is destroyed by fire, each may recover upon his own policy to the full extent of his insurance.

Opinions (*per* the same Judges) that the right of the insured creditor to recover under his policy depends upon his interest at the time of the loss by the fire, and not upon the chance of his being ultimately satisfied by the operation of collateral contracts with third persons.

Messrs Hay Brothers, proprietors of the Greenhead Grain Mills, situated at 95 and 123 James Street, Bridgeton, Glasgow, consisting of a site with grain-mills built thereon and machinery in the mills, borrowed certain sums of money from (1) The Scottish Amicable Heritable Securities Association (Limited), (2) James Alexander Robertson, (3) The Glasgow Provident Investment Society, and (4) Thomas Wiseman & Company, and in security for the sums they granted bonds and dispositions in security over the mills, &c., which bonds were of priority and preference according to the foregoing order. In order to insure the premises against fire the bondholders, in conjunction with the Messrs Hay, took out the following policies—(1) The Scottish Amicable Heritable Securities Association, as heritable