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

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

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

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

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

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

The Court adhered.

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

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

Thursday, February 28.

FIRST DIVISION.

[Lord Pearson, Ordinary.

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

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

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

by a trustee in bankruptcy, and that it was incompetent to proceed to value the expectancy of the heir whose consent required to be obtained or dispensed with unless and until intimation had been made to him three months after the date of presenting the petition.

In 1894 the estates of the Master of Napier were sequestrated, and Robert Cockburn Millar, C.A., was appointed trustee. In 1898, on the death of his father Lord Napier and Ettrick, the Master of Napier succeeded to the title and to the entailed estates of Thirlestane and others, under a deed of entail dated in 1719.

On 13th March 1899 Mr Millar presented a petition for the disentail of the estates of Thirlestane and others, under section 18 of the Entail Act 1882.

The petition set forth, *inter alia*, that the said Lord Napier and Ettrick was born on 22nd September 1846, and would be entitled to disentail the said estates with consent of the Honourable Francis Edward Basil Napier, now commonly called the Master of Napier, his eldest son and heir-apparent, who was of full age and not subject to any legal incapacity, and was born on 19th November 1876; and that the two next heirs of entail who were entitled to succeed to the said entailed estates in their order successively after the said Lord Napier and Ettrick and the said Master of Napier, the heir-apparent, were the Honourable Frederick William Scott Napier, the second son and only other child of the said Lord Napier and Ettrick, who resided at Thirlestane Castle, Selkirk; and the Honourable John Scott Napier (Lord Napier's brother).

On 14th March 1899 the Lord Ordinary (PEARSON) pronounced an order for intimation, advertisement, and service, and the petition was duly served upon Lord Napier and upon the three next heirs, namely, his two sons and his brother.

After the date upon which the petition was presented the said Honourable Francis Edward Basil Napier, Master of Napier, married, and had a son, who was born on 9th September 1900, and who took the place of the said Honourable Frederick William Scott Napier as heir second entitled to succeed to said entailed estates.

On 7th April 1899 the Lord Ordinary pronounced the following interlocutor:—"Appoints the respondent William John George Lord Napier and Ettrick to produce in process a schedule signed by him and deponed to by him as correct in terms of the Act 38 and 39 Vict. cap. 61, section 12, with regard to entailer's debts or other debts and provisions affecting or that may be made to affect the fee of the entailed estates of Thirlestane and others mentioned in the petition, or the heirs of entail that are not secured by having been placed on the record: Further, remits to Mr Charles Cook, W.S., Edinburgh, to inquire into the facts and circumstances set forth in the petition, and whether the procedure has been regular and proper and in conformity with the provisions of the Entail Acts and relative Acts of Sederunt, and to report: Remits also to Mr David Deuchar, actuary, 19 George Street, Edinburgh, to value in money the expectancy or interest in the said entailed estates of the Honourable Francis Edward Basil Napier, commonly called the Master of Napier, and to report."

On 24th April 1899 the Lord Ordinary remitted to Mr James Inglis Davidson, land valuator, to value the estate of Thirlestane, and to report.

Various other interlocutors, which it is unnecessary to detail, were also pronounced, but no intimation was ordered to be made to the heir whose consent required to be obtained or dispensed with, except in the first order for intimation and service.

On the presentation by Mr Cook, W.S., of an interim report, under the remit made to him by the interlocutor of 7th April 1899, an objection to the competency of the proceedings was stated on behalf of the heir-apparent, and concurred in by the *curator ad litem* for his infant son, in respect that no intimation three months after the date of the petition had been made to the heir whose consent required to be obtained or dispensed with.

The Entail (Scotland) Act 1882 (45 and 46 Vict. c. 53) enacts as follows:—"Section 18—Where any heir of entail in possession is entitled to disentail the estate with the consent of any other heir or heirs, or upon such consent being dispensed with by the Court, any creditor of such heir in possession, in respect of debts incurred after the passing of this Act, who has obtained decree against him for payment and charged upon the decree, shall in the event of the debt so incurred not being paid for six months after the expiration of the charge be entitled to apply to the Court, and the Court shall, if the said debt is not paid within three months after the date of the application, order intimation to be made to the heirs whose consents would be required or must be dispensed with by the Court in an application for disentail by the heir in possession, and in the event of any of the said heirs, or his curator *ad litem* appointed in terms of this Act, refusing to give his consent, the Court shall ascertain the value in money of the expectancy or interest in the entailed estate of such heir. . . .

"If the estates of such heir of entail in possession of an entailed estate shall be sequestrated for debt incurred after the passing of this Act, the trustee on his sequestrated estates shall be entitled to apply to the Court for authority to disentail the estate, and the Court shall forthwith proceed in the same manner as is directed in this section with regard to the application of a creditor."

On 7th February 1901 the Lord Ordinary pronounced an interlocutor whereby he found, *inter alia*, that "no further intimation of the proceedings requires to be made at this stage."

Opinion—"The estates of Lord Napier and Ettrick (who was at the time the Master of Napier) were sequestrated under the Bank-

ruptcy Acts on 7th December 1894. Upon the death of his father on 19th December 1898 he succeeded to the entailed estate of Thirlestane as heir of entail in possession.

"On 13th March 1899 the trustee in the sequestration presented this petition for disentail of the Thirlestane estate, in virtue of section 18 of the Entail Act of 1882, which enacts among other things that if the estates of an heir of entail in possession shall be sequestrated for debt incurred after the passing of the Act (which is the case here), 'the trustee on his sequestrated estates shall be entitled to apply to the Court for authority to disentail the estate, and the Court shall forthwith proceed in the same manner as is directed in this section with regard to the application of a creditor.'

"The petition was duly advertised and intimated, and it was served upon Lord Napier and upon the three next heirs—namely, his two sons and his brother. Since then his eldest son, the Master of Napier, who is heir-apparent under the entail, and whose consent alone would have been necessary to a disentail, has had a son born to him, and a curator *ad litem* has been appointed to the infant heir.

"The case now comes up on an interim report by Mr Cook, W.S., as to the security which is to be given for the value of the expectancy of the heir-apparent. But a preliminary objection has been stated for the heir-apparent and his infant son, which must first be considered.

"Their contention is that a petition by the trustee in a sequestration, presented under the provisions of the 18th section, which I have quoted, is to proceed in all respects in the same manner as a petition by a creditor under the prior part of that section; that upon the presentation of such a petition there must in all cases be a delay of three months before intimation is given to the heirs whose consent must be obtained or dispensed with; and that no such period having been allowed to elapse, the intimations already made do not suffice, and must be made over again. They refer to the case of *Baird* (18 R. 1184), as showing that in such cases the statutory procedure must be rigorously carried out.

"The conditions which enable a creditor to disentail are (1) that he has obtained decree for his debt and has charged upon the decree; and (2) that the debt shall not have been paid for six months after the expiry of the charge. He may then present his petition, 'and the Court shall, if the said debt is not paid within three months after the date of the application, order intimation to be made to the heirs whose consent must be given or dispensed with,' and if any such heir refuses to consent, the value of his expectancy is to be ascertained.

"This, it is said, contemplates such a petition lying dormant after its presentation until after the lapse of three months, when (if the debt has not then been paid) the usual service will be made upon the next heirs. The statute does not say that the usual first order (for intimation, advertisement, and service) shall not be made in ordinary course at once; and as the heirs whose consent is required are always the three next heirs, or some of them, service upon these heirs in ordinary course would amount to intimation of the petition to them. But whether such order is pronounced or not, it is contended that when the three months have expired without payment, 'intimation' must thereafter be made to the heirs whose consent requires to be dealt with. I suppose that where a creditor petitions, it was thought proper that all interested should have an opportunity of procuring payment of the debt charged for, so as to obviate the drastic remedy of disentail. Certainly it would be right that the heir in possession whose debt it is should have the earliest intimation of the petition. But the next heir may also have an interest in seeing the debt paid; and yet the statute does not in terms provide for any intimation to him until after the lapse of three months from the presentation of the petition. Probably in such a case the usual first order would be pronounced as matter of course, including an order for service upon the next heirs; and then, after the lapse of three months without payment, a special intimation would be made, in terms of the words I have quoted, to those heirs only whose consents are required to be dealt with, certiorating them that if they did not consent the Court was now to proceed to value their expectancy. At all events, in the case of a single creditor petitioning, the statute provides for a delay of nine months from the expiry of the charge before the present stage is reached; and I assume that the object is to enable anyone whom it may concern to pay off the debt.

"Now, in the case of a trustee in bankruptcy petitioning, the statute requires that 'the Court shall forthwith proceed in the same manner as is directed in this section with regard to the application of a creditor.' *Prima facie*, I think this is a direction to proceed without any delay, and in particular without the delay of three months after the petition is in Court. The lapse of six months after the expiry of the charge in the other case has no counterpart in the case of a trustee petitioning; and when the petition is presented the Court is to proceed 'forthwith.' It appears to me that the construction contended for by the respondents takes all significance out of that important word. Moreover, while the Court is to proceed 'in the same manner' as is directed in the other part of the section, I doubt if these words are appropriate to include the condition, 'if the said debt is not paid within three months after the date of the application.' I therefore hold that no further intimation is required." . . .

The respondents, the Master of Napier and the Honourable Frederick William Scott Napier, reclaimed, and argued that the procedure laid down in section 18 as applicable to the case of an application for disentail by a single creditor was by the terms of the last clause of that section also applicable in the case of a petition by a

trustee in bankruptcy. It was therefore necessary that the first step in the procedure, after an order for intimation and service, should be an order for intimation to the heirs whose consents must be given or dispensed with, and that order could not be pronounced until three months after the presentation of the petition. That delay was given to the bankrupt or to the next heirs to give them an opportunity of paying the debts and averting the disentail. Here the Lord Ordinary had proceeded without giving such intimation, and his interlocutor must therefore be recalled.

For the petitioner it was argued that the provision as to intimation three months after the date of the petition to the heirs whose consents must be given or dispensed with was only applicable to the case of a petition by a single creditor.

LORD PRESIDENT—This question arises under section 18 of the Entail Act 1882, which provides that where an application for disentail is presented at the instance of the trustee in the sequestration of an heir of entail in possession "the Court shall forthwith proceed in the same manner as is directed in this section with regard to the application of a creditor." The question is, whether the word "forthwith" requires the Court to proceed with the application without taking cognisance of the provision in the earlier part of the section to the effect that in an application at the instance of a creditor "the Court shall, if the said debt is not paid within three months after the date of the application, order intimation to be made to the heirs whose consents would be required or must be dispensed with by the Court in an application for disentail by the heir in possession." It is contended that the delay of three months to afford an opportunity of paying the debt is only a condition of the disentail, not a matter of procedure, and that therefore the order for intimation to the heirs mentioned may be made at once. It is true in one sense that delay is a condition, but in many cases with which we are familiar certain periods of time are allowed for certain steps of process, *e.g.*, reclaiming, and in such cases it appears to me regulations as to time are matters of procedure. I therefore think that unless it can be shown that this condition is in some way inapplicable to the case of a trustee in bankruptcy, the direction to proceed forthwith must mean to proceed at once to carry out the procedure specified in the earlier part of the section, including the provision as to the three months. The difference between the two parts of section 18 is that the first part relates to the case where the estates of the heir have not been sequestrated. In that case, where the application is at the instance of a single creditor it cannot be made until six months after the heir has been charged upon a decree. That provision is inapplicable to a case like the present, where the heir is sequestrated, because sequestration is a congeries of all requisite diligences. But all that follows in the section seems applicable to the case of a trustee in sequestration, and if we were considering, not the language of the statute, but the reason of the thing, it is difficult to see why the delay of three months should not be given in the one case as much as in the other. Many things might happen to improve the heir's position within the three months; he might, for instance, succeed to money, and I think the delay of three months is quite consistent with the direction to proceed forthwith.

It therefore appears to me that the Lord Ordinary has erred in this matter, and that as the expiry of three months is a condition precedent to the intimation and the further procedure, the interlocutors pronounced by his Lordship other than the first should be recalled.

LORD ADAM—I am of the same opinion. It appears to me on reading this section (18) that the intention of the Legislature was to place a petition for disentail at the instance of a trustee in sequestration in the same position as a petition at the instance of a single creditor. The last clause of the section provides that where the estates of an heir of entail are sequestrated the trustee shall be entitled to apply to the Court for authority to disentail. The preceding part of the section enacts, in the case of an application by a single creditor, that he shall "be entitled to apply to the Court, and the Court shall, if the said debt is not paid within three months after the date of the application, order intimation to be made to the heir whose consent would be required." It would seem that the same procedure must be followed in the case of an application by a trustee in sequestration, because the closing words of the section are, "And the Court shall forthwith proceed in the same manner as is directed in this section with regard to the application of a creditor." Now, if an application by a creditor were presented, I think the proper procedure would be that the judge forthwith should apply his mind to the case, and should order intimation, not merely intimation to the next heirs, but intimation on the walls and in the minute-book, with advertisement to all who might be concerned, in order that all parties interested might be made aware of the petition. That is the first step in procedure, and after that the Court would consider what was next to be done, and would find that no further procedure was to be taken for three months, and then that an order should be made for intimation to the heir whose consent to a disentail would be required. That is not an ordinary order for intimation; it is a particular intimation to particular persons. It does not seem clear why the same procedure should not be followed in the case of an application by a trustee in sequestration, since the statute says that the same procedure shall be followed. If that is so, it appears that all procedure in this case subsequent to the first order for intimation must be held to be bad. These proceedings it must be remembered are statutory, and must be strictly observed. It is not a sufficient reason to

say that the next heirs should have appeared and insisted on the three months' delay. Parties in these cases are entitled to rely on the Court seeing that all the statutory requisites are carried out, and it has never been our practice that they should be bound to appear. On these grounds I think there is no alternative but to recal all the interlocutors after that of 14th March 1899, and as the three months have now expired to remit to the Lord Ordinary to proceed with intimation to the next heir.

LORD M'LAREN—In this case we are in a different position from the Lord Ordinary, because the Lord Ordinary had no power to recal interlocutors already pronounced even if he had come to think the orders were incompetent or premature. I am of the same opinion as your Lordships. The fallacy of the Lord Ordinary's opinion appears to be in attributing too much importance to the use of the word "forthwith" in section 18 of the Act of 1882. If in one clause of a statute the judge is directed to do something, and in another clause to do something else "forthwith," the duty of the judge in the two cases as regards the despatch of the business in hand would be the same. In either case his duty is to carry out the procedure described with as little delay as possible. If in this view it be necessary to find a reason for the use of the word "forthwith," such a reason appears from the consideration that in the case of a single creditor he is not authorised to apply to the Court until six months after a charge has expired, while a trustee in a sequestration may present his application immediately on his appointment. At the same time it is not in my view necessary to sist a petition under section 18 for the three months for all purposes. Many things might be done in this interval. Curators might be appointed, the claims of creditors claiming a preference dealt with, and other cognate incidental matters followed out; but nothing must be done within the time limit which could affect the rights of expectant heirs. Here there has been a remit to a lawyer and a remit to an actuary before the elapse of three months, and therefore before the expectant heir was in a position to come forward and state objections. I am therefore of opinion that all interlocutors already pronounced, except such as are merely incidental, ought to be recalled *hoc statu*, and the case remitted to the Lord Ordinary to take the proper steps of procedure afresh.

LORD KINNEAR—I agree with your Lordship in the chair and Lord Adam. It appears to me that no procedure can be validly taken under the 18th section until the heir whose consent is to be dispensed with has received the special intimation provided by that section, and that that special intimation cannot be given until after the lapse of three months from the date of the application. It follows that the procedure in this case is ineffectual, and therefore that the interlocutors mentioned by your Lordships must be recalled and the procedure carried out anew. It is clear enough that the special intimation in question does not dispense with the usual notice to all persons interested by intimation or service when the application is brought into Court, and the usual interlocutors may therefore be perfectly good for their own purpose.

The Court pronounced this interlocutor:—

"The Lords having considered the reclaiming-note for The Honourable Francis Edward Basil Napier and The Honourable Frederick William Scott Napier against the interlocutor of Lord Pearson dated 7th February 1901, and heard counsel for the parties, Recal said interlocutor and the other interlocutors in the case subsequent to 14th March 1899, and remit to the Lord Ordinary to order intimation of the proceedings to be made in terms of section 18 of the Entail (Scotland) Act 1882, in the same manner as in a petition by a creditor under that section; and decern: Find the reclaimers entitled to expenses," &c.

Counsel for the Petitioner—Dundas, K.C. — Cullen. Agents — J. A. Campbell & Lamond, C.S.

Counsel for the Respondents—A. O. M. Mackenzie. Agents—E. A. & F. Hunter & Company, W.S.

Thursday, February 28.

FIRST DIVISION.

MONTGOMERIE-FLEMING'S TRUSTEES.

Succession — Liferent and Fee — Annual Income—Duplications of Feu-Duties.

A truster directed his trustees to hold and apply the whole residue and reversion of his estate and effects, heritable and moveable, real and personal, *inter alia*, for behoof of his widow in liferent. Practically the whole of the estate consisted of land in or near Glasgow, on which a large number of building feus had been given out at different dates since 1830. From the lands there fell due duplications of feu-duty payable by the feuars every nineteenth year from the date of their respective entries. From these duplications the estate derived an annual revenue of varying amount. In a special case presented by the truster's widow and children, *held* (distinguishing *Ewing* v. *Ewing*, March 20, 1872, 10 Macph. 678) that the widow was entitled to such of these duplications as might fall due each year, as part of her liferent.

This was a special case presented by (1) Robert Jameson and others, trustees under the trust-disposition of the late James Brown Montgomerie-Fleming of Kelvin-