LORD MONCREIFF — The only share in question is the share which was liferented by a daughter of the testator, Henrietta M'Dougal, afterwards Mrs Hosack, who died in 1901. Now the direction with regard to the shares of the daughters in the original will was this—The trustees were to divide the residue of the testator's estate into six equal parts, each of his daughters receiving one-sixth, of which, however, they were only to have a liferent; and on their deaths, if their husbands had predeceased them, the trustees were to pay the interest of each daughter's share to her children equally until they respectively attained majority.

Mrs Hosack died without issue. The provision of the original will applicable generally to the shares of predeceasing children was this—"In case of the death of any of my said children before me or before the first term of Whitsunday or Martinmas after my youngest child shall have attained majority (which is hereby declared to be the term of vesting of their provisions under this settlement) without leaving issue, then the share of such predeceaser shall go to increase the shares of the surviving children." Therefore, according to the original settlement, the period of vesting was the time when the youngest child of the testator attained majority. The settlement goes on to deal more particularly with the case of daughters dying after that period without issue, and the provision for that event is to this effect—"And in the event of any of my daughters dying after the date of the period of division aforesaid" (that is the period of vesting) "without leaving issue, then the share of the daughters so deceasing shall go to increase the shares of my surviving children." No mention is made in the meantime of children of those who predeceased the period of vesting and division.

Now, the codicil makes two alterations on the will—(1) At the time when the codicil was executed the testator's children had all attained majority, and in view of that fact the testator declared that the period of his own death should be the period of vesting instead of the attainment of majority of his youngest child. (2) Then it is provided that in case of the death of any of the testator's other children before that period of vesting without leaving issue, "then the share of such predeceaser shall go to increase the share of my other children and the issue of children deceased, which latter shall be entitled to the share which would have gone to or been liferented by their parent; and in case of either of my two surviving daughters dying after me without leaving children, the share liferented by such daughter shall go to increase not only the share of my remaining children but the shares falling to the children of any of them who have died leaving children." The codicil then declares that the fee of shares destined to children of the testator's daughters shall not vest in such children until they respectively attain majority.

The question is this, when the testator talks of children remaining or surviving, to what period does he refer? After the best consideration I can give to the case, my opinion is that he is speaking of the period of vesting which he expressly specifies in both deeds; in the first deed as being the attainment of majority by his youngest child; in the second deed as being his own death. And when he speaks of children remaining he means surviving himself. Now, as regards a share liferented by a daughter who survived him, the testator, any right to such share which vested in the other children was subject to defeasance if the daughter left issue who attained majority. But the testator's daughter Mrs Hosack died without issue; therefore, in my opinion, right to a share of the fee of her share became absolute on her death in the children of the testator who survived him, the representatives of those who survived him and predeceased Mrs Hosack, and the children who attained majority of the daughter who predeceased him leaving children who survived him.

Accordingly I think the first alternative of the second question should be answered in the affirmative.

The LORD JUSTICE-CLERK and LORD TRAYNER concurred.

LORD YOUNG was absent.

The Court answered the first alternative of the second question in the affirmative.

Counsel for the First and Second Parties—Mackenzie, K.C.—Cullen. Agents—Macandrew, Wright, & Murray, W.S.

Counsel for the Third Parties—Lees, K.C.—Berry. Agents—Hagart & Burn Murdoch, W.S.

Friday, January 31.

FIRST DIVISION.

[Sheriff of Ayrshire.

METCALFE *v.* PURDON.

Servitude—Negative Servitude—Light and Air—Implied Grant—Adjoining Subjects Derived from Common Author—Lease—Long Lease—Servitude as between Tenants under Long Lease from Common Author—Servitude Necessary for Reasonable Enjoyment of Property.

Two plots of ground with buildings thereon, both parts of the subjects held under a lease for a period of more than 900 years, were conveyed at the same time, the one to one purchaser and the other to another. At the date of the severance a window in the house erected upon one plot looked upon the other, but no reference to any servitude of light in favour of the former plot was made in either conveyance.

Circumstances in which *held* that the person in right of the plot, upon which stood the building containing the win-

dow, was not entitled to prevent the person in right of the other plot from making erections which would obstruct the access of light and air by the window, in respect that in any view a servitude of light and air by that window was not essential for the convenient and comfortable enjoyment of the subjects.

Opinion (*per* the Lord President) that a negative servitude can only be constituted by express grant.

Heron v. *Gray*, November 17, 1880, 8 R. 155, 18 S.L.R. 113, *commented on* and *explained*.

Question (1) Whether a right of servitude could exist as between plots held on lease by two tenants under the same proprietor? and (2) whether such a right could exist as between plots both parts of the subjects let under one long lease?

This was an action brought in the Sheriff Court at Ayr by Arthur Metcalfe, draper, Hamilton Street, Girvan, against James Purdon, butcher, Hamilton Street, Girvan, in which the pursuer prayed the Court (1) to find and declare that certain subjects (held by the defender) were subject to an implied servitude of light and air in favour of certain adjoining subjects (held by the pursuer) by a window in the west wall of the dwelling-house thereon; (2) to find and declare that the defender was not entitled to make any erection which would obstruct the access of light and air by means of the said window; and (3) to ordain the defender to remove certain erections recently made by him or to grant warrant to the pursuer to do so.

The subjects referred to were both parts of certain subjects embraced in one long lease, to their respective parts of which the pursuer and defender had acquired right by assignation.

By lease dated 5th July 1765, and recorded in the General Register of Sasines 16th November 1860, John Hamilton, Esquire of Bargany, let to John Logie, late in Dalfask then in Newton of Girvan, for 900 years from Martinmas 1851, a piece of ground on the upper side of Girvan Burn Bridge in the parish of Girvan and county of Ayr.

In 1872 the right to this long lease was vested in Alexander Kelly and Agnes Davidson or Kelly, his spouse, who prior to that date possessed the whole of the subjects contained in the long lease; and the subjects were then occupied part by William Morton, draper, Girvan, and part by Fergus Steven, flesher, Girvan, and others.

By disposition and assignation dated 23rd November, and recorded in the Division of the General Register of Sasines applicable to the County of Ayr 6th December 1872, Alexander Kelly and Agnes Davidson or Kelly, his spouse, assigned the lease to William Morton, "but in so far only as regards the following portion of the subjects leased, viz.—'All and whole that piece of ground with the buildings thereon occupied by the said William Morton, bounded on the west partly by the property assigned by the said Alexander Kelly and Agnes Davidson or Kelly to the said Fergus Steven, and partly by the piece of ground excambed to the said Alexander Kelly and Agnes Davidson or Kelly by the Commercial Bank of Scotland, on the north by Hamilton Street, on the south by property belonging to John Miller, civil engineer in Edinburgh, and on the east by the Girvan Burn, now called the Mill Burn, lying in the burgh and parish of Girvan and county of Ayr; and all and whole that piece of ground extending to 5 poles 5 yards 4 feet and 36 inches or thereby, imperial measure, lying in the burgh and parish of Girvan and shire of Ayr, being the piece of ground excambed to the said Alexander Kelly and Agnes Davidson or Kelly by the Commercial Bank of Scotland as aforesaid."

The pursuer had now acquired right to the said lease, in so far as conveyed to William Morton, and to the pieces of ground described in the assignation in his favour.

At or about the same time as the said Alexander Kelly and Agnes Davidson or Kelly, his spouse, granted the disposition and assignation to William Morton, they assigned the lease to the extent of the remainder of the subjects leased to Fergus Steven, and to this portion the defender had now acquired right.

In the west wall of the house erected upon the part of the leasehold subjects acquired by the pursuer there were two windows which looked out on the subjects acquired by the defender.

The pursuer maintained that the southmost of these windows existed prior to the severance of the property above narrated; that its existence and the purpose for which it was built were then manifest; and that it was then and still was necessary for the light, ventilation, and comfortable enjoyment of his house. The pursuer further averred as follows:—"The said subjects acquired from the said Alexander Kelly and Agnes Davidson or Kelly by the said Fergus Steven and now belonging to the defender were accordingly so acquired by him under an implied servitude of light and air in favour of the adjoining subjects by means of said southmost window, at the same time sold and conveyed by them to the said William Morton and now belonging to the pursuer. The said implied servitude was continuously enjoyed by the pursuer and his authors until recently, and the pursuer is still entitled to the enjoyment thereof."

No mention of or reference to any such servitude as that now claimed appeared in the titles of either the pursuer or the defender.

The other facts in the case sufficiently appear from the interlocutor and note of the Sheriff-Substitute, and the opinion of the Lord President.

The defender pleaded—"(1) The pursuer's averments are irrelevant and insufficient to warrant the conclusions of the summons. (2) There being no servitude constituted in the pursuer's favour, he is not entitled to interfere with the defender's subjects or to use the said subjects as servient subjects. (3) There being no servitude of light and air constituted in favour of the pursuer in his titles or implied in any way

in his favour, the pursuer's action is unfounded and should be dismissed with expenses. (4) There being no restriction of any kind in the defender's titles, he is entitled to the free and absolute use of his property, and to build any erections thereon and to the extreme verge of his ground without any interference on the part of the pursuer, and cannot be restrained from so doing. (5) The alleged servitude claimed by the pursuer being of a negative character cannot be acquired by prescription nor be constituted except by grant."

On 17th January 1901 the Sheriff-Substitute (PATERSON) pronounced the following interlocutor:—"Finds in fact that on 23rd November 1872 the deceased Andrew Kelly and spouse, who were then in right of a long lease of the whole subjects now belonging in part to the pursuer and in part to the defender, conveyed to the pursuer's author one portion of these subjects, and at the same time conveyed to the defender's author the other portion of these subjects, each of the subjects so conveyed being described as bounded by the other: That at the date of these simultaneous conveyances there existed in the west wall of the dwelling-house, now the property of the pursuer, a window opening on the property now belonging to the defender, of the following dimensions, about 5 feet 7 inches high, by 3 feet 6 inches wide, which had been struck out and formed in this wall in the year 1870 to give light to a kitchen on the pursuer's property, and which has existed and afforded light to the kitchen until blocked up by the defender about March 1900: That there is no grant in the pursuer's title of a servitude of light and air by this window, and that there is no restriction in the defender's title of his full rights of ownership, and no reference in either title to the existence of this window: That the pursuer has failed to prove that the servitude of light and air by this window is essential for the convenient and comfortable enjoyment of the tenement: Finds in law that there being no grant of a right of servitude of light and air in the pursuer's title, nor any restriction in the defender's title of his rights of ownership, and the continued existence of this window not being essential for the convenient and comfortable enjoyment of the pursuer's tenement, the pursuer is not entitled to the declarator craved, viz., that the subjects of the defender are subject to an implied servitude of light and air by this window in favour of the pursuer's subjects, and that the defender is not entitled to make any erection on his property which will obstruct the access of light and air to the pursuer's property by this window: In respect of these findings assoilzies the defender from the conclusions of the action: Finds him entitled to expenses," &c.

Note.—"It is thought to be proved by the evidence of Mr Morton and by the accounts produced that the window in dispute was struck out in 1870, and existed at the date of the severance of the property in 1872. The pursuer contends that the severance having been by simultaneous conveyances to his and the defender's author, and this window having existed during the unity of possession and at the date of severance, the grant of a servitude right to continue its use was implied.

"Prior to 1870 the tenement now belonging to the pursuer was possessed and enjoyed without any window in this west wall, and it does not follow from the fact that the then proprietor of both the pursuer's and the defender's subjects struck out this window for his own convenience, that it is necessary for the comfortable and convenient enjoyment of the pursuer's tenement, or that the implication is involved that at the severance of the two properties there was an implied grant of servitude in favour of the pursuer's tenement, and an implied restriction on the defender's property—*Gow's Trustees* v. *Mealls*, May 25, 1875, 2 R. 729.

"According to the evidence of Mr Hunter, architect, 'it would be quite easy to introduce a roof light between the oxters of the loft and the kitchen wall, which would light and ventilate the kitchen near the fireplace without injuring to any appreciable extent the usefulness of the loft above the kitchen.'

"The rule of the law of Scotland is that negative servitudes can be constituted only by grant, and it is questionable whether that law recognises implied grant as a mode of constituting negative servitudes—*Dundas* v. *Blair*, March 12, 1886, 13 R. p. 759.

"Even assuming that the doctrine of implied grant has been received in Scotland—*Heron* v. *Gray*, November 27, 1880, 8 R. 155—it ought to be very cautiously applied. The Sheriff-Substitute is of opinion that the facts of the present case do not call for its application here."

The pursuer appealed to the Sheriff (BRAND).

On 18th June 1901 the Sheriff pronounced the following interlocutor:—"The Sheriff, having heard parties' procurators and considered the cause, adheres to the interlocutor appealed against, and dismisses the pursuer's appeal: Finds the defender entitled to additional expenses," &c

"*Note.*—I regret the delay which has arisen in the disposal of this case, but it has been to some extent unavoidable.

"The main averments upon which the action is based are, that the property is 'subject to an implied servitude of light and air in favour of the adjoining subjects,' and accordingly that the defender is not entitled 'to make any erection on the area of the said subjects belonging to him' that will in any way obstruct the access 'of light and air' to the adjoining subjects belonging to the pursuer. In other words, it is maintained that the defender, as servient owner, is to be restrained from exercising his full rights as proprietor of the subjects belonging to him. As the Sheriff-Substitute has found, there is no grant in the pursuer's titles of a servitude of light and air by the window in question, and no restriction in the defender's titles of his full rights of ownership; and further there is,

as the Sheriff-Substitute also points out, no reference in either title to the existence of the window in question. Notwithstanding this state of the titles, I think that if the pursuer could have proved that the alleged servitude was essential to the convenient and comfortable enjoyment of his property, it might with reason and safety have been inferred and the grant contended for implied. There are a number of authorities which support this view, and in particular—*Cochranes* v. *Ewart*, January 13, 1860, 22 D. 358, affirmed March 22, 1861, 4 M'Q. 117. As also *Maclaren* v. *City of Glasgow Union Railway Company*, July 10, 1878, 5 R. 1042; and *Cullens* v. *Cambusbarron Co-operative Society, Limited*, November 27, 1895, 23 R. 209.

"Very much accordingly turns in this case on whether the continued existence and use of the window in question is necessary to the convenient and comfortable enjoyment of the subjects belonging to the pursuer. The Sheriff-Substitute has formed the opinion, based mainly on the skilled evidence of the witness Hunter, that such continued existence and use is not necessary. With that opinion I entirely concur. No doubt a skilled witness called for the pursuer, viz., Eaglesham, depones that the window in question is necessary. But the weight of his evidence is somewhat impaired by the admission made by him in cross-examination 'that the kitchen might be lighted from the roof, but you have a room over the kitchen which would require to be cleared away to make a satisfactory light for the kitchen.' Moreover, Eaglesham admits that his examination of the pursuer's property was made more with a view to ascertaining whether the existing window was necessary 'in the state of the property at present,' than of ascertaining whether the kitchen might be adequately lighted from the roof.

"According to the pursuer's witness, William Morton, certain operations which took place in 1870 led to the blocking up of the back door, the converting of the window on the east side of the kitchen into a door, and the slapping out of the window in question.

"There is no reason why the window should not now be transferred to the roof. The Sheriff-Substitute seems to have entertained some slight doubt whether the doctrine of implied grant has been received in Scotland. For my own part I see no good reason for such doubt if it was entertained, and at all events the case to which he referred in this connection, viz., *Heron* v. *Gray*, November 27, 1880, 8 R. 155, affords no aid in the disposal of the present case. The circumstances are totally different. Lord Gifford, who pronounced the judgment of the Court in that case, says that in cases of urban property with a main-door sunk area and separate flats above there is 'an implied servitude in all such cases in favour of the proprietors of the upper flats that the proprietor of the main-door house shall not erect buildings in the back green so as to obstruct their rights.'

"This opinion rightly assumes that the erection of such buildings would interfere with the convenience and comfortable enjoyment of their properties by the owners of the upper flats, an assumption at direct variance with what has been held to be proved in the present case in regard to the window in dispute.

"Reference may also be made to the cases of the *Union Heritable Securities Company, Limited* v. *Mathie*, March 3, 1886, 13 R. 670, and *Morris* v. *M'Kean*, February 19, 1830, 8 S. 564.

"Upon the whole matter, and while it must be said that in the debate on the appeal the pursuer's case was handled with great skill, I see no reason for doubting that the interlocutor under review is well founded in fact and law."

The pursuer appealed, and argued—The right to light claimed here was necessary, and must be held to have been impliedly granted. A servitude could be constituted by implied grant in such circumstances—*Cochranes* v. *Ewart*, January 13, 1860, 22 D. 358. It did not matter that it was a negative servitude which was claimed, for it had been decided that such a servitude could be so constituted—*Heron* v. *Gray*, November 27, 1880, 8 R. 155, 18 S.L.R. 113. That was even a stronger case than this, for in it the titles to the servient tenement bore that there was no servitude. The test was what was reasonably necessary for the enjoyment of the property at the date of the severance—*Gow's Trustees* v. *Mealls*, May 28, 1875, 2 R. 729, at p. 737, 12 S.L.R. 458. And therein lay the distinction between the present case and *Dundas* v. *Blair*, March 12, 1886, 13 R. 759, 23 S.L.R. 526, because in that case the window in question had only been put in after the date of the severance of the properties.

Argued for the defender—The basis of the claim here was implied grant of a servitude, but a negative servitude could not be constituted by implication, and a singular successor with a clear title could not be restricted in the use of his property by any implied agreement between the assigner and assignee of the other portion of the original property—*Dundas* v. *Blair*, *cit. sup.*; *Inglis* v. *Clark*, December 7, 1901, 39 S.L.R. 193. The case of *Heron* v. *Gray*, which was relied on by the pursuer, was one dealing with the law of tenement and was not applicable here. The registration of a long lease did not change its character—*Stroyan* v. *Murray*, July 17, 1890, 17 R. 1170, 27 S.L.R. 896. The pursuer therefore was a tenant, and there was no authority for one tenant acquiring a servitude over the holding of another tenant. But, further, on the facts the window was not required for the reasonable enjoyment of the property.

LORD PRESIDENT—The question in this case is, whether the pursuer, who holds certain subjects in Girvan on lease, has an implied servitude of light and air in favour of these subjects over adjoining subjects held by the defender on lease, in virtue of which implied servitude the pursuer is entitled to

prevent the defender from interfering with the light of a window in the west wall of the subjects held by the pursuer which looks out upon the subjects held by the defender.

The lease under which both the pursuer and the defender hold was granted on 5th July 1765 by John Hamilton, Esquire of Bargany, in favour of John Loggie for 900 years from the term of Martinmas 1851 at the rent therein specified, the subject let being a piece of ground therein described as on the upper side of Grivan Burn Bridge. Prior to 1870 the right to that lease had come to be vested in Alexander Kelly and his wife, and they by disposition and assignation dated 23rd November 1872 assigned the tenant's part of the lease to William Morton in so far as it related to a portion of the ground and buildings thereon then occupied by him, and at or about the same time they assigned the tenant's part of the lease in so far as it related to the remainder of the subjects let to Fergus Steven. The pursuer has now by assignation obtained a right to the tenant's interest in the part of the subjects to which William Morton acquired right, and the defender has now right to the tenant's interest in the part of the subjects to which Fergus Steven acquired right. The defender's title is unrestricted, containing no mention of any such servitude as is now claimed, and there is no reference to the window in the titles of either of the parties.

The pursuer alleges that in 1872, the date of the severance of the interests under the lease, there were two windows in the house or building upon the part of the leasehold subjects acquired by him which looked out upon the ground, the tenant's interest in which had been acquired by the defender, and that the southmost of these windows existed at and for a number of years prior to the severance of the tenant's interest in the lease of 5th July 1765, as also that at the date of the severance the existence of the window and the purpose for which it had been placed there were manifest, viz., for providing light, ventilation, and comfortable enjoyment of the part of the subjects in which the pursuer had acquired the tenant's interest under the lease above mentioned. He alleges that he thus acquired an implied servitude of light and air by means of that window against the defender and any person who might come to be in right of the part of the tenant's interest in the subjects acquired by him.

In answer to these contentions the defender maintains (1) that even assuming that an implied servitude of light and air by the window in question would have existed if the subjects had been held by the pursuer and defender respectively in property, it did not and could not exist in respect that the pursuer and the defender are leaseholders only, having the tenant's interests in property belonging to the same proprietor; (2) That the window in question did not exist at the date of the severance of the aggregate rights originally held under the lease, but that it had been inserted at some time subsequent to that severance; (3) that assuming the window to have existed prior to the severance, the right claimed, being in the nature of a negative servitude, could only be constituted by express grant, and that no such grant is alleged or was ever made; and (4) that even supposing none of these contentions on the part of the defender to be well-founded, the pursuer's claim to a servitude of light and air by the window in question founded on implied grant must fail, because the alleged servitude is not necessary for the reasonable and comfortable enjoyment of the premises to the tenant's part of which the pursuer has right.

1. The first of these questions appears to me to be an important one, and I am not aware of any decided case in which a right of servitude has been held to exist as between two subjects held by tenants of the same proprietor, whether under leases originally separate or under assignations of portions of the tenant's part of a lease originally granted to one lessee. The general maxim is *prædium servit prædio.* Here the entire *prædium* held by two tenants belongs to the same proprietor, and the defender maintains that where, as in the present case, the parties are not proprietors but only tenants of portions of a subject belonging in undivided property to the same owner the doctrine does not apply. In support of this contention the defender referred to a decision of Lord Kyllachy in *Reid (M'Tavish's Trustees)* v. *Anderson,* June 20, 1900, 8 S.L.T. 73, p. 80, in which his Lordship held that an agreement constituting rights of the nature of servitude between two neighbouring leaseholders was not binding upon singular successors. In the course of his opinion Lord Kyllachy said—"There can be no servitude between two subjects which belong in property to the same heritor and are separately possessed by virtue only of a contract of location, however long. The doctrine of servitude is a limited doctrine having its limits well defined and does not admit of being extended by analogy." In the present case the property occupied by both the pursuer and the defender belongs to the same heritor, and although long leases may now be registered in the Register of Sasines, I do not think that this makes the respective lessees proprietors or heritors for the purpose of the present question. I am not aware of any instance in which a servitude right has been established as between two tenants, whether holding from the same proprietor under leases originally separate or under one lease, the tenant's part of which has been assigned in shares to them respectively. While I see great difficulty in sustaining a claim of servitude as between tenants of the same proprietor, I desire to reserve my opinion upon the question, as it does not appear to me to be essential for the decision of the present case.

2. The evidence upon the question whether the window existed at the date of the severance is conflicting, but I think the Sheriff-Substitute is right in holding that the preponderance of evidence is in favour of the view that it did exist at that time. The

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

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

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

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

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

The Court pronounced this interlocutor:—

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

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

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

HOUSE OF LORDS.

Friday, February 14.

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

DOUGAN'S TRUSTEE *v.* DOUGAN.

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

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

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