could proceed. The pursuers had offered to purchase all the shares of the ship, but not one or two shares belonging to individual shareholders. The Lord Ordinary's judgment was right.

At advising—

LORD JUSTICE-CLERK—The action is one of set and sale of this vessel, and the pursuers in condescendence 3 express what they are willing to do—[*His Lordship read condescendence* 3].

Now, the defender Sillars maintains that the pursuers have here made an offer to him for the purchase of his share of the vessel, although the other shares should not be obtainable from the other defenders, and that as he had sent a letter accepting that offer the pursuers were therefore bound by it.

I cannot read condescendence 3 as being such an offer. It bears to be an offer to *all* the defenders to purchase their shares at the pursuers' price. I can read nothing else into it, and I therefore think it is a sound view to take, that no contract has been established between the pursuer and the defender by what the pursuer has stated in the summons and in the condescendence, and by the defender professing to accept the offer which he avers is there made.

I think the conclusion which the Lord Ordinary has arrived at is right. I should have come to the same conclusion apart from the amendment allowed, and taking the condescendence as it stands. My opinion is that no offer for the purchase of this defender's individual share was ever made by the pursuers.

LORD YOUNG—I have arrived at the same conclusion. We shall have to dispose of the whole case, as the pursuers admit that the action was a miscarriage, and that the plea of Mr Gardiner that the Court has no jurisdiction over him is a valid one.

One small shareholder with two shares appears and pleads his acceptance of an alleged offer contained in the summons. I think the pursuers would have acted discreetly if they had abandoned the action and paid this defender's expenses. I would have given this defender his expenses in the Outer House on that matter. But the Lord Ordinary was called on to decide the question argued before us, whether there is here a concluded contract giving this defender the right to decree that his shares have been taken by the pursuer at a certain price. I agree with your Lordship, affirming the Lord Ordinary's judgment, that such a contention is not maintainable. On the whole, I think the most judicious way of dealing with the matter will be to give no expenses to either party.

LORD RUTHERFURD CLARK—I am of the same opinion. I think the expenses of this discussion should be given to the pursuers.

LORD TRAYNER—I agree. I think Mr Younger's argument could not be maintained. Looking to the form in which the pursuers' statement is made, and having regard to the nature and position of the action, I think it is out of the question to suggest that the pursuers' pleadings amount to an offer to take this defender's shares regardless of what the other defenders may do. Fairly read, it is simply an offer of the pursuers to sell their shares to the defenders, or to buy all the shares of the defenders at a price, and not an offer to buy any individual share, unless by this action he can get possession of the whole shares.

With regard to expenses, I am not disposed to meddle with what the Lord Ordinary did in the Outer House, although I think a great deal is to be said against Mr Sillars for starting this question, but I venture to say he is liable in the expenses of this discussion.

The Court pronounced this interlocutor:—

"Refuse the reclaiming-note, adhere to the interlocutor reclaimed against, and in respect that the pursuer is not now insisting in the action, dismiss the same and decern: Find the pursuer entitled to expenses since the date of the said interlocutor."

Counsel for Pursuers—Ure—A. S. D. Thomson. Agent—Robert John Calver, S.S.C.

Counsel for Defender, Duncan Sillars—C. S. Dickson—Younger. Agents—Webster, Will, & Ritchie, S.S.C.

Friday, November 30.

SECOND DIVISION.

[Sheriff Court at Dumfries.

CHARLTON AND ANOTHER *v.* SCOTT AND ANOTHER.

Property—Sale—Conditions in Disposition—Obligation to Make Road—Interest to Enforce.

The proprietor of a park, an acre and a-half in extent, disponed three portions of it in 1877 by separate dispositions. The park was bounded on the south by a public road, and the lots disponed were those nearest to the road. Each disposition was granted under the conditions that the ground disponed should be used for the erection of dwelling-houses or for garden ground; that a strip of ground should be taken from it for the formation of a private road extending northwards from the public road, to be used by the disponee "and others, the proprietors of portions of said park, in all time coming as a private road," from the said public road "to the subjects hereby conveyed, and the other portions of said park;" and that the private road should be formed at the disponee's ex-

pense, as far as the ground disponed extended, before a certain date. Annexed to each disposition was a plan showing the road running northwards through the park to a point at which it marched with a railway.

In 1889 the remainder of the park lying to the north was disponed with and under the conditions, so far as applicable thereto *mutatis mutandis*, contained in the dispositions granted in 1877, and in particular the disponee was taken bound to continue the road northwards as far as the ground disponed extended, but no time was fixed within which this should be done. The disponee proceeded to lay out the northern portion of the ground which he had acquired as garden ground in connection with his house, which was situated upon an adjoining property, and declined to continue the road through the ground so laid out. Even if he had done so, the road would not have reached any public place.

In an action against him at the instance of the disponees under the dispositions of 1877, *held* that the pursuers' right was to use the road as an access to the pieces of ground disponed to them respectively, and that, as matters stood, they had no interest, and therefore no right, to compel the defender to continue the road northwards through the ground conveyed to him.

The lands of Loreburn Park, extending to about an acre and a-half, were situated in the burgh of Dumfries, and were bounded on the south by a road known as the Lover's Walk. Prior to 1877 they belonged to Mrs Nicholas Macminn and her children.

By three separate dispositions, all dated 24th February and 3rd March 1877, Mrs Macminn and her children conveyed three separate parcels of the said lands, being the three lots nearest to the Lover's Walk, to John Charlton, John Welsh, and William Craig, under certain conditions and restrictions, which were substantially the same in each disposition. These conditions were thus expressed in the disposition to John Charlton—"But declaring always, as it is hereby expressly provided and declared, that the said area or piece of ground is disponed with and under the conditions and restrictions following, viz., (1) that the said area or piece of ground shall be used only for the erection of dwelling-houses and pertinents (which shall not include byres, stables, poultry-houses, or fixed dog-kennels), or for garden or ornamental pleasure ground for private use; (2) that no buildings shall be erected thereon except one dwelling-house and pertinents of the value of £750, or two dwelling-houses and pertinents of the value of £1250; (3) that a strip of ground 10 feet in breadth shall be taken off the western boundary of the subjects hereby conveyed for the formation *pro tanto* of the road 20 feet in width running from the Lovers' Walk northwards, as shown on the foresaid sketch or plan (the remainder being provided by the opposite proprietor or proprietors, or by us and our foresaids in the event after mentioned), to be used, said road, by the said John Charlton and others, the proprietors of portions of said park, and his and their tenants and successors in all time coming, as a private road from Lovers' Walk to the subjects hereby conveyed, and the other portions of said park: Declaring that the said John Charlton and others foresaid, and his and their foresaids, may use said road and continuation thereof for all necessary purposes in connection with their respective lot or lots, but they shall have no right to use the same as an access to or egress from any properties beyond said Loreburn Park, except to properties immediately adjoining their respective lots, and that by a foot-passage for persons only; (4) that the said road and continuation thereof shall be formed and maintained at the mutual expense of the proprietors on each side, whose properties will be bounded by it when formed; (5) that the said road shall be formed from the Lovers' Walk northwards as far as the area or piece of ground hereby disponed extends before the term of Whitsunday 1879, and the said John Charlton and his foresaids shall be bound within the same period to build upon or lay out the said area or piece of ground, and enclose the same on the side adjoining the said private road with a stone parapet and iron railing; and (6) that in the event of the other portions of said park, through which the said private road is to be formed, not being sold by us previous to the term of Whitsunday 1878, we shall then be bound, as we hereby bind and oblige ourselves and our foresaids, to give the ground for, and be at the expense of making and maintaining the remainder of said road of 20 feet wide from the Lovers' Walk to the northern boundary of the area or piece of ground hereby disponed, all which provisions, declarations, conditions, and restrictions above written we hereby bind ourselves and our foresaids to insert *mutatis mutandis* in all feu-charters, contracts of ground-annual, dispositions, or other deeds of conveyance of other portions of said park, otherwise the same shall be void and null, but declaring that it shall be in our power to alter or vary the period within which any purchaser shall be bound to build upon the ground sold to him in the disposition or other conveyance to such purchaser."

Annexed to each disposition was a plan signed as relative thereto, showing the private road which was to be formed. As so shown the road did not reach the northern extremity of Loreburn Park, but terminated at a point where the park marched with the Glasgow and South-Western Railway.

By disposition dated in 1889 the remainder of Loreburn Park, being the portion to the north of the lots previously given off, was conveyed to William Thomas Grierson under the following declaration—"But declaring always, as it is hereby expressly provided and declared, that the said lands and others are so disponed with and under, but only in so far as the same

are binding on our said disponee, and applicable *mutatis mutandis* to the lands and others above disponed, the whole burdens, conditions, provisions, restrictions, reservations, declarations, servitudes, and others specified and contained in the title-deeds thereof, or the said conveyances to John Charlton and others, recorded as aforesaid, or otherwise affecting the same, which are here referred to, and held as repeated, *brevitatis causa*, and in particular, without prejudice to the foregoing generality, with and under the conditions and restrictions following, so far as applicable to the said lands and others above disponed, viz.—(*First*) That a stripe of ground, 20 feet in breadth, shall be taken off the ground above disponed for the formation of a private road, conform to the plan endorsed on the said disposition in favour of the said William Craig, recorded as aforesaid, and which road our said disponee and his tenants in the subjects above disponed shall be entitled to use as a private road from Lovers' Walk to the ground hereby disponed, and which road our said disponee and his foresaids shall also be entitled to use as a passage to and from the other properties adjoining the ground possessed or occupied by them, but for this purpose as a foot passage for persons only; (*second*) that the said road shall be formed and maintained at the mutual expense of the proprietors on each side whose properties will be bounded by it when formed; (*third*) that the said lands and others above disponed shall be used only for the erection of dwelling-houses and pertinents (which shall not include byres, stables, or poultry-houses, nor fixed dog-kennels), or for garden or ornamental pleasure grounds for private use; (*fourth*) that no buildings shall be erected thereon except separate detached dwelling-houses and pertinents, each of the value of £750, or semi-detached dwelling-houses and pertinents of the value of £1250 for each double house, and said dwelling-houses shall be built with their frontage towards the said private road, but this condition as to frontage shall not apply to any house that may be built on the plot of ground at the north corner of the said park; and (*fifth*) that the said road shall be formed from the Lovers' Walk northward as far as the land hereby disponed extends, and when formed, our said disponee shall be bound to build upon or lay out the said lands, and enclose the same on the sides adjoining the said private road with a stone parapet and iron railing uniform with the boundary wall of the plots of ground immediately to the south of them."

Grierson did not build on the ground so acquired by him. He laid out the southern portion of it, which was adjacent to a neighbouring property belonging to him, as garden ground, and formed the private road opposite to the ground so laid out. In 1894 he conveyed the remainder or northern portion of the ground which he had acquired to Charles Walker Scott, who proceeded to lay it out as garden ground in connection with his house, which was situated on an adjoining property. Scott declined to comply with an application by Charlton and Craig to continue the private road opposite the ground which he had acquired. Even if the road had been so continued it would not have reached any public place.

The present action was raised by Charlton and Craig in the Sheriff Court at Dumfries against Scott and Grierson, for the purpose of having it declared, *inter alia*, that under the disposition in Grierson's favour the defenders, as proprietors of portions of the lands of Loreburn Park, were bound to make and construct a private road 20 feet in breadth northward through the said lands as far as they extended in continuation of the existing road from the Lovers' Walk, and to enclose the same, which road when formed the defenders and pursuers, as proprietors of portions of the said lands of Loreburn, should be entitled to use along with the said existing road as a private road from Lovers' Walk to the portions of Loreburn Park belonging to them, and to other portions of the said park, and also as a passage to and from the other properties adjoining the ground possessed or occupied by them, but for this purpose as a foot-passage for persons only, and for decree ordaining the defenders, or one or other of them, to construct the road in a proper manner.

The pursuers pleaded, *inter alia*—"(1) The pursuers and defenders having derived their rights from common authors, and the conditions and restrictions contained in the various titles being similar, and having been imposed for the benefit of all the disponees of Loreburn Park, there exists a mutuality and community of rights and obligations between the pursuers and defenders, whereby the pursuers have a *jus quaesitum* entitling them to insist upon the fulfilment of the said conditions and restrictions. (2) The obligation in the defenders' titles to form and maintain the road and the stone parapet and railing, being a real burden upon the lands belonging to them, or a real condition of their title thereto, the pursuers are entitled to decree, in terms of the first two declaratory conclusions. (3) The pursuers having a common right of property in the piece of ground specially set apart on the said plan as a site for a road, or, at all events, having a servitude of way thereover, the defenders are not entitled to appropriate the same and convert it into ornamental grounds, or to use it in any way except as a roadway, in terms of their titles."

The defenders pleaded, *inter alia*—"(2) The pursuers having under their titles no right to compel the formation of the continuation of the private road in question beyond the northern boundary of their respective lots, the defenders should be assoilzied from the conclusions of the action. (3) The pursuers having no interest in the continuation of the said road beyond the northern boundary of their respective lots, they are not entitled to the decree craved."

On 6th August 1894 the Sheriff-Substi-

tute (CAMPION) pronounced the following interlocutor—"Finds that the pursuers, as proprietors of certain lands situated to the south of the defenders' lands in Loreburn Park, not having sufficient and substantial interest to enforce the obligation, are not entitled to have it found and declared that the defenders, or one or other of them, as proprietors of said lands, are bound to construct a private road through their said lands northwards so far as they extend in continuation of the existing road from Lovers' Walk: Finds it unnecessary to dispose of the other conclusions of the petition: Therefore sustains the second and third pleas-in-law stated for the defenders; assoilzies them from the conclusions of the action, and decerns," &c.

The pursuers appealed to the Sheriff (VARY CAMPBELL), who on 27th August pronounced the following interlocutor—"Sustains the appeal, and recals the judgment of the Sheriff-Substitute appealed against: Finds that the defenders are bound, by their disposition from the common authors of the parties, to make and maintain to the northmost limit of Loreburn Park the road in question, with parapet and railing, in continuation of the road with parapet and railing already made by the pursuers and another disponee from Lovers' Walk to the northern boundary of the pursuers' lots: Finds that the pursuers have title, and have also sufficient interest to enforce the continuation of the said road: Therefore finds and declares against the defenders in terms of the prayer of the petition, the nature of the right in all and each of the parties in the said road beyond the boundaries of their respective properties being declared to be a common interest; ordains the defenders to make and construct in a proper and sufficient manner the said road, parapet, and railing, as set forth in the petition, and that within two months from this date, at the sight of Allan Burgess Crombie, architect, Dumfries," &c.

The defenders appealed, and argued—The primary object of the road was to serve as an access from Lovers' Walk to the various properties of the disponees. The titles gave only such a right of access. No thoroughfare was contemplated; the road was to end in a plot having a house fronting it. No legal right was conferred on the pursuers except to use this road as an access to their own property. If their right could be extended beyond this, the defenders had no legitimate interest to enforce it. If there was found in a title a burden, useless, vexatious, or contrary to public policy, that burden could not be enforced. If a person had no interest to enforce a burden, he could not enforce it *in æmulationem vicini—Gould* v. *M'Corquodale*, November 24, 1869, 8 Macph., opinion of Lord President Inglis, p. 170, and Lord Deas, p. 171; *Dennistoun* v. *Thomson*, November 22, 1872, 11 Macph., opinion of Lord Ardmillan, p. 127; *M'Gibbon* v. *Rankin*, January 19, 1871, 9 Macph., opinion of Lord Kinloch, p. 423. The case of *Fimister* v. *Milne*, May 24, 1860, 22 D. 1100, founded on by the pursuers, was a contrast and not an analogy to this case. Here a private road was to be made for the purposes of access, while in *Fimister* the road was made before the feu was given off, and the feus were bounded by the then existing road.

Argued for the pursuers—The moment the defender Grierson accepted his disposition he came under an obligation to make this road, which the pursuers were entitled to enforce. In the plan attached to the deed a road was shown, and there was a special contract on the part of Grierson to form the whole of the road as far as it extended into his property—*Crawford* v. *Field*, October 15, 1874, 2 R. 20. The case of *Fimister* exactly resembled the present. In that case it was never contemplated that the road should be a public road or thoroughfare. There was an interest in pursuers to enforce the burden. The road was a useful adjunct to their property for walking, &c. Besides, there was a prospective interest that the road might at a later date lead to a public place, or that it might lead to property bought by the pursuers. Their property would be appreciably more valuable if the road was made, and the right to have the whole road formed was part of the contract which the pursuers were entitled to enforce—*Henderson* v. *Nimmo*, May 20, 1840, 2 D. 869; *Glasgow Jute Company* v. *Carrick*, November 5, 1869, 8 Macph. 93; *Dennistoun* v. *Thomson*, November 22, 1872, 11 Macph. 121; *Earl of Zetland* v. *Hislop*, June 12, 1882, 9 R. (H. of L.) 40; *Beattie* v. *Ures*, March 18, 1876, 3 R. 634; *Bennett* v. *Playfair*, January 24, 1877, 4 R. 321; *Stewart* v. *Bunten*, July 20, 1878, 5 R. 1108; *Mackenzie* v. *Carrick*, January 27, 1869, 7 R. 419.

At advising—

LORD RUTHERFURD CLARK—The lands of Loreburn Park are situated in the burgh of Dumfries. They extend to about an acre and a-half. In 1877 it was proposed to use them for the erection of villas. In that year three parcels were given off, one to each of the pursuers.

In giving off these parcels, provision was made for the formation of a road twenty feet wide from Lovers' Walk by which the lands of Loreburn Park are bounded on the south. The road was shown on a plan referred to in the titles. As so shown it did not reach the northern extremity of the park. It terminated at the point where it marches with the Glasgow and South-Western Railway.

It is not necessary to examine the several dispositions. I take the title of Mr Charlton as a sufficient and indeed the most favourable example for the pursuers. He was taken bound to give a strip of ground ten feet in breadth off the western boundary of the subjects conveyed to him for the formation of the road from Lovers' Walk northwards, "to be used said road by the said John Charlton and others, the proprietors of portions of the said park . . . as a private road from the Lovers' Walk to

the subjects hereby conveyed and the other portions of the said park, declaring that the said John Charlton and others foresaid, may use said road and continuation thereof for all necessary purposes in connection with their respective lots." It is also declared that Mr Charlton and the other proprietors shall not be entitled to use the road as an access to or egress from any properties beyond the park except to properties immediately adjoining their respective lots, "and that by a foot-passage for persons only." I notice this last declaration in order that I may put it aside. For it is plain that no proprietor could exercise the right thereby given except through his own plot,

The disponers, in the event of the other portions of the park not being sold before Whitsunday 1878, bound themselves to make the remainder of the road from the Lovers' Walk to the northern boundary of the property, and to insert in the other conveyances the same conditions as are contained in Mr Charlton's title.

In 1889 the defender Mr Grierson acquired the remainder of the park—that is to say, the portion which lies to the north of the lots which had previously been given off. The lands were conveyed to him "with and under, but only so far as the same are binding on our said disponee and applicable *mutatis mutandis* to the lands and others hereby disponed, the whole" burdens and conditions in the conveyances to John Charlton and others, and under the conditions and restrictions following—(*First*) that a strip of ground shall be given for the formation of a private road conform to plan endorsed on the disposition to William Craig, and which road the disponee shall be entitled to use as a private road from Lovers' Walk to the ground disponed; (*second*) that the road shall be formed at the mutual expense of the proprietors on each side; (*third*) that the lands shall only be used for the erection of dwelling-houses, and for garden or ornamental pleasure grounds for private use; (*fourth*) that no buildings shall be erected except separate dwelling-houses or semi-detached dwelling-houses, with a frontage to the road, but that this condition should not apply to any house built at the north corner of the park; and (*fifth*) that the road shall be formed from the Lovers' Walk as far as the land hereby disponed extends.

Mr Grierson did not build on the property conveyed to him. He laid out a part of it as a garden. He has conveyed the rest to the defender Mr Scott, who proposes to use it as ornamental ground in connection with his house, which is situated on an adjoining property; the portion so conveyed lies to the north of that which Mr Grierson retains.

The road has been formed from Lovers' Walk to a point a little beyond Mr Grierson's boundary. The defenders do not propose to continue it. On the contrary, Mr Scott intends to erect a gate at its northern end, which, while it would give him access to his own grounds, will necessarily exclude the pursuers therefrom. The pursuers object, and maintain their right to have the road immediately formed to the north boundary of the park.

The road was to be made for private use. It could not, as things now exist, be made a public road, for it could not reach a public place. As I have already said, the park near its northern boundary marches with the Glasgow and South-Western Railway, and Mr Scott, if he is so minded, has according to the condition of his title, the right to erect on the north corner a house which would prevent the road from passing to the extremity of the park. For the house may be erected across the road, and not with a frontage to it. I cannot imagine that the parties who bought the several lots had anything else in view than a private road. They could not imagine that a road which stopped at the railway, and might be blocked near its northern end, would be converted into a public road.

It is only as a private road that the proprietors have a right to use it, and such a use seems limited to a right of access to the several lots. Reverting to Mr Charlton's title, I observe that the road is to be used by him and the other proprietors as a private road to the lot belonging to him and the other portions of the said park. The title does not speak of his own use merely. It gives him a joint right along with the other proprietors, and it gives them all a right to use it as an access to their respective properties. If we eliminate the reference to the other proprietors, Mr Charlton's right to use the road is limited to the use of it as an access to his own property.

There is a declaration with reference to the "said road and the continuation thereof." The said road is plainly that portion which is opposite Mr Charlton's property. The continuation of it is that portion of it which lies to the north. The declaration deals with both alike. It does not refer to Mr Charlton alone. It embraces the other proprietors, giving all of them a right to use the road and continuation for all necessary purposes in connection with their respective lots. I can put no meaning on the clause other than that the road is to be a means of access for each and for all. I do not see for what further interest the pursuers stipulated, or what further interest they can have or can desire to enforce.

It is true that the original disponers bound themselves after Whitsunday 1878 to make the road to the northern boundary of the park, and if the defenders are bound to the pursuer in such an obligation, it may not be a sufficient defence to say that the pursuers have no interest to enforce it. But the existence or non-existence of an interest is of material importance in determining whether the obligation exists, and we know that mutual conditions in feu-contracts cannot be enforced when there is no interest to enforce them.

It is plain that this obligation did not pass against Mr Grierson by the mere fact of his purchase. It was not imposed on him in any way, for it is not referred to in

his title. It is no doubt a condition of the conveyance that a strip of ground should be taken off for the formation of a private road, and that the road shall be formed from the Lovers' Walk northward as far as the land disponed extends. No time is specified for the formation of the road. It is said that the condition imposes an immediate obligation. I cannot assent to that proposition. I find that as matters now stand, the pursuers have no interest in the formation of the road, and I prefer to construe the disposition as imposing no higher obligation on the disponee than to make the road when the purposes for which it is required come into existence, or, in other words, when the property is laid out for building ground. That may never be, for Mr Grierson and Mr Scott as his disponee are entitled to reserve it for garden or ornamental purposes, and it seems absurd to read the disposition as obliging them to make a road through their private grounds.

If the property were to be used for building purposes the several proprietors would probably have a legitimate interest to see that uniformity was preserved in the buildings, and in the road along which they are to be built. In that case it might be of importance to them that the road should be in the line specified in the plan, and that it should be 20 feet in width. If there was an obligation to make it, I should not doubt that these conditions must be observed. But these considerations are of no importance unless we can affirm the existence of an obligation to make the road. The title is silent as to time, and I cannot hold that the obligation comes into force until there is a reason for the road,

We are referred to the case of *Fimister*. I do not think that it applies. There a road had been made through the entire length of the property, which had been given off in several feus, but terminating at a private place, namely, at the property of another person. A feuar at the inner end proposed to shut up a part of the road. It was held that he was not entitled to do so, because the road was common to all the feuars, and because they had an interest to keep it open in case it should be extended to a public place. It is different here. The defenders do not propose to shut up a road. They are contending that they are not obliged to make one. We have to determine whether they are at the present time under such an obligation. I do not think they are.

The LORD JUSTICE-CLERK—That is the opinion of the Court.

The Court pronounced the following interlocutor:—

"Sustain the appeal, recal the interlocutor appealed against, and the interlocutor of the Sheriff-Substitute dated 6th August 1894: Find that the defenders, as proprietors of portions of the lands of Loreburn Park, are not bound forthwith to make and construct a private road northward through the said lands in continuation of the existing road from Lovers' Walk, and to enclose the same: Therefore assoilzie them from the conclusions of the action, and decern," &c.

Counsel for the Pursuers—C. S. Dickson – A. S. D. Thomson. Agents—Somerville & Watson, S.S.C.

Counsel for the Defenders—Jameson—Clyde. Agents—J. & A. Hastie, S.S.C.

Friday, November 30.

SECOND DIVISION.

[Lord Low, Ordinary.

ADAIRS' JUDICIAL FACTOR *v.* CONNELL'S TRUSTEES.

Fraud—Trustee and Beneficiary—Forgery by One of Two Trustees—Liability of Beneficiary through Negligence in Supervising Trust Administration.

A sum of £1000, being part of a trust-estate in the hands of two trustees, was invested in a bond. One of the trustees granted a transfer of the bond, to which he forged the signature of his co-trustee, and embezzled the money paid by the transferee. The forger having absconded, a judicial factor was appointed on the trust-estate. In an action by the judicial factor for reduction of the transfer the purchasers of the bond pleaded that the pursuer was barred from insisting in the action, in respect that the forger had been left by his co-trustee and by the beneficiaries under the trust in the uncontrolled management of the trust funds after knowledge on their part that he was not a fit person to be entrusted therewith.

The Court *repelled* this plea, on the grounds (1) that negligence on the part of the forger's co-trustee could not bar the pursuer from maintaining the action in the interest of the beneficiaries; and (2) that the defenders had failed to prove negligence on the part of the beneficiaries.

Opinion by Lord Young that, to make the plea of bar effectual against the judicial factor, negligence would have had to be proved on the part of all the beneficiaries.

By mutual disposition and settlement dated 2nd September 1864, John Adair and Mrs Jane Elizabeth Adair, his wife, disponed to each other and the longest liver in liferent their heritable and moveable estate, and at the death of the survivor conveyed their whole estate to the trustees therein named for the purpose of dividing it among their children. John Adair died in 1867, and thereafter, with Mrs Adair's consent, Hugh Adair, her eldest son, and Robert Vans Agnew, acted as trustees under the said trust-disposition, and paid over the liferent to Mrs Adair Hugh Adair, who was a writer, also acted as agent for the trust.