previous one—bind the granter Sir John M'Donald alone, and his heirs, executors, and representatives whatsoever—that is his general representatives—to relieve the entailed estates of the granter's debts. There is no obligation laid upon the heirs of entail in any of the entailed estates to pay entailer's debts, even those affecting the estates respectively entailed, far less is it made a condition that the heirs succeeding to one entailed estate shall pay off the debts affecting other and separately entailed lands. None of the heirs of entail are bound at common law to do so, although of course all the estates are attachable at the instance of the creditors. Now, when the question of liability for entailer's debts, or questions as to the right to be relieved therefrom, arise, not between the heirs of entail and the general representatives of the entailer, but between two series of heirs of entail under separate deeds of entail, I do not think it is material, at least it is not conclusive, that one of the entails was executed long before the other, or that one of the entails contains a power of revocation while the other does not. These may be indications of intention, but they are no more. In particular, the power of revocation though reserved was never exercised, and I think it impossible to hold that the entail must be held revoked *eo ipso* from the mere fact that the entailer left debts unprovided for. It appears to me that in all such cases the real question is a question as to the intention of the testator or entailer. Did the late Sir John M'Donald really mean and intend that the estate of Dunalastair, carefully and specially entailed, should be burdened with—made answerable for—and probably be sold to pay off—an heritable debt which he had previously constituted effectually as an entailer's debt and a real burden affecting and against the separate entailed lands of Dalchosnie, Loch Garry, and Kinloch Rannoch? Reading the deeds, I should have the greatest possible difficulty in holding that this was Sir John M'Donald's intention, and when we remember that Sir John M'Donald himself at great expense built upon Dunalastair the mansion house which he intended to be the mansion house of the whole entailed estates, viewed as one estate and settled upon the same series of heirs, then, if it should turn out that Dunalastair must be sold in order to pay off the heritable debt affecting Dalchosnie, Loch Garry, and Kinloch Rannoch, I cannot help thinking that this would be defeating, and signally defeating, the intentions of the testator. While I say this much, however, in consequence of the clear opinion to an opposite effect expressed by the Lord Ordinary, I do so merely for the purpose of expressing my difficulty and reserving my opinion entire, for I think that the question cannot be decided under any of the conclusions of the present action.

The case may go back to the Lord Ordinary to ascertain the amount of the free executry, which, so far as it will go, is admittedly liable for the entailer's debts.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming note for John Alan M'Donald against Lord Shand's interlocutor of 22d November 1876, Refuse said note, and adhere to the interlocutor complained of, with the following addition to the Lord Ordinary's reservation—'and to the defender his defences thereto:' Find the defender entitled to expenses since the date of the Lord Ordinary's interlocutor: Appoint the defender to lodge the executry accounts in this Court within eight days: Remit to the Auditor to tax the expenses now found due, and to report, and decern."

Counsel for Pursuer—Fraser—Trayner. Agents—Dewar & Deas, W.S.

Counsel for Defender—Lord Advocate (Watson)—M'Laren. Agent—A. P. Purves, W.S.

Friday, January 12.

FIRST DIVISION.

[Lord Young, Ordinary.

THE HUNTINGTON COPPER AND SULPHUR COMPANY (LIMITED) *v.* HENDERSON.

Company—Director—Trustee—Promotion-Money.

A mining company sued one of their directors for £10,000, which they averred he had received from the persons from whom the company had purchased their mines, out of the price paid therefor, as an inducement to him to become a director, and to promote the formation of the company and the consequent purchase of the mines. The defender admitted that he had received £10,000 from the vendors, but averred that this sum was paid to him in terms of an agreement between him and the vendors, whereby he undertook to render various services to the company, when formed, outwith his duties as a director. These services he claimed to have actually rendered. There was no mention of any such agreement in the prospectus; none of the other directors were made aware of any such agreement, nor did they understand that the defender rendered any services to the company, except in his capacity of director.—*Held* that the defender was bound to repay the £10,000 to the company.

Trustee.

Observed that whenever it can be shewn that a trustee has so arranged matters as to obtain an advantage, whether in money or in money's worth, to himself personally through the execution of his trust, he will not be permitted to retain it, but will be compelled to make it over to his constituent.

This was an action brought by the Huntington Copper & Sulphur Company (Limited) against William Henderson, chemical manufacturer in Glasgow and Irvine, for the sum of £10,000, with interest from 1st April 1872, in the following circumstances:—

The Huntington Company was incorporated and registered under the Companies Acts of 1862 and 1867, upon the 1st of April 1872, with a nominal capital of £200,000 in 20,000 shares of £10 each. The Company was formed for the purpose of adopting and carrying out a contract, dated 25th and 26th March 1872, between John

George Long, of Lombard House, London, on behalf of himself and other vendors, of the one part, and James Henderson (nephew of the defender), of the other part, for the purchase of the Huntington Copper Mines, in Canada.

The pursuers averred—"(Cond. 2) Early in the year 1872 the Honourable Lucius Seth Huntington of the city of Montreal, in the province of Quebec, in the Dominion of Canada, advocate and Queen's Counsel, came from Canada to England, and arranged with Alexander M'Ewen, then of Lombard House, London, merchant or financial agent, for promoting a joint-stock company for the purpose of purchasing certain mining properties in the township of Bolton, Canada, belonging to a company called the Huntington Mining Copper Company of Canada (Limited), and also certain lands belonging to himself as an individual, adjoining the said property of the said Company. The said Lucius Seth Huntington was a shareholder in and director of the said Huntington Mining Copper Company of Canada. (Cond. 3) The said Alexander M'Ewen and the said Lucius Seth Huntington, or one or other of them, applied to the defender to become a director of the said proposed company. The defender had previously been acquainted with the said Lucius Seth Huntington, and was himself a shareholder in the said Huntington Mining Copper Company, or, at all events, was possessed of full information regarding the said Company and their mines. Messrs Huntington and M'Ewen, in order to induce the defender to become a director of the Company and allow his name to appear on the prospectus as a director, which, it was supposed, would induce the public to take shares in the Company, and to use his influence to obtain gentlemen of position to join the board of directors, offered to pay him the sum of £10,000 out of the purchase-money to be obtained by the sale of the said mining properties to the Company. The defender accepted the said offer, and agreed, in consideration of the said sum of £10,000, to become a director of the said Company, to allow his name to appear as a director in the prospectus, to obtain other gentlemen of influence to become directors, and otherwise to aid Messrs Huntington and M'Ewen in promoting and establishing the said Company. It was further arranged between the defender and Messrs Huntington and M'Ewen that Mr James Henderson, a nephew of the defender, who was also a shareholder of the Huntington Mining Company of Canada, should be interim secretary of the proposed company, and that the defender's office in Glasgow should be the temporary office of the new Company."

The pursuer further averred that in pursuance of the said arrangement between the defender and Messrs Huntington and M'Ewen, a prospectus, in which the defender's name alone appeared as a director, was prepared and printed and sent to several gentlemen whom it was thought it would be advantageous to obtain as directors of the proposed company. The defender further used his influence to obtain gentlemen of position to become directors of the Company, and ultimately certain gentlemen well known in Glasgow and the neighbourhood consented to become directors. Each of these gentlemen received from Messrs M'Ewen and Huntington sums of £500 or £1000 each. After the Company was registered, these gentlemen were formally appointed directors. The shares were allotted, and the purchase-price of the mine, which amounted to £125,000, was paid by instalments.

The Company not having proved successful, a committee of investigation was appointed in 1875 to inquire into the state of the Company's affairs, and it was then discovered for the first time that the defender had received the said sum of £10,000. The defender was accordingly asked to pay over to the Company the said sum of £10,000, with interest at 5 per cent. from the date of receipt till payment. This the defender refused to do, and the present action was accordingly brought against him.

All the other gentlemen who had received promotion-money had paid it to the Company, with interest.

The material statements in defence were contained in the defender's answer to article 3 of the condescendence, and in article 2 of the defender's statement of facts, which were as follows: — ("Ans. 3) Admitted that Messrs M'Ewen and Huntington applied to the defender to become a director of the said proposed company. Admitted that it was agreed between them and the defender that the latter should receive £10,000 out of the sum to be paid by the proposed company to the vendors. Admitted also that the defender's nephew was appointed secretary to the Company, and that the defender's offices were used as the temporary offices of the Company." "(Stat. 2) In consideration of the sum of £10,000, agreed to be paid to the defender by Messrs M'Ewen and Huntington, the defender undertook to perform a variety of services which lay entirely outwith the ordinary duties of a director of the Company, and which were necessary to be performed in the interest both of the vendors and of the Company, and, in particular, he undertook to experiment upon the ores proposed to be worked, to procure and train suitable managers, chemists, &c., to design the works, furnaces, &c., to be erected, and, if necessary, to go out to Canada and set the Company's works agoing. All the services thus agreed to be rendered the defender duly rendered to the vendors and the Company. In particular, and *inter alia*, he bought with his own funds fifty-two tons of the Huntington ores, and had the same taken to his works at Irvine and there experimented on in great detail and at considerable cost, in order to determine the form of apparatus and the particular modification of his patented processes which were best suited for working the said ore. He also selected two managers for the Company's works, and had them, one for some months and the other for some weeks, at his works at Irvine, instructing them in the details of his processes. He further furnished plans and designs, and made a journey to Canada in order to set agoing the Company's works. Apart from any allowance for his own time and trouble, he expended in the performance of these and the other services rendered by him in consideration of the said sum of £10,000 a sum not less than £8000. In the result the defender has derived no profit whatever from or under the said agreement with Messrs M'Ewen and Huntington."

The pursuers pleaded—"(1) The defender is bound to pay to the pursuers the said sum of £10,000, in respect that the said sum was stipulated for by the defender, and received by him from

Messrs Huntington and M'Ewen, the vendors, under the arrangement and upon the considerations stated in article 3 of the condescendence, without the knowledge or sanction of the pursuers, and contrary to the duty which he owed to them as their director and agent. (2) The defender is bound to exhibit and produce a full and particular account of, and pay over to the pursuers, all payments, premiums, or other considerations, benefits, or advantages received by him when acting as their agent, without their knowledge and sanction, and contrary to his duty to them as aforesaid. (3) The actings of the defender condescended on having been illegal, and contrary to his duty to the pursuers, they are entitled to decree in terms of the conclusions of the summons, with expenses."

The defender pleaded —"(1) The averments of the pursuers are irrelevant, and insufficient to support the conclusions of the action. (2) The averments of the pursuers being, so far as material, unfounded in fact, and, in particular, the only sum received by the defender from Messrs M'Ewen and Huntington having been received on the footing set forth in the defender's statement, the defender is entitled to absolvitor. (3) *Separatim*, the defender is entitled to absolvitor, in respect that no benefit or profit has accrued to him under the said agreement between him and Messrs M'Ewen and Huntington.

A proof was allowed, and the material portions of the evidence were as follows :—

The defender deponed—"I was acquainted with Alexander M'Ewen, at one time of Glasgow, and afterwards of London. I knew him for a number of years. He was associated with me in Tharsis matters. In the autumn of 1871 he wrote me with reference to the Huntington mine, in Canada, proposing to bring that mine out as a company. I had previously experimented on the ores from that mine, but I did not know much about it except from report. It produced copper and sulphur. Mr M'Ewen consulted me as to bringing it out, and a good deal of correspondence passed between us on the subject. . . . My advice was taken as to whether it should be brought out. The first step I took in order to enable me to give this advice was to assure myself that the mine was a good mine, by getting Mr Charles Robb, a thoroughly competent person in Canada, recommended by Sir William Logan, to examine it and report to me. Specimens of the ore were brought to me by Robert M'Ewen, and I took extra precautions to satisfy myself that it was a good mine. I made experiments on these specimens, and arrived at the conclusion that the ores could be worked satisfactorily in Canada. Besides communicating with Alexander M'Ewen on the subject, I saw Mr Huntington, the principal owner of the mine, once or twice. When he came to me I was working out further processes to utilise not only the copper but the sulphur, which was a very important element in it, and I had taken out several patents and was working them on a large scale at my works at Irvine; and unless I had seen my way to utilise the sulphur I did not see that the copper would be a very successful affair. They bargained with me to get the benefit of these new processes which I was working out along with my partners at Irvine. They did not come to me to bring out the company, but to ask me if I would undertake to erect works and see that they were properly managed to use up all the constituents which the ores contained. This was to be done for a company which they proposed to bring out. . . . After communings with Mr M'Ewen and Mr Huntington, I entered into an arrangement with them, by which I was to assist them in putting up works at the mine for extracting the copper from the ores by my old process, which had lapsed; that I was further to give them the benefit of all the improvements which I was then working at Irvine for the utilisation of the sulphur, and any other improvements which I might make during the existence of the company they were to have the benefit of without any further payment. In return for that I was to receive £10,000. The company which was to be formed was to have the benefit of my patent processes without any license duty, for ever. I was also to undertake to see the processes started at the mine, and to superintend the working of them—to go out to Canada if necessary, or, if anything went wrong, I was also to train and send out a manager, and I did train a manager, who was sent out. I promised also to bring home some of the ores to experiment upon them at my own works, so as to make quite certain that no mistake was made. These were the things which I undertook for the £10,000. . . . (Q) After the company was formed did you proceed to fulfil the arrangement which you had made with the vendors.—(A) I did. I prepared plans and specifications for the works, and I superintended the making and shipping of them, and seeing that everything was sent away which was necessary to start the works successfully. I also continued my experiments on the ores at Irvine. No charge was made by me for the work just mentioned, except some trifling amount for extra draughtsman necessarily employed to hurry the work forward. I engaged two managers, one to look after the works by night and the other by day, and had them under training at my works for a considerable time. One of them was there for two or three months, and afterwards his father was there for a shorter time. . . . After the works of the Huntington Company were set agoing, it was found that they were not getting on well, and I was asked by the directors to go out and put things right. I did so; my travelling expenses were paid, but I got nothing more. . . . (Q) Did Mr M'Ewen say to you that it would be of great importance for getting the Company floated that you should become a director?—(A) No, he did not say anything of the sort; he asked me to assist him and give my services in working the thing out. He asked me to become a director. I don't know when I agreed to become a director. It must have been immediately before the first prospectus was printed. (Q) With whom was the arrangement which you have spoken of made?—(A) With Alexander M'Ewen and Mr Huntington—with both of them. It was made about the end of 1871. (Q) Was it made at one meeting or more?—(A) They were staying in Glasgow for a few days at that time, and I saw them more than once (Q) Why was it not reduced to writing?—(A) I never have any written agreements with Mr M'Ewen. . . . (Q) Did you make charges to the Huntington Company for analysing ores?—(A) Yes, after the Company was at work. (Q)

Was the £10,000 only for analysing the ores before the Company was at work?—(A) No; there were regular samples sent down for analysis after the Company was commercially at work. (Q) The £10,000 had nothing to do with analysis of ores?—(A) Nothing to do with the usual charges for working the mines. (Q) Did you make the usual charges for analysing ores for the Company that you would have made to anybody else?—(A) No; these charges are just one-half of what the Company could have got them done for anywhere else. . . . (Q) The agreement of the vendors was to allow you £10,000 off the price when they received it?—(A) They were to give me £10,000; that was all the bargain they made with me. (Q) Whether they sold their works or not?—(A) No; if they required my assistance in working out the processes at the mine. (Q) Were they to give you £10,000 whether they sold their works or not?—(A) They were not to give me £10,000 unless the Company was formed and the works established. (Q) And then they were to give you the £10,000 off the price?—(A) Well, it would naturally be off the price. (Q) You were to get £10,000 off the price if the Company was formed and the works sold to the Company?—(A) I was to get £10,000 from them if these things were carried out, but I cannot say it was ever mentioned that it was off the price. They might have worked the mines themselves. (Q) Then they were to pay you the £10,000 whether they sold them or not?—(A) Yes, if the works were put up and the process carried out in Canada, I was to get £10,000 in lieu of royalty. (Q) Was such a thing spoken of between you?—(A) For a long time Mr Huntington said it would be a Canadian Company. At first he did not intend to make it an English Company; he intended to extend their own capital and put up the works himself; that was the shape the negotiations took to begin with. (Q) Then you were to get £10,000 whether they sold the works or carried them on themselves?—(A) Yes. (Q) And it was in contemplation that they might either sell them or carry them on themselves?—(A) Yes. (Q) Was the £10,000 for services rendered or to be rendered?—(A) For services to be rendered. No services had been rendered at the time they agreed to pay me the money. The services to be rendered were that I was to give them license to use my patent processes without duty, to instruct and send out skilled managers, and to provide the necessary plans and specifications. (Q) Then it was prepayment of patent license duty and of instructing skilled managers to use the patents?—(A) Exactly. (Q) At that time had you any patents which required your license to use the processes in Canada?—(A) I was about to take out patents. (Q) At that time had you any?—(A) No. (Q) Did you thereafter take out any patents requiring licenses to use them in Canada?—(A) No. (Q) Then, so far as the patents were concerned, you never either gave, or were in a condition to give, any return whatever for the £10,000?—(A) If they had demanded it of me, I would have immediately patented the processes in Canada, and they would have had them then."

Mr Morton, one of the original directors, deponed—"I was informed that Mr Henderson was to be a director. I was not acquainted with Mr Henderson then, but I knew generally that he had been prominent in connection with the Tharsis Company, which had been very successful, and I was told that through him and his patents the Huntington would become a second Tharsis, and as wealthy, or more so. It was Mr Alexander M'Ewen who told me this. He said that Mr Henderson being a director would give to the Company the benefit of his knowledge and experience, that his processes had made the Tharsis Company so wealthy, and that the same processes carried out on the Canadian ores would make this Company equally wealthy. . . . (Q) Was it explained to you on what footing Mr Henderson was to give his services and professional skill to the Company?—(A) On the same footing as myself, with this difference, that he was a practical chemist, understanding the processes and able to give effective aid, while I was not so, and could not give much aid."

Mr Jamieson deponed—"I was one of the original directors of the Huntington Company, formed in 1872. Mr William Henderson first spoke to me about it. I was aware of his connection with the Tharsis Company, by which he had earned a considerable reputation. He told me that he was going to take a leading part in the management of the Huntington concern, by which I understood that his practical knowledge of chemistry and of mining was to be made available to the Company as managing or leading director. He led me to suppose that he would look after the practical affairs of the Company in detail. I thought this would be of very great value to the Company. Without this I would not have considered the Company a valuable thing to go into."

Mr Alexander M'Ewen deponed—"I arranged with Mr Henderson that he was to assist me in bringing out the Company to buy the mines, and that he was to have a share of the profits in consideration of his doing so. He was to judge, in the first place, of the desirability of purchasing the mines and bringing out the Company. He was to analyse the samples of ores, and report whether they were suitable for his process. He was to become a director of the Company, so as to enable him to assist in the application of his process to the ores. I considered the application of his process as an essential part of the success of the Company. I would not have gone into it at all without securing Mr Henderson's assistance. . . . The services Mr Henderson was to render were in my opinion well worth the share I was to give him in the profits. That share was fixed at £10,000. I requested him to become a director. It did not occur to me that in any other capacity he could render the same services. I would have been quite willing to pay him the same amount had he consented to become manager. I don't think consulting engineer would have been sufficient. He is not an engineer. The £10,000 was given to him for the services he was to render to the Company, and to me in assisting to bring it out. . . . I could not have secured his services otherwise than as director or manager. I have said that I would not have brought out the Company without securing Mr Henderson as director. I did not think of Mr Henderson as anything else but as a director. I considered his being a director essential to the success of the Company, and as likely to induce the public to take shares in it. That was because he was inventor of the process which had made the Tharsis mine a great success."

It further appeared that in the first prospectus (mentioned above) in which the defender's name alone appeared as director, the following clause occurred:—"It is proposed to utilise the whole of the sulphur in the ores worked in the Dominion, and arrangements have been made with Mr Henderson and his partners to adopt the most improved processes for this purpose when fully developed at Irvine, which, it is anticipated, will very much increase the profits of the Company. The products being bleaching powder and alkali, which command high prices and a ready sale in both Canada and the United States." In the prospectus as ultimately issued, the clause ran thus:—"It is proposed to utilise the whole of the sulphur contained in the poorer ores treated at the mine, and arrangements will be made with Mr Henderson and his partners to adopt the most improved processes for this purpose when fully developed at Irvine, which will very much increase the profits of the Company." In the contract of sale between Long and James Henderson, the following clauses occur:—"The vendor shall sell, and the Company shall when incorporated purchase, &c.;" and "This agreement shall not be binding until adopted by the Company."

The pursuers further put in evidence receipts granted by the defender for payments of from one to five pounds made to him by the pursuers for analysing work done for them.

The Lord Ordinary (YOUNG) pronounced the following interlocutor:—

"22*d June* 1876.—The Lord Ordinary, having considered the proof, record and productions, and heard counsel thereon, Repels the defender's pleas, and decerns against the defender to make payment to the pursuers of the sum of ten thousand pounds, with interest thereon at the rate of 5 per cent. per annum from the 31st day of August 1872 till paid, being the date of payment of the last instalment of the purchase money; and, in respect the pursuers do not insist in the remaining conclusions for accounting and payment, finds it unnecessary to dispose of these conclusions:—Finds the defender liable in expenses, and remits the account thereof, when lodged, to the auditor to tax and report.

"*Opinion.*—The relevancy of the pursuers' case as stated was not disputed in argument, notwithstanding of the plea of irrelevancy on record; and I am of opinion that it is clearly relevant. The relevancy of the defence, or its legal sufficiency as an answer to the action, might, I think, have been reasonably questioned, but the pursuers, no doubt advisedly, abstained from doing so as an objection to proof, although before the commencement of the evidence they contended that, having regard to the defender's admissions, which they represented as sufficient *prima facie* to entitle them to judgment, the defender ought to begin. This course was in accordance with my own impression, and was not resisted by the counsel for the defender. It was, however, understood that the course so taken should be without prejudice to the pleas of parties on the whole case when the proof was concluded.

"The facts of the case as established, and indeed substantially admitted, are very simple. Mr Huntington of Montreal, being interested in a copper mining company in Canada called after his own name, and whose property he had authority to sell, and being himself proprietor of certain lands adjoining the company's mine and works, which he wished to dispose of, came to this country in order to effect a sale of the whole for the company and himself. His first communication, so far as we know, was with Alexander M'Ewen of London, a gentleman of experience in promoting the formation of companies to purchase such properties as Huntington wished to dispose of. In the result Huntington and M'Ewen together applied to the defender for his aid in the matter, which was no doubt important, or thought to be so, to the success of the scheme, for they on the part of the proposed vendors offered him £10,000 for it, or, (adopting the expression in the defender's answer to condescendence 3), agreed that he "should receive £10,000 out of the sum to be paid by the proposed company to the vendors." The defender agreed to these terms after, (as he says, no doubt truly), satisfying himself by enquiry that the property was valuable, and that the concern was likely to prosper in the hands of a joint stock company. The agreement being thus made, the defender set about the performance of his part of it, by assisting in the preparation of a prospectus for a company, which was printed and circulated with his name as sole director, the purpose of it being apparently to induce other gentlemen of probable influence to allow their names to be added to the direction, with a view to a further and more complete prospectus. The measure was successful to the extent of inducing five gentlemen to join and add their names to the direction. They were no doubt influenced by the confidence which they not unreasonably reposed in the defender, being ignorant of the terms upon which his aid had been purchased by the vendors, though four of them had some reason for suspicion from the circumstance of bribes being promised, and in the result paid, to themselves for the use of their names as means of promoting the interests of the vendors. The bribes promised and eventually paid to these gentlemen were of less amount than that for which the defender had agreed, but were, I think, of exactly the same character. The result was, that of the six provisional directors who had been selected because of the influence which their names were likely to carry with the public, five had been induced to give the use of their names by bribes to the aggregate amount of £13,000, promised on the part of the vendors speculating on the advantageous sale which they hoped to effect through the influence thus procured. On 25th and 26th March 1872, the contract whereby the sale was made to the intended company was executed by a Mr John George Long on the part of the vendors, and by the defender on the part of the intended company. By this contract, which is set out in condescendence 5, it was agreed that "the company shall, when incorporated, purchase" the property specified "for the sum of £125,000," payable as therein mentioned. This contract was necessarily conditional on the formation and incorporation of the projected company, but the condition was immediately thereafter, viz., on 1st April 1872, purified by the registration of the company. For all legal purposes the contract may be taken as effected by the directors of the company, (including the defender), immediately after the registration whereby its incorporation was effected.

It has since been implemented by a conveyance of the property and payment of the agreed on price. The vendors have also kept faith with the defender, and those of his co-directors with whom they had agreements, by payment of the rewards promised to them for the services which they received at their hands, and to which no doubt the advantageous sale which they effected through their means is greatly attributable.

"Had the company prospered nothing might ever have been heard of the manner in which the directors who were charged, indeed had charged themselves, with the company's interests in the matter of the purchase, had been seduced or at least greatly tempted by the vendors whose interests were necessarily opposed to those of which the directors were the guardians. But the company having proved unfortunate, and a committee of investigation having been appointed, the facts came to light. The defender's brother directors who received money from the vendors have seen fit to pay to the company what they so received, with interest. Their view seems to have been that the price agreed to by them for the company may be considered as having been higher by at least that amount than it would otherwise have been, but the defender declines to take even this apparently moderate view, and insists on retaining what he has got. Hence the present action.

"The view of his position or of the agreement between him and the vendors under which he was to "receive £10,000 out of the sum to be paid by the proposed company to the vendors," as urged at the debate, is distinctly enough stated in his agents' letter, quoted in cond. 12: 'For the advantages accorded by him to the company, and for the benefits the company would derive from his technical skill and experience, (which we would remind your committee have been unceasingly devoted to the company,—quite distinct from the duties of a director,—at great inconvenience, with very considerable loss of time, and without any other remuneration), the vendors paid Mr Henderson £10,000.'

"I cannot assent to this view. The import of it is, that by the contract of March 1872 the vendors, for the agreed-on price of £125,000, sold and agreed to transfer, not only the property therein carefully specified, but also the defender's services as a skilful and active director, together with some undefined right to use his peculiar processes, for which they had prepaid him £10,000. But there was no contract between the vendors and the defender the benefit of which was capable of being sold and transferred to the company, and in the contract between them and the company there is no allusion to anything of the kind.

"But laying aside this view as untenable, the rule of law applicable to the case is, I think, not doubtful. It is the simple and familiar rule of trust law, that a trustee (using the term in its largest sense), shall not without the knowledge and consent of his constituent make profit of his office, or take any personal benefit from his execution of it. It is not a different rule, but merely a developmen tand instance of the same rule, that a trustee shall not be permitted to do anything which involves or may involve a conflict between his personal interest and his trust duty. The rule is not confined to particular cases which are capable of being enumerated, but is commensurate with the large and important principle on which it rests. That principle is, that a person who is charged with the duty of attending to the interest of another shall not bring his own interest into competition with his duty. It is immaterial, as many cases illustrate, what may be the particular relation which raises the duty, provided only it raises a duty, as on reposed trust, of which the law takes cognisance. The remedy for a breach of the rule depends on the circumstances of the particular case, and is, to some extent, in the option of the person who has suffered thereby, either actually or in presumption of law. I say in presumption of law, for it very well settled that remedy under the rule is not confined to cases of established injury, and that the law presumes an injury wherever the rule has been violated. But without speculating on the remedy in general, it is, I think, firmly established that wherever it can be shewn that the trustee has so arranged matters as to obtain an advantage, whether in money or in money's worth, to himself personally, through the execution of his trust, he will not be permitted to retain it, but be compelled to make it over to his constituent. It is unnecessary to express such limitations as must tacitly accompany so general a proposition; as, for example, by excluding cases of fraud practised by a trustee for his own benefit on a third party with whom he was dealing for the trust, and in which, no doubt, the remedy would be to the party defrauded.

"Applying the rule to the case in hand, it appears, and so I hold in point of fact, that the defender, being a director of the pursuer's company, and so charged with the duty of attending to their interests, made on their behalf a contract for the purchase of certain specified property at the price of £125,000, having at the time when he made it a secret agreement with the vendors to receive to himself £10,000 out of that price. The company implemented on their part the sale so made for them, by paying the price, and accepting a conveyance of the property, and the defender received back from the vendors £10,000, which he has retained. Assuming the facts to be so, the case seems to be *prima facie* an exceptionally clear one for the application of the rule of law to which I have adverted.

"The first point which the defender makes in answer to it is, that when he made his bargain for the £10,000 he was in no trust relation, and that there was nothing to hinder him accepting the vendors' offer of that sum for his services in aiding them to sell their property to advantage. To this I agree, provided the proposition does not extend to the case that the services were to be given by first bringing about the constitution of a trust relation between the defender and a contemplated purchaser, and then effecting the sale through the medium of that relation. But I must exclude that case from my general assent, for I think an agreement to that effect would be an agreement to commit a fraud, of no importance truly if the contemplated fraud was not in the result actually perpetrated, but very important, even in its character of a preliminary agreement, if the fraud was afterwards in fact perpetrated in pursuance of it. Now this is precisely what I must, on the evidence, hold to be the fact here. Nor would it signify, in my opinion, that the agreement between the defender and the vendors

might have been otherwise implemented, as, for example, by procuring a purchaser to whom the defender did not stand in any trust relation. I think it was in fact implemented exactly as contemplated and intended from the first, but it would not affect the result in my opinion had this been otherwise. The defender being a trustee did in fact purchase for his constituent from a vendor who agreed to pay and did pay him £10,000 for his services in the matter, and the date or the terms of the preliminary agreement or understanding according to which he was to receive the money are, I think, altogether immaterial, except as bearing on a question of personal integrity, which need not be decided.

"The next point the defender makes is, that the Company was not incorporated when the sale was concluded, and that the present members, or the great body of them, joined subsequently. But, 1st, I think it clear that the purchase *was* made on behalf of the incorporated Company, and by the defender acting as a director of the incorporated Company. From the necessity of the case, or at least quite naturally and in ordinary course of business, the contract was made provisionally, before the incorporation: But it was made in contemplation of that event, and in terms dependent upon it, so that on the incorporation, a few days thereafter, it became *eo instanti* a contract of the Company, made for them by the directors, and as such accompanied by all the ordinary legal rules and incidents applicable to it and to the conduct and responsibility of the directors in making it, notwithstanding that the directors and the contract were alike originally provisional, and remained so till the incorporation. 2nd, The ordinary rules of law apply to an incorporated company, and to the relations between it and others, including its directors, without regard to changes in the membership. Further, apart from this rule of law as I regard it, and looking only to the reason and justice of the thing, I must hold that members joining an incorporated company at any time after its incorporation are entitled to rely upon it that all subsisting contracts have been made by the directors in the due discharge of their duty as governed by the rules of law, and on finding the fact to be otherwise are entitled, through the ordinary vital action of the company itself, which they have power to set in motion, to all the remedies which the law may allow to the company in the circumstances which may be established. Nor, for the reasons which I have indicated, can I distinguish in the matter between provisional contracts which became absolute by the incorporation, and those made subsequently to the incorporation, and so absolute from the first.

"The last point the defender makes is of this nature. He says there is no evidence that the price agreed to be given for the property was extravagant or unfair, and contends that when the price, thus assumed to be fair, was actually paid to the vendors the money became theirs to dispose of as they pleased, and that if they were pleased to give £10,000 to the defender that was their affair and no concern of the Company's, who, on the assumption, had only paid a fair price for the property they acquired. This, which was the burden of the defender's argument, I must regard as altogether unsound, for it ignores the rule of law to which I have already sufficiently adverted, and a host of cases by which it has been illustrated. According to the view of the law thus maintained, an agent or trustee purchasing a property may take any sum he pleases from the seller as a personal gratification to himself, without any remedy to his constituent, except on proof that the price was extravagant or unfair. Or an engineer or architect may, without violation of duty, take gratifications from the contractors employed by him for his principal, in recognition of his patronage, and the principal will have no remedy except on proof of extravagant prices. The law, as I understand it, is otherwise. When an agent or other trustee takes money from a person with whom he contracts for his constituent, the law assumes that he takes it at the cost of his constituent, and admits of no evidence to the contrary. To hold otherwise would greatly defeat the wholesome object of the rule, by exposing those who sought a remedy under it to litigation about values to determine whether or not abatements, for the trustee's personal gratification, had been made from fair prices and fair profits, and so really at the sacrifice by the third parties of what they were reasonably entitled to for their goods or services, without real injury to the constituent who got his money's worth. The law avoids all this by holding firmly to the rule, that a trustee or agent shall have no benefits except what the law allows or his constituent knowingly agrees to, and that if he receives more he receives it unfairly, at his constituent's expense. The rule is founded on good sense, and the mischief of any other would be incalculable. Thus, to instance in the case of sale, it seems only reasonable to assume that a vendor will not subsidise a buyer's agent for merely performing faithfully his duty as such. But if not, what is the conclusion when such a subsidy has been given? Simply, that which every man forms who hears of it, that the interest of the buyer has by his own agent been sacrificed to that of the seller, and that this is precisely what the seller has paid for. The law, so far as it can, protects principals against the danger of having their interests so sacrificed, by prohibiting agents from taking any benefit whatever in this manner without their knowledge and consent, and by taking from agents, without further inquiry, the fruits of any violation by them of this prohibition.

"The defender attempted to make a point of the circumstance, that it did not appear that the £10,000 which he received was part of the very money which the vendors had from the Company. It was probably, or even certainly, no part of it. All the payments together may have been by cheques or bills, or even, so far as the defender was concerned, by credit, in accounts between him and the vendors. The identity of the money is of no importance, nor would it have affected the application of the rule on which I decide the case had the gratification by the vendors to the defender been not in money but in money's worth, as by a conveyance or delivery to him of heritable or other property here or in America.

"I have, I hope and believe, made it sufficiently clear that I decide the case on a general rule of law; the application of which does not imply any imputation to the defender of fraud, in the sense that he bought the property in question for the company solely because of the benefit he was personally to receive from the vendors, and with-

out believing that the property would be worth to the company for which he acted the price he agreed to pay for it, although that did necessarily include the large amount which he had agreed with the vendors to receive out of it on his own account. So far from this, it is according to my conviction of the fact, on the evidence, that he believed, as the result of his inquiries and the exercise of his judgment, that the company which he was so instrumental in calling into existence would be successful, and that there would be no reason to regret the purchase. He, no doubt, also thought that in the event of the success which he anticipated he ought to have some gratification for his skill and active services in originating the concern, and setting it a-going, beyond a mere participation in the profits according to his shares. Nor could there have been any objection to an arrangement between him and the company whereby he was to be remunerated as the originator and most active director, in such manner and to such extent as they mutually agreed on, and that either absolutely and in any event, or conditionally on success and according to profits. Such agreement might indeed have formed part of the articles of association, and appearing there would necessarily have been binding on the company incorporated according to these articles. This was the obvious, familiar, and above-board course if the defender meant that the company should remunerate him for his services, and the only objection to taking it apparently is that it might have formed an obstacle to the successful creation of the company, for men might not have been willing to join on such terms. But having, for whatever reason, omitted to take this course, the defender was, I think, clearly without any resource except an appeal to the Company after its incorporation. It is therefore impossible, in my opinion, to defend the payment which the defender obtained from the vendors on the ground that it was only an indirect way of obtaining from the Company payment for his services as the originator, promoter, and active director of the concern. That the vendors should, out of the proper price of their property, pay the defender for these services to the Company is simply ridiculous, although it is conceivable that they might have lent themselves to such a device as is suggested by the great stress laid by the defender on these services in his argument, provided the price was increased beyond what they were content to receive to themselves by such amount as the defender wished to receive to himself out of the funds of the Company. I need hardly say that no court of law could for a moment countenance such a proceeding.

"The case is important as disclosing proceedings which there is reason to believe not unfrequently attend the genesis of joint-stock companies; and, being of opinion that they are of an illegal and mischievous character, I have considered and dealt with the case in all the aspects of it which were suggested in argument, or have occurred to myself, in order that I might distinctly express and explain the grounds of that opinion. The length at which I have entered on the case is not, however, to be taken as any indication of doubt or difficulty on my part, for, indeed, I regard the case as a very clear and even gross case for the application of a familiar and well-settled rule of law. And with respect to the remedy (which I have here given to the extent asked), I desire to say that I am not of opinion that the law affords no larger and more complete remedy than depriving the trustee of the profit which he has personally made. If a private individual should discover that his factor or agent had betrayed him into the purchase of a property, effected on his advice and through his instrumentality, in pursuance of a secret agreement with the seller to share the price with him, I am not of opinion that the remedy is confined to compelling such factor or agent to give up so much of the price as he had received. On the contrary, I incline, as at present advised, to think that any one who discovers that he has been thus defrauded, may, if so minded, repudiate the purchase altogether, and seek complete redress against both the seller who seduced his agent and the agent who faithlessly yielded to the seduction. A company is in no different position with respect to its directors, and if it should appear that a party having property to sell tempted the directors of a company by personal bribery to buy it for the company, I cannot permit myself to doubt that the company might, on discovering the fraud, repudiate the transaction and seek complete redress against all concerned in it."

The defender reclaimed, and the arguments submitted for him sufficiently appear from Lord Young's judgment, and from the opinions of the Judges of the First Division.

Authorities cited—*In re Canadian Oil-Works Corporation* (*Hay's* case), 10 L.R., Ch. 593; *Carlung's* case, 20 L.R., Eq. 580; *Parkes* v. *M'Kenna*, 10 L.R., Ch. 96; *York Buildings Company* v. *Mackenzie*, 13th May 1769, 3 Pat. App. 378; *Aberdeen Railway Company* v. *Blaikie Brothers*, 20th July 1854, 1 Macq. 461; *Tyrrell* v. *Bank of London*, 10 H. of L. Cases (Clark's) 26; Act 30 and 31 Victoria, chap. 131, sec. 38.

At advising—

Lord Shand—I agree with the Lord Ordinary that there is no doubt as to the general legal principle by which the question here in dispute must be determined, or as to the application of that principle to the circumstances of the present case.

It is clear that as part of the arrangement for the purchase of the Canadian property by the Company at the price of £125,000, the defender, a director of the Company, stipulated that he should receive £10,000 from the vendors, and that on the sale being completed he received that sum. This payment was agreed to be made, and was made, without notice to the Company. In order to enable them to make the payment the vendors had to stipulate for £10,000 in addition to the sum they were themselves to accept as the value of the property, and the enhanced price to the extent of this sum of £10,000 was thus simply the money of the Company paid without the sanction or knowledge of the Company, through the vendors of the property, to one of the Company's directors.

It was provided by the agreement for the purchase of the property that it should not be binding until adopted by the Company. The defender, as a director of the Company, was thus a party to the agreement being adopted, and so taking effect. It would, in my opinion, have made no difference if the arrange-

ment with the vendors had stood entirely on a concluded agreement entered into prior to the registration of the Company, it having been part of the agreement that the defender should assume the trust-character of a director in order to carry the arrangement out; but the fact is that in binding the Company to make the purchase by adopting the agreement to that effect, which had been previously entered into with the defender's sanction by Mr James Henderson as a trustee for the intended company, the defender, being then a director of the Company, stipulated for payment to himself of the sum of £10,000, which, for the reason already stated, must be regarded as a payment of money truly belonging to the Company, and which, according to the ordinary rule arising out of a trust-relation, stated so clearly by the Lord Ordinary, the defender cannot be permitted to retain.

The defender, unable to dispute the force and effect of the general rule, has endeavoured to justify his receival and retention of the money on the ground that it was paid to him under an agreement with the vendors that he should render important professional services to the Company in preparing plans for their works in Canada, training men to take charge of the Company's operations, going to Canada if necessary to see the works started, and pursuing experiments in this country in order to make the most of the manufacture of the Company's ores, and that in point of fact these services were rendered to the Company. The defence maintained has substantially rested on this, which is represented as making a special case, entirely distinguishable from the case of a director receiving promotion-money or shares in the Company as a qualification for his seat at the board, in which cases it cannot be disputed the ordinary rule applies. To this defence, however, there are several obvious and conclusive answers.

So far as services are said to have been actually rendered to the Company under the alleged agreement, it is a sufficient answer to say that it is impossible to refer any services rendered by the defender to the Company of which he was a director to an agreement now alleged to have existed, but of which every director of the Company, and everyone in the management except the defender himself, was entirely ignorant. If the defender was really rendering, or professing to render, services to the Company under an agreement binding on him in respect of remuneration received when the Company was formed, it is inconceivable that this should not have been mentioned or disclosed in some way before the claim for repetition of this money was made. The entire absence of knowledge by the directors of any such agreement tends to create a strong impression that the defence founded on it has been reared up on a very slender foundation—the understanding, or promise it may be, that the defender, like the other proposed directors, would do his best to promote the formation and aid the business of the Company, giving also the benefit of the professional knowledge he had. And this impression has not been removed but confirmed by the proof. The defender's connection with the Tharsis mine, which is referred to in the prospectus, and the success of which is said to have been to a considerable extent due to him, is probably of itself sufficient to account for the larger bonus given to him to procure his name and influence on the direction (and so to attract shareholders) than the sums given to other gentlemen admittedly with that view. And the suggestion now made of services having been rendered under an agreement antecedent to the formation of the Company is in direct variance with the statement in the prospectus issued after being approved of by the defender, to the effect, not that an arrangement had been made, but that it was proposed to make arrangements with him for getting the benefit of his improved processes when fully developed.

It is not, I think, proved that the bonus of £10,000 was paid in respect of any agreement for services to be rendered to the Company. Mr M'Ewen attributed the payment mainly, at least, to the assistance he expected from the defender "in bringing out the Company," and that assistance was evidently so great that without it the Company would probably never have come into existence. He states that the defender was under no legal obligation to perform the services referred to—a statement which is of course inconsistent with the existence of an effectual agreement to that effect—and it is scarcely intelligible that Mr M'Ewen, in effecting the sale of the property which was to be the source of his profit, should stipulate and should pay the defender for services to be rendered to the Company in its operations after the sale was completed and he was himself divested of the property.

I have only further to say, that it would, in my opinion, make no difference in the result even if such an agreement as that which the defender alleges had been clearly proved to have been entered into between him and the sellers of the property, unless indeed the shareholders of the Company, after being duly informed of all the circumstances, had resolved to adopt it.

Both at common law, as well as under the provisions of the Statute 30 and 31 Vict. c. 131, § 38, the defender is, I think, precluded from founding on any agreement entered into by the promoters of the Company of which distinct notice was not given in the prospectus. Even if the agreement had been entered into after the Company came into existence, by a formal contract between the defender and his co-directors, the defender could not have taken advantage of it. His position as a director or trustee plainly prevented his entering into any contract of a nature so unusual, which involved a conflict between his personal interest and his trust duty. It may be that if a contract for remuneration for professional services had been entered into between the promoters of the Company and the defender, and this had been clearly explained in the prospectus, it would be held that shareholders afterwards subscribing were thereby bound—in which case they would have had a legal obligation against the defender to have the services rendered. So also, if in compliance with the provisions of the Joint-Stock Company Acts an agreement had been made after due notice to the shareholders, both parties would be bound. Here, then, was nothing of the kind. It is plain the defender could not have received £10,000 from the Company on the statement of an agreement made with the vendors, and services rendered but not yet paid for, and upon the evidence which has been adduced in this case. It seems to me to be equally clear that he cannot retain the £10,000 of the Company's funds, received without their

knowledge or sanction on the ground of an agreement and services alleged, even if these were proved, which I am far from thinking to be the case.

Lord Deas—This is a case of great importance, but I really have very little to say about it, because it appears to me that it has been very accurately, ably, and exhaustively stated by the Lord Ordinary. It is very clear that this £10,000 was by the agreement to be paid out of the price of the subject purchased. The effect of this therefore is, and must be assumed to have been, just to increase the price paid by the purchaser to that amount. That being so, the £10,000 cannot, I think, be called by any other name than that of a bribe—a bribe to the defender to accept the subject sold for the Company at that enlarged price, unless before this was actually done, and after the Company was incorporated, the matter was brought before the Company and approved of by them. Now, that undoubtedly was not done. On the contrary, knowledge of it was withheld from the Company not only until after the Company was incorporated, but until an investigation subsequent to the incorporation took place into the affairs of the Company, when this for the first time became known to the Company, and in place of being approved of, was disapproved of and disclaimed. The defender was by that time in the position and held the character of a trustee for the Company, but it appears to me that the fact of the arrangement having been made by anticipation does not vary the case at all from what it would have been if he had been a trustee at the time the agreement was made. The agreement made by anticipation, and afterwards carried out, just puts him in the same position as if he had done this after he was actually invested with the character of trustee. It was contemplated from the first that the purchase was to be confirmed, and that he was to hold the character which he afterwards did. These views are, as they deserve to be, very fully developed in the note of the Lord Ordinary; and I have only further to say that in the whole of that note, from beginning to end, I substantially concur.

Lord Mure—I have come to the same conclusion, and as the Lord Ordinary has entered so very fully into the question, and as I entirely concur in his opinion and in what has fallen from Lord Shand, I shall simply state that it appears to me that this is a very clear case indeed for applying the general rule which runs through all the cases on the subject, that parties in the position of trustees are not permitted to make profit by that position. As I understand the arrangement made in this case, it was settled from the first that the defender was to be a director in this proposed company, and it was arranged at that time that for what he calls certain services to be performed by him as to the floating of the Company and other matters he was to get £10,000. That is broadly affirmed in the 3d article of the condescendence, and I think almost as broadly admitted by the defender. Therefore he was in the position of a party who was to get £10,000 of the purchase-price of this property, provided the Company came into existence in consequence of the exertions of the provisional committee and the directors who floated the Company. Now, the general rule of law as applicable to trustees, as I have always understood it, is this—it is laid down in these words by Lord Lyndhurst in the case of *New* v. *Jones*—"It is the duty of a trustee to be guardian of the estate, and to watch over the interests of the estate committed to his charge. If he be allowed to perform the duties connected with the estate, and to claim compensation for his services, his interest would then be opposed to his duty, and as a matter of prudence the Court does not allow a trustee to place himself in that situation." And he further adds—"it would be placing his interest at variance with the duties which he has to discharge." Some question was raised about the extent to which that opinion of Lord Lyndhurst in *New* v. *Jones* was meant to go, and in the subsequent case of *Broughton* v. *Broughton*, 5 De Gex, Macnaghten, and Gordon, Lord Cranworth, with reference to the question, whether some doubt had not been thrown upon Lord Lyndhurst's dictum in the case of *Cradock*, uses these expressions in 1856, when he was Lord Chancellor—"The rule really is, that no one having a duty to perform shall place himself in a situation to have his interests conflicting with that duty. And a case for the application of the rule is that of a trustee himself doing acts which he might employ others to perform, and taking payment in some way for them. As the trustee might make the payment to others, this Court says he shall not make it to himself." Now, I think, in the circumstances of this case, the defender as trustee had a duty to endeavour to acquire this copper mine at as low a price as possible from the parties who were selling it to the Company. His duty therefore was to beat down the price to be paid to the lowest possible figure that he could get it at. That was his duty as trustee. But, on the other hand, he was only to get this £10,000, as I understand the case, if the Company was floated, and therefore he had a material interest to get the Company started, whatever the cost might be to the other shareholders, in order to get the £10,000.

Lord Deas—There is one observation I wish to make. A good deal has been said about counterclaims on the part of the defender. I do not mean to give any opinion about these, but I am very clearly of opinion that nothing can be made of them here, whatever may be made of them in a counter-action.

Lord President—I agree with all your Lordships that this is a case of great importance, and also that it is a very clear and even gross case for the application of the general rule of law which your Lordships have stated. The Company was registered on the 1st of April 1872, and in the memorandum of association, in that part of it which professes to state the objects for which the Company was established, we find that the leading object, without which indeed the existence of the Company would be utterly purposeless, is thus expressed—"To adopt and carry out a contract dated the 25th and 26th of March 1872, entered into between John George Long, on behalf of himself and other vendors on the one part, and James Henderson of Glasgow, on the other part, for the purchase" of a certain mine in Canada. It is obvious, therefore, from this, without going further, that the Company was brought into ex-

istence for the very purpose of purchasing and working this particular mine. Now, the preliminary contract by which the terms of the sale were settled was a contract in which the nominal vendor was Mr Long and the nominal vendee was Mr James Henderson. The Lord Ordinary has made a slight mistake, in point of fact, in supposing James Henderson to be the defender. He is the defender's nephew. But that circumstance makes not the slightest difference in my mind upon the general result of the case. There can be no doubt that both these gentlemen were mere names, representing other people. The vendors were the persons who had the true interest in this Canadian mine, and the vendees were the persons who were getting up the Company which was registered on the 1st of April. Now, who then were these vendees? So far as I can see, in the first place, the true vendee was the defender Mr Henderson; because when the first prospectus was issued his name appears as the only director of the Company, and the other parties who assisted him or co-operated with him in framing the prospectus and circulating it privately were parties who were rather interested on the side of the vendors, particularly Mr M'Ewen, who really was the agent of the vendors in Glasgow. The original prospectus thus framed having been privately circulated, some additional names were procured of persons to act as directors. And it is not immaterial to observe that of the gentlemen who are named in the second edition of the prospectus as it was ultimately issued there are only two of them who were not, in point of fact bribed to get up this Company for the purpose of adopting and giving effect to this sale. No doubt the other gentlemen who received money on account of this service received much smaller shares than the defender, and they have made the best reparation in their power by paying over the money to the Company, with interest; and the position of the defender is that he received £10,000 for giving his name as a director, and for getting up the Company along with those other persons, the object or one of the objects at least of these parties in getting up the Company being to secure to the vendors the full price of £125,000 as the equivalent for the mine to be sold. Then we have it established by the clearest and most distinct evidence that what Mr Henderson, the defender, stipulated for as the condition of his becoming a director and getting up the Company to give effect to this contract of sale, was that he should receive from the vendors a certain portion—amounting to £10,000—of the price which was to be paid by the Company for the mine. Now, that is enough I think for the decision of the case. I think all the other facts may be looked at with advantage in judging of the conduct of the persons who are involved in this transaction, but these are the broad and simple facts upon which I think the decision of the case must rest; and it appears to me that they disclose Mr Henderson, the defender, as standing distinctly in this position, not that he was a director of the Company at the time that he entered into the arrangement with Mr M'Ewen and his clients, because the Company was not then in existence, but that he stipulated that he should become a director, and so place himself in a fiduciary position for the Company, and so assume the duty of managing and protecting the interests of the Company when it came into existence, for the very purpose—not perhaps the sole purpose, but for this purpose among others—of compelling the Company when it came into existence to adopt and fulfil this contract of sale by which they were to pay that £125,000. I think therefore that he just accepted the £10,000 as a bribe to induce him to bring this Company into existence, and to make himself a director of the Company—he accepted the £10,000 as the consideration upon which he was to perform that office for the vendors of the mine, and thus he placed himself in the position of having a trust duty to perform and a personal interest directly conflicting with that trust duty.

Now, the doctrine of law as applicable to such a case I think cannot be better stated than it is in one passage of the Lord Ordinary's note, in which he says,—"Whenever it can be shown that the trustee has so arranged matters as to obtain an advantage, whether in money or in money's worth, to himself personally through the execution of his trust, he will not be permitted to retain it, but be compelled to make it over to his constituent." The judgment which the Lord Ordinary has pronounced is just to compel this gentleman to make over the money which he has received to his constituent, the Company, and in that judgment, as I said before, I entirely concur.

The Court adhered.

Counsel for Pursuers—Lord Advocate (Watson) —Balfour—Low. Agents—Frasers, Stodart, & Mackenzie, W.S.

Counsel for Defender — Asher — Mackintosh. Agents—Mylne & Campbell, W.S.

Friday, January 12.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

HOGG *v.* ELLIOT.

Contract—Sale—Offer and Acceptance.

E. sold a horse to H. at the price of £170, subject to a veterinary surgeon's certificate that the horse was sound. It was understood that the horse was eight years old, but the veterinary surgeon discovered that he was ten. This fact was communicated by H. to E. by letter, in which H. expressed his willingness to buy the horse if the price was reduced to £150, and if he was allowed to try him. E. agreed to take £150 for the horse, and thereafter it was arranged that H. should try the horse on "Tuesday or Wednesday" the 5th and 6th October. On Monday the 4th October, E. sold the horse to a third party, delivered him on the following day, and communicated the sale to H. by post-card dated 5th October, and posted about one o'clock on the afternoon of that day—H. received the card on the Wednesday. In the meantime H. had found that owing to engagements he could not try the horse either on Tuesday or Wednesday, and on the afternoon of Tuesday the 5th October he posted a letter to E. agreeing