choice is made in circumstances like the present the law should give redress. For we have nothing in this case of the nature of a *condictio indebiti*; we are simply dealing with certain actings of this lady entirely voluntary in their character, and so long as matters remain entire, it does not appear to me that there is anything to prevent her resiling. The result I think would have been the same even though Mr Inglis had not been a trustee, and had not in any way been a party to his sister's decision; much more is it so when it has been made out that as in the present case Mr Inglis was a trustee, took part in the meetings, and contributed to a considerable extent to the mistake into which his sister has fallen. When anyone so manifests his intention to another as to induce that other party to act upon it, the party advising is barred from afterwards maintaining that the intention which he indicated was not his true intention. This principle was laid down in the case of *Stewart's Trustees* v. *Hart*, 3 R. 192. In the present case Mrs Breen was induced to act as she did on Mr Inglis' avowed intention that the sum which she was to be entitled to receive was £70,000.

I am therefore of opinion that we ought to adhere to the Lord Ordinary's interlocutor. As to the passage in the Lord Ordinary's note in which he says, "If an election was well made and intimated on 28th January, I am of opinion that it was beyond the power of Mrs Breen to withdraw it," I desire to reserve my opinion on that point. In the absence of anything turning upon that election, it is not necessary for us to decide the point. My opinion at present on the matter is, however, contrary to that of the Lord Ordinary. As it is, all I desire to say is that I am not to be held as concurring in the view upon this point expressed by his Lordship.

Lord Adam—In my opinion nothing is clearer than that upon the 28th of January 1885, when Mr Kidston's letter was written, Mrs Breen was in the full belief, and no one interested had disputed the point, that she was entitled to one-half of the executry estate. That was the state of her mind, and it has been urged that her error was one in law and not in fact, because she believed that she was entitled to one-half instead of, as is now contended for by Mr Inglis, only one-fourth of the personal estate.

As to which of these contentions is the correct one, nobody at present seems exactly to know, and we have been told that before we should have been in a position to determine the question a great deal of argument would require to have been submitted to us. But her error lay in this,—she understood that it was undisputed that in the event of her claiming her legitim that was to be one-half of her father's personal estate. Her error was entirely one of fact, and to my mind it is so essential that she is entitled to be restored from the consequences of her election. I therefore concur with your Lordships.

With reference to the passage in the opinion of the Lord Ordinary referred to by Lord Shand, I would only desire to say that the point is one upon which I have not made up my mind, although at present I am inclined to share the opinion expressed by Lord Shand.

The Court adhered.

Counsel for John Inglis, junior—Pearson—Dickson. Agents — Webster, Will, & Ritchie, S.S.C.

Counsel for Mrs Breen—D.-F. Mackintosh — Guthrie. Agents—H. B. & F. J. Dewar, W.S.

Tuesday, May 31.

FIRST DIVISION.

[Exchequer Cause.

THE NORTHERN INVESTMENT COMPANY OF NEW ZEALAND, LIMITED, *v.* SMILES (SURVEYOR OF TAXES).

Revenue—Property and Income-Tax Act 1842 (5 *and* 6 *Vict. c.* 35), *sec.* 100, *Sched. D, Fourth Case—Interest Received from Foreign Investments.*

A Scottish company which carried on the business of borrowing money in this country and lending it on securities in New Zealand, was charged with income-tax on the interest received from the securities under the fourth case of Schedule D. They objected to the assessment on the ground that the company was a trading company, and could only be assessed upon its profits under the first case of Schedule D. *Held* that the assessment under the fourth case was competent.

The Scottish Mortgage and Land Investment Company of New Mexico (Limited) v. *The Commissioners of Inland Revenue*, Nov. 19, 1886, *ante*, p. 87, 14 R. 98, *followed* and *explained.*

The Northern Investment Company of New Zealand, Limited, incorporated under the Companies Acts, was formed in 1880 principally for the purpose of borrowing money on debentures in this country, and lending it, along with the paid-up capital, upon securities in New Zealand.

The head-office of the company was in Edinburgh, with a managing board of six directors. There was a local board of directors in New Zealand with a manager there. Since its formation it had in each year been assessed on its profits and gains, and had paid duty thereon in terms of the *first* case of Schedule D of the Act 5 and 6 Vict. c. 35, sec. 100. For the year ending 5th April 1886 the Surveyor of Taxes made a surcharge of £236, 3s. 4d., being duty on the sum of £7085, the said sum representing the difference between the sum on which the company was assessed for the year 1885–1886 in terms of the *first* case, and the amount of the profits or gains from colonial securities computed in terms of the *fourth* case of the said Schedule D. The Surveyor and the company were agreed as to the figures.

Before the Commissioners it was maintained on behalf of the company that it, the company, was "an adventure or concern in the nature of trade," and that for the purposes of assessment to income-tax the profits of the company for the year of assessment should be estimated according to the rule contained in the *first* case of Schedule D, section 100 of the Income-Tax Act, 5 and 6

Vict. cap. 35, on the average of the three preceding years, in the same manner as it had been hitherto assessed.

The Surveyor maintained on behalf of the Crown that the profits were of the nature described or comprised in the third clause, Schedule D, section 2, of the Act 16 and 17 Vict. cap. 34, viz., "for and in respect of all interest of money, annuities, and other annual profits and gains not charged by virtue of any of the other schedules contained in this Act;" and that the company was liable to be assessed on the total amount of interest which had been or would be received in the United Kingdom in the year of assessment, according to the rule contained in the *fourth* case of Schedule D, section 100, of 5 and 6 Vict. cap. 35.

The Surveyor further contended that a species of profit or gain appropriately set forth in the statute by its true specific denomination as chargeable in a particular way under a particular rule could not properly be classed under another and more general designation, in order to bring it under the operation of another rule regulating the assessment of a different description of profit; the Surveyor referred to the case of *The Scottish Mortgage and Land Investment Company of New Mexico (Limited)* v. *The Commissioners of Inland Revenue*, November 19, 1886, *ante* p. 87, 14 R. 98.

The Commissioners were of opinion that the profits of the business carried on by the company were chargeable with income-tax under the rules applicable to the *first* case of Schedule D aforesaid, sustained the appeal of the company, and discharged the surcharge by the Surveyor.

The company appealed, and a Case was stated by the Commissioners. Reference is made to the report of *The Scottish Mortgage and Land Investment Company of New Mexico (Limited)* v. *The Commissioners of Inland Revenue, supra cit.*, where the cases of Schedule D are quoted.

The appellant maintained that the case could not be distinguished from that of *The Scottish Mortgage and Land Investment Company of New Mexico (Limited), supra cit.*

Argued for the company—This case was distinguishable from the case of the *New Mexico Company*, on the ground that the *New Mexico Company* was a new company, and the assessment imposed was a first assessment. The New Zealand Company had, however, been assessed under the *first* case of Schedule D, and it was now proposed to assess it under the *fourth* case of that Schedule. It was quite possible that an assessment might be imposed under either of the cases. The Lord President, in his opinion in the *New Mexico Company's* case, recognised that the Commissioners had an option as to the case under which they should assess. This option was in the general Commissioners, and not in the Inland Revenue Commissioners. They had exercised that option, and they thought they were entitled to continue to assess according to that rule. The Commissioners could not be allowed to change their minds as to the case under which they should impose an assessment. If that were allowed the same income might be subjected to a double assessment.

At advising—

Lord President—This is a very clear case, and I do not know that it would be necessary to make any remarks upon it at all, if it were not that I think my judgment in the previous case of the *Scottish Mortgage and Land Investment Company of New Mexico, supra cit.*, has been a little misunderstood. The passage which has been founded upon is this:—"The question is whether it may be lawfully charged under the fourth case. One can quite understand that in particular circumstances the duty may be chargeable either under the one or the other. The income in respect of which the duty is to be charged may fall under more than one description in the statute, and in that case it would, of course, be in the option of the Commissioners of Inland Revenue to take the case that was most favourable to themselves." Now no more was there meant than to say that it would lie in the option of the Surveyor to take the case which was most favourable to the Crown, because the Commissioners of Inland Revenue, of whom I am speaking there, are the Board in London—the Board that is charged with the collection of revenue, and not the Commissioners from whom this appeal is taken. The Commissioners from whom this appeal is taken are vested with a *quasi*-judicial function undoubtedly, in determining whether the assessment as finally adjusted by the Surveyor and laid before them is well imposed or not, if it is objected to by the party who is assessed; and accordingly, the statute provides that whatever the determination of the Commissioners may be, whether it is in favour of the party assessed or in favour of the Surveyor, an appeal lies to this Court. They can have no discretion in the matter at all. They are to determine the dispute between the two parties before them, and that is their only function, so far as I can see, in regard to a case of this description. Now, what they have determined in the present case is, that the Company here, deriving a large revenue from foreign or colonial investments, and receiving a return from these investments in this country, within the meaning of the Act, is liable to be assessed under the fourth case. I cannot distinguish in any way between the present case and the case of the *Scottish Mortgage and Land Investment Company of New Mexico*, and I think it must follow the judgment pronounced in that case.

Lords Mure, Shand, and Adam concurred.

The Court sustained the appeal, and reversed the determination of the Commissioners.

Counsel for the Inland Revenue (Appellants)—Sol.-Gen. Robertson — Young. Agent — David Crole, Solicitor of Inland Revenue.

Counsel for the Company (Respondents)—Dickson. Agents—Graham, Johnston, & Fleming, W.S.