ocean-going steamer having assented to a contract containing any variation of the ordinary common law obligation. In all cases in which a defendant relies for his defence on the conditions of a contract he must prove that such conditions form part of the contract bargain. It is, however, an extravagant assumption that a passenger by an ocean-going steamship from New York to Glasgow would expect to be carried without a contract containing some conditions, or that he would regard the ticket issued to him merely as a voucher or receipt for payment. Such an assumption might have been admissible in case of a passenger by railway in the early days of railway travelling, but the conditions have changed, and the appellant in spite of his evidence is not entitled to claim to be in a better position than other passengers who in the exercise of ordinary intelligence and common-sense took care to become acquainted with the conditions of the contract, having had their attention called thereto by a reasonable notice. The position as stated by Lord Haldane in *Grand Trunk Railway Company of Canada* v. *Robinson*, [1915] A.C. 740, is applicable—"In a case to which these principles apply it cannot be accurate to speak, as did the learned Judge who presided at the trial, of a right to be carried without negligence, as if such a right existed independently of the contract and was taken away by it. The only right to be carried will be one which arises under the terms of the contract itself, and these terms must be accepted in their entirety. The company owes the passenger no duty which the contract is expressed on the face of it to exclude, and if he has approbated that contract by travelling under it he cannot afterwards reprobate it by claiming a right inconsistent with it. For the only footing on which he has been accepted as a passenger is simply that which the contract has defined."

In my view the appeal should be dismissed.

Their Lordships dismissed the appeal, with expenses.

Counsel for the Appellant (Pursuer)—Lord Advocate and Dean of Faculty (Clyde, K.C.)—MacRobert. Agents—G. H. Robb & Crosbie, Glasgow—Macpherson & Mackay, S.S.C., Edinburgh—W. A. Crump & Son, London.

Counsel for the Respondents (Defenders)—Macmillan, K.C.—C. H. Brown. Agents—Bannatyne, Kirkwood, France, & Company, Glasgow—Webster, Will, & Company, W.S., Edinburgh—Botterell & Roche, London.

COURT OF SESSION.

Tuesday, May 21.

FIRST DIVISION.

HALL'S TRUSTEES *v.* M'ARTHUR.

Trust—Administration—Nobile Officium—Special Powers—Power to Sell—Trustees Proposing to Sell Trust Property to Two of their Number.

Testamentary trustees presented a petition to the *nobile officium* craving authority to sell the major part of the trust estate to two of their own number at prices fixed by a valuator, or alternatively to expose the subjects by public roup with a right to bid thereat by the two trustees in question. The trust-disposition gave the trustees power to sell to these two certain portions of the trust estate at a price fixed by the trustees or by arbitration, and also a general power to sell the trust estate by public roup or private bargain. *Held* that the Court had no power to grant the authority craved, and petition *refused*.

Coats' Trustees, 1914 S.C. 723, 51 S.L.R. 642, *distinguished*.

Alexander Hall, James Hall, and others, the sole surviving testamentary trustees of the late Adam Hall, woollen-carder, Newtown St Boswells, *petitioners*, brought a petition craving the Court to authorise the petitioners as trustees to sell (1) a villa at Newtown St Boswells to James Hall as an individual for £725, and (2) other subjects in Newtown St Boswells and Langlands Mill (excluding the machinery and plant therein) to James Hall and Alexander Hall as individuals for £5800, in terms of offers made by them, or to sell the villa and other subjects respectively to James Hall and James and Alexander Hall at such other price or prices and upon such other terms and conditions as the Court might direct, or alternatively to authorise the sale of the subjects by public roup with a right to bid thereat in James and Alexander Hall.

Answers were lodged by Mrs M'Arthur, a daughter of the testator, and her children, *respondents*.

The *facts* of the case appear from the following narrative, which is taken from the opinion of Lord Johnston—"The late Adam Hall died in 1908 possessed of estate to the value of about £8000, which consisted of his interest in the business of A. Hall & Sons, woollen-carders and spinners, Langlands Mill, Newtown St Boswells, including the machinery and plant therein, together with certain heritable properties. These latter were (1) tenements in Galashiels, (2) dwelling-house at Newtown St Boswells, (3) Langlands Mill, (4) certain tenements in Newtown St Boswells, mostly erected by Mr Hall, and many of them occupied by workers engaged in his mill. There was also a good deal of spare ground adjoining the mill available for extension thereof or for feuing or building. The various tenement properties were

burdened with debt to the amount of about £4700. By his settlement Mr Hall nominated seven trustees, now reduced by death to five, of whom two were and are his sons Alexander and James Hall, and a third his unmarried daughter Miss Adelina Hall. At the date of his death the business of A. Hall & Sons was being carried on by Mr Hall in partnership with his two sons Alexander and James Hall under a deed of copartnery expiring at 1st July 1911. Mr Hall authorised his trustees to continue his business for such period and on such terms as they might think expedient, or to make such arrangements and settlements with his sons relating to his share and interest in the copartnery as they might think advisable. Shortly, the ultimate purpose of Mr Hall's settlement, after providing annuities for his widow and unmarried daughter, was equal division of his estate among his children, who were the two sons already mentioned and four daughters, three of whom were married and had issue, the sons taking their shares in fee and the daughters their shares in liferent and their issue in fee. Mr Hall's interest in his business was paid out by his sons at the conclusion of the partnership in 1911, and at the same time they acquired from the trustees the machinery and plant so far as belonging to their father. The sum payable by them was fixed at £4238, and this when paid up was applied by the trustees along with other moneys in their hands in freeing the heritable properties of debt. It resulted that at the date of the present application what remained of Mr Hall's estate was the heritage above enumerated. Mr Hall's settlement, which bears marks of care and discrimination in providing for eventualities, and more or less indicated incidentally the probable course of administration which his trustees would require to adopt, contained the following:—In the first place, though providing, consistently with their terms, that his children's provisions should vest at his death, Mr Hall expressly declared that his trustees should not be bound to make any payments to the beneficiaries until such time as they should see fit, "regard being had to the circumstances of my trust estate, it being my particular wish that my trustees shall not require to sell my heritable property under unfavourable circumstances, but that they shall be allowed to settle with the beneficiaries, interest as well as principal, at such times and in such way and manner as they may see proper." But, in the next place, in the event of his sons or either of them continuing to carry on the business of A. Hall & Sons he provided that his trustees might, but only if they judged it to be fit and expedient, sell to them or him his factory of Langlands Mill and such of the machinery and plant therein as might belong to him at his death at such price as to his trustees might seem just and reasonable, or at a price to be fixed by arbiters in common form. And lastly, he empowered his trustees to feu his heritable property or any part thereof on such terms as they might think fit, and also to sell his heritable and moveable property, at any time they might think it expedient, by public roup or private sale, and to let his heritable property for such periods and on such terms as they might find necessary or expedient. It is therefore evident that Mr Hall's settlement contains all that is necessary to enable his estate to be administered and if deemed proper to be realised. It is also, I think, evident, having regard to the composition of Mr Hall's family and to the nature of the net estate which he left behind him, that while it is not impossible that division of the heritage should be made without realisation, realisation would be a natural and businesslike course for the trustees to adopt provided the times were favourable, and, should they do so, that nothing is wanting in the matter of powers conferred upon them. It is now proposed to sell to the two sons the whole of the Newtown St Boswells properties, and the trustees and the sons after taking what is said to be neutral advice by way of valuations have agreed on terms. But owing to the fact, as they say, that the fiars of a considerable part of the residue are in pupillarity or minority, and that they are therefore unable to carry out the transaction without special powers from the Court, the trustees have applied to the Court for authority to sell the property to Mr Hall's sons at the agreed-on price, or otherwise at such other price or prices as the Court may direct, or alternatively to authorise the whole of the properties at Newtown St Boswells to be exposed for sale by public roup under the express condition that the two sons as individuals or either of them should be entitled to bid at said sale for all or any part of them. The petitioners do not draw attention to the primary difficulty which meets them, viz., that the proposed purchasers of trust property are themselves two out of the five trustees, and that though this does not in point of principle alter the situation, from their position they presumably have a predominant voice in the trust management. The application is opposed by Mrs M'Arthur, one of the married daughters, and her husband as her curator-at-law, and on behalf of their minor and pupil children. They maintain shortly that so far as the petition relates to the mill subjects it is unnecessary, and that so far as it applies to the other heritable subjects it is irrelevant and incompetent.'

Argued for petitioners—In general there was no absolute rule that trustees could not buy the trust estate, a part of it, or be bidders when it was exposed to public roup. If the trustees secured the interposition of the authority of the Court, they or some of them might buy or bid at the public roup — *Maxwell* v. *Drummond's Trustees*, 1823, 2 S. 130 (N.E. 122); *Taylor* v. *Watson*, 1846, 8 D. 400, *per* Lord Mackenzie at p. 406, and Lord Fullerton at p. 407; *Gillies* v. *Maclachlan's Representatives*, 1846, 8 D. 487, *per* Lord Cunninghame at p. 493; *Coats' Trustees*, 1914 S.C. 723, 51 S.L.R. 642. [LORD SKERRINGTON referred to *Fraser* v. *Hankey & Company*, 1847, 9 D. 415.] If, however, the trustees did not obtain the authority of the Court, the transaction was open to challenge, but the sale was not

absolutely null—*Hankey's* case (*cit.*), *per* Lord Fullerton at p. 429. The English law was to the same effect—*Campbell* v. *Walker*, 1800, 5 Ves. Junr. 677, *per* Sir Richard Arden, M.R., at p. 681; *Boswell* v. *Coaks*, 1883, 23 Ch.D. 302, *per* Fry, J., at p. 310, 1886, 11 A.C. 232, *per* Lord Selborne at p. 242. Further, the Court could adject conditions which would prevent the trustees using their special knowledge to secure an undue advantage. Further, in the present case the circumstances were special. An immediate division was necessary so far as the sons were concerned, and might in the daughters' case become necessary at any moment, and that could only be effected by realisation. Further, the heart of the trust property was the mill; the machinery and plant in it belonged to James and Alexander Hall; the shell of the mill was of little value; and the mill itself without the rest of the property was useless to James and Alexander Hall, who were tenants of the business in the mill under Adam Hall's settlement. It was unreasonable to sustain an objection when, as here, the course desired by the petitioners was the best in the interests of the trust. One or other of the alternatives of the prayer should be granted. The Heritable Securities Act 1894 (57 and 58 Vict. cap. 44), section 8, was referred to.

Argued for the respondents—The prayer of the petition was incompetent. If the rule was as stated by the petitioners, it was strange that there was no instance of its application until 1914. Even *Coats'* case (*cit.*) was not an authority, for there there was no opposition to the petition; the part of the estate in question was very small in comparison with the rest; the trustees were competing amongst themselves for the subjects in question; and if the trustees had been excluded, the best bidders would have been excluded. Further, in that case the fact that the inclusion of trustees amongst possible bidders generally discouraged biding by third parties, was absent. The petitioners had not cited any decision in their favour. Further, the cases where creditors were allowed to buy the security subjects had no application for a creditor could not remove the obstacle as a trustee could by resignation. *Tennant* v. *Trenchard*, 1869, L.R., 4 Ch. 537, *per* Hatherly, L.C., at p. 544, was referred to. Further, even if the matter was in the discretion of the Court, the present case was not appropriate for the exercise of that discretion. The subjects proposed to be sold were about three-quarters of the whole estate. There was no explanation of why the trustees had not adopted the usual course of resigning. There was no need for division, and consequently a sale was not necessary. In any event the only sale that should be allowed should be by public roup.

At advising—

LORD JOHNSTON—[*After the narrative quoted supra*]—As an application to the *nobile officium* of the Court the application is certainly without precedent unless the case of *Coats' Trustees*, 1914 S.C. 723, 51 S.L.R. 642, can be prayed in aid, for the other cases referred to have, I think, little or no applicability to the circumstances. Of the *nobile officium* of the Court I do not think it is necessary to say more than that it is an extraordinary equitable jurisdiction, the exercise of which has always been scrupulously guarded and rarely carried beyond precedent. In the matter of trusts, which are an important branch of its exercise, resort to it has been practically confined to cases where something administrative or executive is wanting in the constating document to enable the trust purposes to be effectually carried out, and such cases are now largely met by the provision of the modern Trusts Acts. But where no such executive or administrative provisions are wanting in the trust deed the Court will not interfere, for the Court in Scotland does not undertake, as does the Court of Chancery in England, the administration of trusts. In the present case no such executive or administrative provisions are wanting. On the contrary, they exist in exceptionally full and carefully thought out measure.

It is in any view impossible that the Court should intervene to authorise the completion of a bargain already made between the testator's trustees and his two sons for sale by agreement at a price adjusted behind the back of the Court even on neutral advice. It is equally impossible that the Court should take the responsibility of authorising a sale at a price to be ascertained by remit to a man of skill, for such man of skill would be the Court's own official, and the proceeding would therefore amount to the Court's undertaking the administration of the trust. The first two branches of the prayer of the petition cannot therefore be entertained, and, indeed, were very faintly pressed.

The other alternative is, I think, equally impossible of adoption. The trustees require no power of sale from the Court, for that is amply given them by the trust deed itself. They may sell the mill to the sons in terms of the express provisions made by the truster to that effect, though I take leave to say that should they do so they will be well advised to clear their feet by adopting the method which the truster offers them of selling at a price to be fixed by arbiters in common form. They may also sell any other parts of the property under the general power conferred upon them by the truster by public roup or private bargain, though it does not follow that they can so sell to those who are themselves trustees. Doubtless they are aware that this is the real difficulty which confronts them, and hence they crave alternatively the authority of the Court to expose the subjects to sale by auction on the express condition that the testator's two sons shall be authorised to bid at the roup. There is but one instance in the books of such a power having been granted. This was done by this Division of the Court in the case of *Coats' Trustees*, already referred to. I was not myself a party to that judgment, but I have carefully considered it and have come to the conclusion that it was an exceptional case, which does not make and was not intended to make a precedent which

can be appealed to in any other not precisely the same in its circumstances.

There are two reasons for the rule of law that trustees cannot be allowed to traffic in their own interest in the trust estate under their administration. The first is that their duty and their interest must not conflict. It is the duty of the trustee to obtain the highest price for any item of the trust property which it becomes necessary to sell. It is the interest of the individual trustee if he becomes an offerer to buy the property at the lowest price possible. Were anyone of the trustees to be both seller and buyer, his duty and his interest would conflict. The second reason is, that a trustee in his position as administrator of the trust estate has opportunities of knowledge regarding the property of which the estate consists which are not open to outsiders, and that this gives him an advantage in dealing with the trust estate which he may turn to his own profit even unconsciously. But in particular, if the sale be by auction, and one of the exposers appears even openly and with notice as a bidder, members of the public may reasonably consider that they are not entering on the competition on equal terms, and may be choked off, to the detriment of the trust estate and advantage of the trustee bidding. If on the other hand an exposer appears and bids without notice or prior disclosure, his doing so is a breach of faith with the public and his action may be effectually challenged—see the case of *Faulds* v. *Corbet*, 1859, 21 D. 587, and compare with it that of *Shiell* v. *Guthrie's Trustees*, 1874, 1 R. 1083, 11 S.L.R. 625.

Can then these objections be removed by bringing the property to public sale and allowing the trustee to bid with the authority of the Court? So far as the legality of the sale in a question with the public goes this might be so, for no member of the public could then complain. But as to the interest of the trust estate the matter is quite different. Even where the sale is by public roup there are possibilities of so conducting such sale as may prevent the best result to the trust estate being obtained, and procure an advantage to accrue to the trustee who is allowed to buy it on his own account. It is perhaps enough to say that in many cases the open and acknowledged bidding by one of the exposers would prevent a full and free competition, and that for more reasons than the one already indicated. If the trustee could not as exposer bid in his own interest without the authority of the Court, there is no justification but the reverse for the Court here making a new precedent in the exercise of its *nobile officium* by giving the testator's two sons authority so to bid, and it is certainly not necessary in order to effect the sale of the testator's property.

I have said that the case of *Coats' Trustees* was an exceptional case, and that I do not think that it can be, or was intended to be, treated as a precedent. The estate was a very large one, the moveable assets being valued at more than £1,000,000. The particular article or articles in question were also in themselves exceptional. They were works of art known to be of very great value. The market for such is very special. If sold as they were intended to be at the great London mart of Messrs Christie & Manson, there was no risk that the bidding by one of the trustees would in any way adversely affect the competition; on the contrary, it was much more likely that it would stimulate it. But even then I do not think that in the face of opposition by beneficiaries interested in the trust estate the Court would have interposed to grant the authority craved. But not only was there no opposition, but all concerned were expressly anxious that the authority should be given, not merely from a sense of family good feeling, but being doubtless well advised that it would be in their interest. As I read the case all that the Court did was to give their *imprimatur* to this concurrence in such a way as authoritatively to advise the public that no objection would be entertained to the legality of the bidding of one of the exposers at the sale, especially as the sale was to take place in England and the exposers were subject to the jurisdiction of the Courts of Scotland. I respectfully think that the Court was therefore well advised, in the exceptional circumstances of the case, in giving the authority craved, but that their doing so is not to be made a precedent for the same course in differing circumstances.

I think therefore that your Lordships should refuse the prayer of the petition in all its parts.

LORD MACKENZIE—I reach the same conclusion, and I do so on the ground that were we to entertain this petition it would not be consistent with the law of Scotland.

The petition is not presented under the Trusts Act; it is an appeal to the *nobile officium;* and the view hitherto taken and applied has been that the powers of trustees are defined by the trust deed and that the Court will give no higher powers. It follows from this that if the trustees have the power, then a petition such as this is unnecessary; and if they have not the power it is not competent for the Court to give it.

That just means this, that the Court in Scotland will not administer a trust. If the Court is to be vested with such a power and charged with such a duty, it must be by further Act of Parliament. In this respect the power of the Court of Session differs from the powers which are vested in the Court of Chancery in England.

In my opinion therefore, in face of the opposition which is stated to the petition here, the ordinary law must be applied; and I do not regard the case of *Coats' Trustees*, 1914 S.C. 723, 51 S.L.R. 642, as an authority in favour of granting the prayer of the petition presented by the trustees.

LORD SKERRINGTON — It is a general though not a universal rule of trust management that a person in a fiduciary position cannot sell the trust property to himself, and that if he does so his act is challengeable at the instance of any beneficiary. No authority was cited for the proposition that

the Court in Scotland has ever asserted the right to take away this power of challenge from a beneficiary. The English authorities which were referred to are not in point, because in England the Court assumes the administration of a trust, and accordingly what is done by trustees under such circumstances is done by them as the hands of the Court.

The case of *Coats' Trustees*, 1914 S.C. 723, 51 S.L.R. 642, which was founded on by the petitioners, does not apply. In that case what was proposed to be done was in substance authorised by the trust deed. The testator had made express provision authorising his trustees to hand over any portion of his estate to a beneficiary at a valuation to be made by themselves. Accordingly there was no objection in substance to Mr Coats, who happened to be a trustee, taking over the pictures. The trustees accordingly had made arrangements to transfer the pictures to him in the manner laid down in the will, namely, at a valuation made by themselves. It was, however, suggested by one of the parties interested in the estate—and the suggestion was accepted by the trustees and by all the other beneficiaries as a good one — that a preferable method of arriving at the value of the pictures would be to have them exposed for sale in London by way of auction, but with a proviso that Mr Coats should be entitled to bid. Plainly Mr Coats could not be deprived of the right which the testator had given him—to obtain the pictures as part of his inheritance if the trustees approved of that course. It was, I think, a typical illustration of the *nobile officium* that when objection was taken to the machinery devised by the testator as not being the best in the circumstances something better should be substituted. That, I say, is a typical illustration of the exercise of the *nobile officium*, where something is to be done which is right and necessary and the machinery for doing it is either wanting or defective.

I should have been prepared to follow *Coats'* case if the two sons of the testator had been content with what he gave them in his will, namely, the right to purchase the factory, and if then all parties had agreed that a better method of arriving at the value of the property than the method pointed out by the testator would be that there should be an auction sale at which the two sons might bid. Of course it is inconceivable, looking to our practice in Scotland, that any business man would have come forward and told the Court that that was a better method than the method devised by the testator, and equally inconceivable that the Court would have believed him if he had; but I put that by way of illustration. If the Court had been satisfied that the better method of arriving at the value of this mill was that it should be put up for sale by auction, and if all the parties had agreed, the case of *Coats' Trustees* would have applied and we might have followed it. What the two sons of the testator desire is something totally different. They are not content with what their father gave them, but they wish the authority of the Court to take over the greater part of the assets of the trust estate although the power in the will is limited to the factory. I have no doubt that that application is incompetent according to the practice of this Court.

I cannot help regretting that the jurisdiction of the Supreme Court in Scotland in the matter of conferring special powers upon trustees is so limited and inelastic. The difficulty arises from the somewhat peculiar theory upon which this branch of the law rests. The theory is this—That a truster must be deemed to have implicitly conferred upon his trustees every power which is necessary for the working out of the trust. Accordingly if circumstances of novelty and difficulty occur the course open to the trustees according to the common law of Scotland was to institute an action of declarator for the purpose of having it found and declared that in the peculiar circumstances which had arisen they possessed implied power to perform a certain act. The practical objections to this theory were twofold. In the first place it verged upon a legal fiction to attribute to a testator an intention to confer powers with a view to circumstances which he undoubtedly never foresaw. In the second place the theory broke down unless it was confined to cases where the powers were not merely expedient for the working out of the trust but were absolutely necessary. In conformity with that view the Court in a leading case—*Vere v. Dale*, 1804, M. 16,389—found it necessary to set aside its own decree by which it had authorised tutors-nominate to sell a pupil's heritable property. The ground of reduction was that although the sale was expedient it was not urgently necessary.

Now that was the common law of Scotland. It was improved to a marked extent just fifty years ago by the Trusts Act of 1867. That statute did three things—In the first place it simplified procedure—instead of a declarator a summary petition was made competent; in the second place it was no longer necessary to prove necessity — expediency was sufficient; in the third place it was no longer necessary to establish affirmatively that the testator had intended that the trustees should exercise the special power in the peculiar circumstances which had arisen. By the statute it was enough if one could satisfy the Court that the proposed power was not inconsistent with the intention of the testator.

All that, as I said before, was of very great value, but I venture to think that the time has now come when the law of trusts might be amended so as to make the granting of special powers to trustees rest upon principles of a more liberal and more elastic character. As was pointed out by my brother Lord Mackenzie, when trustees apply for special powers they are at present met by this dilemma—either they have the powers already conferred upon them, in which case the application is unnecessary, or if the power is not conferred upon them the Court has no jurisdiction to enlarge the terms of the trust deed. From that dilemma there is no logical escape. On the other

hand it seems to me that from the point of view of practical convenience and good sense the dilemma is a most unfortunate one.

It has been said—and the saying correctly represents the law of Scotland—that the Court will not advise trustees. If trustees possess a power, however difficult and delicate may be its exercise, and however serious the responsibility which they may incur either by exercising it or refusing to exercise it, the Court will not lift a finger to help them; it declines to advise them. I should have thought that a primary purpose of a supreme court of equity was to assist trustees and beneficiaries in circumstances of difficulty by aiding them in the exercise of powers which already belonged to them in circumstances where such assistance was desirable. I should further have thought that a supreme court of equity should have jurisdiction and the right to confer upon trustees powers which the testator had not conferred upon them if the circumstances made that course desirable.

The only reason which I have ever heard stated in justification of the legal theory on which our Courts proceed is that of expense—that it is undesirable that the Court in Scotland should undertake the administration of trusts because that course may lead to expense. Cheapness may be too dearly bought. It would be easy to amend the Trusts Acts first of all so as to enable the Court to intervene to assist trustees in the exercise of the powers conferred upon them by the testator, and also so as to enable the Court to confer additional powers upon trustees. Undue expense might be avoided by directing the Court, in any case where the application seemed not to be properly justified, to order that the costs should be borne by the trustees personally.

In the present case I have a suspicion that if it were competent to look into the matter it would be found that the most expedient course in the interests of all parties would be that the petition should be granted. But for the reason which I have explained I do not think that the Court has power to examine into that matter or to pronounce any opinion upon it.

LORD PRESIDENT—I concur in the opinion delivered by Lord Johnston, which I have had an opportunity of reading.

We consider that the expenses of the petitioners and the respondents ought to be paid out of the trust estate exclusive of the share of the trust estate bequeathed to Mrs M'Arthur and her children.

The Court refused the prayer of the petition.

Counsel for the Petitioners—Blackburn, K.C.—C. H. Brown. Agents—R. D. Ker & Ker, W.S.

Counsel for the Respondents—Constable, K.C.—W. T. Watson. Agents—Guild & Guild, W.S.

Friday, May 24.

FIRST DIVISION.

[Lord Ormidale, Ordinary.

ROSS *v.* ROSS'S EXECUTOR AND OTHERS.

Process — Reclaiming — Competency — Reclaiming Note against Allowance of Proof Boxed but not Lodged on Box Day when Reclaiming Days Expired in Vacation—Court of Session (Scotland) Act 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 28—*C.A.S., C, ii,* 4, 5, *and D, i,* 4.

A reclaiming note against an interlocutor pronounced on 20th March 1918, allowing proof, was boxed but not lodged on the first box day of the Easter vacation. It was lodged two days later. *Held* that the reclaiming note was incompetent.

The Court of Session (Scotland) Act 1868 (31 and 32 Vict. cap. 100) enacts—Section 28—"Any interlocutor pronounced by the Lord Ordinary as provided for in the preceding section . . . shall be final unless within six days from its date the parties or either of them shall present a reclaiming note against it to one of the Divisions of the Court. . . ."

Section 27 (the preceding section) was altered, and the provisions of C.A.S., C, ii, 4, were substituted therefor.

C.A.S., C, ii, 5 enacts—"The provisions of the 28th section of the Court of Session Act 1868 shall apply to all the interlocutors of the Lord Ordinary referred to in the foregoing section, so far as these import an appointment of proof. . . ."

C.A.S., D, i, 4 enacts—"In all cases where the days allowed for presenting a reclaiming note against an interlocutor pronounced by a Lord Ordinary in the Outer House expire during any vacation, recess, or adjournment of the Court, such reclaiming note may be presented on the first box day occurring in said vacation, recess, or adjournment after the reclaiming days have expired. . . ."

Joseph Ross, *pursuer*, brought an action against John James Herdman, W.S., sole executor of James Scott Ross and others, *defenders*, concluding for decree of reduction of a settlement alleged to have been granted by James Scott Ross, dated 15th June 1916.

The pursuer averred—"(Cond. 7) The said James Scott Ross was, from mental decay, incapax at the date of the execution of the said settlement. He was not of a sound disposing mind, and the said settlement is not the deed of the said James Scott Ross. At and for a considerable time prior to the date of its execution, the deceased was unable to give instructions for the preparation of a will, or to execute a will, or to dispose of his estate. He left no other operative writings of a testamentary nature disposing of his estate, which is believed to amount to about £2600."

The pursuer *pleaded*—"2. The said James Scott Ross being of unsound mind at the