

very material bearing on this second conclusion also, because the scheme of the action is this—that the companies having been induced by fraud to execute this contract of purchase and sale have a direct action for repayment of the price against the vendors, and also against a certain firm into whose hands the price was paid by the vendors in the knowledge of the fraud; and second, that failing their remedy against the vendors they have an alternative remedy against their own directors, by whose fault or negligence they have suffered the loss of which the pursuer complains which they sustained. Now, if that be the nature of the second alternative conclusion, it appears to me the defenders have a very material interest to be informed as to the specific ground on which the alternative claim of damages is based. Whether they are to pay damages because the company is unable to restore the properties which they have bought, and therefore cannot recover the price from the vendor, or because the company, regarding these properties as advantageous and beneficial properties, declines to restore them. That would appear to me to be a very material point which would require to be the subject of specific averment in an action of damages against the directors. But I make that observation merely by the way, because I am of opinion that the true ground of judgment being that the action is incompetent, we have no concern with any question as to the relevancy of any of the averments on record. If the action is incompetent, we are not to inquire whether the pursuer's condescendence does or does not contain statements that might be relevant in support of some other demand which he has not thought fit to bring before us.

For the same reason I express no opinion on another question, which it would have been necessary to decide had we had any competent action before us, namely, whether the pursuer as a single shareholder has a title to sue on behalf of the two companies. The general proposition is perfectly clear, that where a company has been defrauded by the execution of a contract of purchase and sale, it is the company alone that has any title to complain, because they alone have a right to decide whether they are to give up the property they have bought and to recover the price, or whether the contract should be affirmed because the properties are too valuable to be given up. But then there is no doubt an exception to that rule of which the pursuer desires to avail himself in this case. The exception is that where the majority of the shareholders of the company are using their voting power to defraud the minority, there the minority may sue an action in name of the company which the majority decline to raise. But whether in a particular case the averments of a fraud of this nature on the part of the majority are sufficient to justify a proof is a question of relevancy which we cannot consider unless it arises in a competent action.

The conclusion to which I come is that the defenders ought to be assoilzied from

the conclusions of this summons as incompetent. I should propose to sustain the first plea-in-law for the defenders. It does not appear to me that we can sustain the tenth plea. That is a plea that "*restitutio in integrum* being impossible, the remedy craved is incompetent." Now, we cannot tell whether restitution is impossible or not. There is nothing in the record to suggest that it is at all impossible to give back those properties, although there is a statement by the defenders that the properties are valuable, and have increased in value by the possession of the companies, and therefore ought not to be restored. But the true objection to competency is not that restitution is impossible, but that the pursuer proposes to recover the price without offering restitution of the subjects he has bought. That appears to me, as I have said, to be a totally untenable position, and therefore I am of opinion that we should assoilzie the defenders.

LORD ADAM and the LORD PRESIDENT concurred.

LORD M'LAREN, who was absent at the hearing, delivered no opinion.

The Court sustained the first plea-in-law for the defenders, and assoilzied them from the conclusions of the action.

Counsel for the Pursuer—Guthrie Smith—J. A. Reid. Agents—Adamson & Gulland, W.S.

Counsel for the Defenders—H. Johnston—W. C. Smith. Agents—Forrester & Davidson, W.S.

Friday, November 13.

## FIRST DIVISION.

[Lord Stormonth Darling,  
Ordinary.

### SEDDON, PETITIONER.

*Trust-Settlement — Pupils — Maintenance and Education—Administrator-in-Law.*

In a petition presented by a father domiciled abroad, for himself and his two pupil children, craving the Court to ordain Scottish testamentary trustees to make an annual payment to the petitioner for the maintenance and education of his said children from the revenue of a fund held by the trustees for the children, the Court *refused* to grant the order craved, but intimated that they would be prepared to re-consider the application on being informed by the petitioner that steps were being taken to have the children provided with a legal guardian.

By his trust-disposition and settlement Stephen Adam conveyed his whole estate to trustees, directing them to hold the shares falling to daughters during their lifetime, and to pay to them, or apply for their behoof, the annual income of such

shares. No direction was given to the trustees with regard to the fee of the shares liferented by daughters dying in minority.

The truster died on 25th May 1889 survived among other children by a daughter, Helen, who on 15th April 1884 had married Thomas Rowley Seddon. She died on 13th May 1891 after having attained majority, and leaving two children, the elder being three, and the younger less than one year old. During her lifetime her father's trustees had duly paid her the income of the share of his estate falling to her.

On 9th September 1891 Thomas Rowley Seddon presented a petition to the Court "for himself and for his children," and "with consent and concurrence" of Stephen Adam's testamentary trustees.

The petitioner stated—"The value of the share of Mr Stephen Adam's estate belonging to Mrs Seddon's children (which had not been realised) is estimated at between £7500 and £8500, and the free annual income in respect thereof is estimated at between £300 and £400. There being no provision in Mr Stephen Adam's trust-disposition and settlement for keeping up the said trust after his daughters' respective deaths, to the effect of holding the shares of said daughters for behoof of their issue, the said shares go to the issue of the daughters without limitation of any kind. The petitioner, however, does not desire the trustees to denude of the said trust so far as his children's shares are concerned, but has requested them to retain the management thereof for his children's behoof. The petitioner is not at present in a position out of his own funds to maintain and educate his said children suitably to their positions and fortunes, having in or about March 1890 been obliged, owing to his wife's then delicate state of health, to give up a lucrative appointment as manager of a sheep-run in New Zealand with a salary of £300 a-year, and although he has lately, with the assistance of friends, acquired for himself and another an extensive sheep-run in New Zealand, it will, owing to the arrangements on which he has obtained the purchase money for the same, be a considerable number of years before he can apply any of the profits arising therefrom to his own uses. The petitioner was born in England, but had been resident in New Zealand for thirteen years prior to his return to this country as before mentioned, and he is about to return to New Zealand in the beginning of October 1891 in order to take possession of the property there acquired by him, and to have the same made suitable as a home for his said children, intending to return to England for them within a year. It is therefore necessary that an immediate arrangement should be made with a view to the maintenance of said children. The petitioner has requested Mr Stephen Adam's trustees to pay him the free annual income of his children's means, but he being domiciled either in England or in New Zealand, and the laws of these two countries applicable to the administration of estates belonging to pupils being

similar, they are advised that they would not be in safety to make such payment without your Lordships' authority. They have, however, no objection to state to the prayer of this petition being granted, and are ready and willing to deal with the income in question by paying to the petitioner, or otherwise as your Lordships may direct."

The petitioner therefore craved the Court to ordain the testamentary trustees of Stephen Adam to make payment to him "for behoof of his children . . . of the free yearly interest, or other free yearly income for the time, of the sum to which the said children are entitled under the said trust-disposition and settlement, or otherwise to ordain the said trustees to make payment to the petitioner of such portion of the interest or other free annual income of the said sum as to your Lordships may seem proper for the suitable maintenance and education of his said children."

On 18th September 1891 the Lord Ordinary officiating on the Bills (STORMONTH DARLING) remitted to Mr James Mylne, W.S., "to inquire into the circumstances stated in the petition, and to report *quam primum* whether the whole, or if not what proportion, of the income available would be a proper allowance for the maintenance and education of the children."

Mr Mylne having reported that it appeared to him that it would be reasonable that the Court should authorise the trustees to pay to the petitioner the whole amount of said income, the Lord Ordinary on 26th September reported the petition to the First Division.

The petitioner argued that there was authority for the application in the case of *Edmiston v. Miller's Trustees*, July 11, 1871, 9 Macph. 987, and that in the circumstances it was not unreasonable that the whole income of the children's shares should be paid to him.

At advising—

The LORD PRESIDENT (who delivered the judgment of the Court)—The Court are not prepared at present to grant the prayer of this petition, which is to ordain the testamentary trustees of the late Stephen Adam to pay to the petitioner the free yearly income of the sum to which his children are entitled, or part thereof. But if the petitioner should state that steps are being taken to have the children provided with a legal guardian, then we should be prepared to consider whether, as matter of emergency, we may not authorise a payment of some reasonable portion of this year's income to be made to the petitioner for the maintenance of the children, who, as we are informed, have not at present a legal guardian. The case can be enrolled when the petitioner has considered his position in this view.

LORD KINNEAR was absent.

Counsel for the Petitioner—Adam. Agent—Arthur Adam, W.S.