are, "subject always to the printed rules, regulations, and bye-laws" of the association, and the contract ends with a provision that these rules are incorporated into it. There is no dispute as to the identity of these rules or bye-laws. The contract further provides that the council of the association is to be the referee of all disputes. A dispute arose between the parties to the contract as to the effect of this reference to the rules. What was the consequence of that? The dispute was referred to the council as referee. The council decided that the rules applied. I agree that their decision is final. I also agree that the view which the council took is right. The case is as clear as if this was a contract between dealers in stocks made subject to the rules of the Stock Exchange. In such a case the rules of the Stock Exchange would be imported into the contract, and if the contract further provided that all disputes under it were to be referred to A B, it is plain that if any difference arose under the contract, A B would be the proper person to decide it.

On the whole matter I am of opinion that the judgment of the Sheriff is right.

LORD MONCREIFF—I am of the same opinion. It is probably sufficient for the decision of the case that in terms of the contract the council of the association is made the referee of all disputes, and that the council has already decided on the matter under discussion.

On the merits I am of opinion that the decision of the council was sound. I think the defender clearly brought himself under the rules of the Beetroot Association. It is admitted that if the contract had been between members of the association, rule 32 would undoubtedly have applied. It is provided that the rules of the association may be applied to contracts between members and non-members, and this rule having been imported into the contract between the parties, it applies just as if they both had been members of the association.

LORD TRAYNER was absent.

The Court dismissed the appeal and affirmed the interlocutor appealed against.

Counsel for the Pursuers — Ure—Deas. Agents — Morton, Smart, & Macdonald, W.S.

Counsel for the Defender — Dundas—Craigie. Agent—James Russell, S.S.C.

Friday, January 29.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

SCOTT *v.* TAYLOR'S EXECUTORS.

Executor—Powers of Co-Executors—Right of Majority of Executors to Compromise Action.

Where five out of six executors-nominate compromised an action which had been raised by the whole of them in the interests of the executry estate, the sixth refusing to assent to the settlement, but not alleging fraud or unfair conduct on the part of his co-executors—*held* that the sixth executor had no title to proceed with the action.

Judicial Factor—Curator Bonis—Power to Compromise—Essential Error—Reduction.

The right to compromise conflicting claims on behalf of his ward is *intra vires* of a *curator bonis*.

An action of reduction of an agreement setting forth a compromise made by the *curator bonis* of a lunatic ward, which was brought on the ground that the *curator bonis* when he entered into the agreement was under essential error, but in which there was no averment that the other parties to the compromise did anything to induce the error of the *curator bonis*, *held* irrelevant.

Trust—Trustee—Judicial Factor—Trusts (Scotland) Amendment Act 1884 (47 *and* 48 *Vict. c.* 63), *sec.* 3.

The Trusts (Scotland) Amendment Act 1884 provides by section 2 that in the construction of recited Acts—one of them being the Trust Act 1867—"trustee" shall include tutor, curator, and judicial factor, and "judicial factor" shall mean *curator bonis*.

Opinion (by Lord Kincairney) that this provision was retrospective.

In January 1894 James Edward Scott and his five brothers and sisters, the executors-nominate of Alexander Taylor, conform to his last will and testament dated 15th November 1866, and relative codicil dated 17th November 1880, "as said executors and also as individuals," raised an action against Mrs Mary Taylor or Craig and others, the executors appointed by the trust-disposition and settlement of Mrs Janet Fraser or Taylor, mother of the said Alexander Taylor, dated 2nd June 1870, and against James Wink, sometime accountant in Glasgow. The action concluded for reduction of an agreement dated 25th September and 4th October 1873, between the defender Wink, as *curator bonis* of Alexander Taylor, and the representatives of Mrs Taylor then deceased, for an account of Mrs Taylor's intromissions with her son's property, and for decree for £14,000 failing accounting.

The pursuers pleaded, *inter alia*—"(1) The said agreement falls to be reduced in respect (1st) that it was granted under mutual

and essential error; (2nd) that it was *ultra vires* of the curator James Wink."

The defenders Mrs Taylor's Executors pleaded, *inter alia*—"(1) No title to sue. (3) The averments of the pursuers being irrelevant, the action should be dismissed."

On 19th January 1895 the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor—"In respect and in terms of the joint-minute for the pursuers other than the pursuer James Edward Scott, and for the defenders, assoilzies the whole defenders from the conclusions of the summons, and decerns."

On 1st December 1896 he pronounced the following interlocutor—"Finds that the pursuer James Edward Scott has no title to sue this action; sustains the defenders' plea to that effect; dismisses the action, and decerns."

The facts of the case and the proceedings in the action leading up to the pronouncement of these interlocutors are fully detailed in the following note to the Lord Ordinary's interlocutor of 1st December 1896.

Note.—"This action was brought by the executors-nominate of Alexander Taylor, who died insane on 14th November 1893, against the representatives of his mother, and concludes for reduction of an agreement executed in 1873, which bears to be an agreement between the *curator bonis* of Alexander Taylor and the representatives of Mrs Taylor, then deceased, for an account of her intromissions with her son's property, and for decree for £14,000 failing accounting.

"Alexander Taylor's executors-nominate were six children of his sister Mrs Scott, who predeceased him; and Mrs Taylor's representatives were Mrs Craig, daughter of Mrs Taylor and sister of Alexander Taylor, and Mrs Harvey her daughter—Mrs Scott's family thus inheriting the estate of Alexander Taylor, Mrs Craig and her family the personal estate of Mrs Taylor.

"The defenders, Mrs Taylor's representatives, have pleaded 'no title to sue,' and that the action is irrelevant, or otherwise, that no sufficient ground of reduction is stated on record; and parties have been heard on these pleas in the Procedure Roll. The case is difficult and complicated, and it is necessary to attend very particularly to the admitted or ascertained facts, and also to the state of the process in considering these pleas.

"Alexander Taylor, master mariner, Greenock, was proprietor of certain buildings in Greenock, and, as he was frequently abroad in the pursuit of his calling, his mother drew his rents and managed his property. He was married, but had no family. His nearest relatives (at the dates which are in question) were two sisters, Mrs Scott and Mrs Craig, and a brother Ebenezer now deceased, and represented by Mrs Craig, and by Mrs Craig's daughter Mrs Harvey. Mrs Scott predeceased her brother; he died on 14th November 1893, and Mrs Craig has died pending this process.

"It now appears, although the fact does not seem to have been known during his life, that on 15th November 1866 Alexander Taylor had executed a holograph will, whereby he appointed Mrs Scott his sole executor and bequeathed his whole estate to her 'for her sole use and behoof, and her children, to do with as she or they may think proper.'

"On 28th June 1872 Mr James Wink was appointed *curator bonis* to Alexander Taylor, who had become insane, and apparently continued to be so until his death. Mr Wink left this country some years ago; his residence is unknown, and I suppose this case is to be disposed of as if he were dead.

"Shortly after or shortly before his appointment (the exact date is not stated, and is not material) Mrs Taylor—Alexander's mother—died. Her executors-nominate were her daughter Mrs Craig, Mrs Craig's daughter Mrs Harvey, and her son Ebenezer; but she appointed her heritable property to be divided among Ebenezer, Mrs Scott, Mrs Craig, and Mrs Harvey.

"In that position of matters it is now said that the *curator bonis* called on Mrs Taylor's representatives to account for the rents of his ward's property, and it is said that the parties came to an understanding, which was embodied in the contract under reduction. These parties were the *curator bonis*, Ebenezer Taylor, Mrs Scott, Mrs Craig, and Mrs Harvey, and the widow of Alexander Taylor. It is to be noticed that these included not only the *curator bonis*, representing Alexander Taylor, and the representatives of Mrs Taylor, but also those who would have been Alexander Taylor's representatives had he then died intestate, viz., Ebenezer Taylor, Mrs Craig, and Mrs Scott. The contract bears date 25th September and 4th October 1873. The parties to it are only the *curator bonis* and Mrs Craig, but it bears that Mrs Craig took burden on her for Mrs Taylor's other representatives, and her right to do so has not been questioned. The contract bears to be a tripartite agreement, whereby Mrs Craig surrenders a personal claim against the *curator bonis*, and the representatives of Mrs Taylor and the *curator bonis*, as representing Alexander Taylor, discharge their several claims against each other. No money passed under this contract.

"Since Alexander Taylor's death it has been discovered that in 1880 he added a holograph codicil to his will, in which he stated that he constituted Mrs Scott his sole residuary legatee, but in case she should die before him he conveyed his estate to her children *nominatim* (being the pursuers), and appointed them his executors; and as Mrs Scott did predecease him, it has resulted that on his death her children became his representatives, and the whole right and claims pertaining to his estate vested in them; and very shortly after his death they brought this action for reduction of the above contract. Whether they have good grounds of reduction in law or in fact or not, it would appear that as representatives of Alexander Taylor they had an undoubted title to sue; and I understand that a plea to title was put on record by the defenders, because they (*i.e.*, Mrs Craig

substantially) had it in contemplation to bring a reduction of Alexander Taylor's settlement, on the ground, as I suppose, of his insanity. That intention has now, I believe, been abandoned, and Alexander Taylor's will and codicil must be accepted as valid, and if the state of the process had not been materially altered since the record was closed there could have been no difficulty in repelling the plea to title.

"By interlocutor of 6th March 1894 production was held to be satisfied, reserving the preliminary defences as defences on the merits, and the record was closed on 20th March. Thereafter procedure was sisted.

"On 17th January 1895 a joint-minute was lodged which must materially affect the position of the case. The minute bears that the pursuers other than James Edward Scott (that is to say, five out of the six executors of Alexander Taylor) concurred with the defenders in stating that they had come to an extra-judicial arrangement, and in respect of it they craved the Lord Ordinary, as between these parties, to assoilzie the whole defenders from the conclusions of the summons. James Edward Scott was not a party to this minute, but he did not oppose it nor object to it as involving in any respect a fraudulent or unfair transaction between the parties to it, and accordingly decree passed in terms of the prayer—that is to say, by interlocutor dated 19th January 1895, the defenders were assoilzied from the whole conclusions of the summons so far as insisted in by the pursuers other than James Edward Scott. There was no absolvitor from the action by him. The interlocutor is unguardedly expressed, but that is undoubtedly its meaning and effect.

"No alteration was made on the record as a consequence of this minute and interlocutor. No restriction of the summons was proposed, and no complaints of the unfairness of the course followed by the other five pursuers were made by James Edward Scott.

"No further step was taken in the action until 21st February 1896, when a minute of wakening and transference was lodged by James Edward Scott, which prayed for transference of the cause to the representatives of Mrs Craig, who in the interval had died. This minute was objected to by Mrs Harvey and the other representatives of Mrs Craig, on the ground that it was incompetent unless with the concurrence of James Edward Scott's co-executors, and accordingly, by the interlocutor of 10th March 1896, by which the process was wakened and transferred as craved, all questions as to the pursuer's title were expressly reserved. Parties have since been heard on title and the grounds of action, and the first question necessarily is whether the objection to title should be sustained.

"With very considerable hesitation I have come to the conclusion that it should. James Edward Scott, the sole pursuer, is one of several executors and one of several beneficiaries under the will of Alexander Taylor, and it is, I think, clear that he does not, either as executor (being only one of many and none of them confirmed) or as beneficiary, represent Alexander Taylor. In the ordinary case a minority of executors cannot sue a debtor of the defunct—See *Earl of Morton* v. *The Duke*, April 11, 1557, M. 14,685; *Borthwick* v. *Douglas*, February 1, 1566, M. 14,686; —— v. *Lag*, March 8, 1634, M. 14,689; *Bryson* v. *Torrance*, November 24, 1841, 4 D. 71, *per* Lord Medwyn. It has also been settled, in a great variety of circumstances, that no creditor or legatee of a defunct can sue the debtor of the defunct—*Bryson* v. *Torrance*, *supra*; *Addison* v. *White*, June 25, 1870, 8 Macph. 909; *Hinton* v. *Connell's Trustees*, June 6, 1883, 10 R. 1110; *Rae* v. *Meek*, July 19, 1888, 15 R. 1033: *Henderson* v. *Robb*, January 18, 1889. 16 R. 341.

"But exceptions have been admitted to both of these rules. In *Bryson* v. *Torrance* the title of one out of three executors was sustained in an action against another of the executors as a debtor to the estate, in which the other executors had refused to concur; and in *Watt* v. *Rodger's Trustees*, July 18, 1890, 17 R. 1201, an action by a beneficiary under a trust for recovery, for the benefit of the trust-estate, of a debt by one of the trustees, where it was said that the other trustees were acting in concert with the defender, was sustained.

"The pursuer James Edward Scott, admitting the general rule, contended that this case falls under either or both of the exceptions so recognised, and that his executorial title is sufficient on the authority of *Bryson* v. *Torrance*, and his title as beneficiary sufficient under the authority of *Watt* v. *Rodger's Trustees*; and if there had been nothing against the pursuer's title, except that the pursuer was only one of several executors and beneficiaries, I think I should hardly have been able to sustain the objection to it. The lapse of time might create much difficulty, but still there is no plea of *mora* against the pursuer, the action having been brought without any delay; and it might have been possible for him, if he had good grounds for setting aside the contract, to have ascertained the balance, if any, which would in that case be due from the estate of Mrs Taylor to the estate of Alexander Taylor; and he might perhaps have restricted his demand to the share of the balance which he might be able to vindicate for himself.

"But then, over and above all this, there has been a transaction by which decree of absolvitor in favour of the defenders has been pronounced against five of the executors. The action by them has not been dismissed. It has been decided against them, although no doubt by agreement. I think the case is the same as if these five executors had ratified the agreement, and that without fraud or any conduct which has been described as unfair. No doubt they did not intend to affect the pursuer's title; but the defenders did not agree that the pursuer's title should not be affected, and they are not barred from objecting to it. If, then, five out of six executors agree to ratify an agreement which has been

challenged, has a single remaining executor a title to ignore that ratification and to set aside that agreement? I must admit that I cannot give a confident answer to that question, and I answer it with hesitation in the negative.

"The law as to the powers of a majority of executors is not very clearly settled, but latterly the view that executors act like trustees, by a majority, has I think been preferred. The earlier cases of *Grant and Gregory* v. *Campbell's Representatives*, July 11, 1764, M. 14,690, and *Rogerson* v. *Baikie*, March 9, 1833, 11 S. & D. 569, and the more recent case of *Mackenzie* v. *Mackenzie*, February 3, 1886, 13 R. 507, favour that view; and I think it is supported by Lord M'Laren on Wills, 2d ed., vol. ii., 902. On these grounds I lean to the opinion that the pursuer has no title to sue this action on this record. Whether he can frame a better action against the defenders, or whether he has any remedy against his co-executors, I do not venture to say.

"This ground of judgment necessarily disposes of the action, and precludes disposal by judgment of the plea of irrelevancy and of the grounds of reduction, and if I were more confident about it than I am I might go no further. But as the grounds of reduction pleaded were fully argued, I think it may be more satisfactory that I should proceed briefly to notice them. I do so as if the whole executors were still insisting.

"Now, the agreement bears to be of the nature of a compromise. It was not a mere discharge, it was a settlement of conflicting claims, and the first question seems to be whether it was *intra vires* of the *curator bonis*. I am disposed to think that it was, especially as it related only to personal estate, and did not affect the ward's heritable property. It must be admitted that the powers of a *curator bonis* at common law to effect a compromise without judicial authority are not well cleared by decisions. Such a power has, however, been recognised to a certain extent. Thus, in *Anderson*, March 7, 1855, 17 D. 596, the Court refused a petition by a judicial factor for special power to compromise, on the ground that such powers were unnecessary. In *Thomson's Trustees* v. *Muir*, December 13, 1867, 6 Macph. 145, a distinction was taken between the power of trustees to compromise, and their power to enter into a submission; and while it was held that a submission into which trustees had entered was beyond their power, the judgment might have been different had the case been in regard to a compromise by the trustees. It appeared to be thought that a power in trustees to compromise would be more readily recognised than a power to refer, and the case of *Anderson* was referred to without disapproval. Yet in the case of *Carson*, July 10, 1835, 13 S. D. 1093, a petition by a *curator bonis* for power to enter into a submission regarding the moveable effects of an imbecile party was refused as unnecessary, because within the discretion of the *curator bonis*. If a power to enter into a submission about moveable estate was held to be within the power of a *curator bonis*, much more must a power to compromise about such an estate be so. Farther, in the case of *Ross* v. *Devine*, June 30, 1878, 5 R. 1015, the power of a *curator bonis* to adjust differences between his ward and her sister seems to have been recognised. The 17th section of The Pupils Protection Act (12 and 13 Vict. cap. 51), which provides for the Court granting power to factors to perform exceptional acts of factorial management, does not apply to this case.

"Further, I am disposed to think that the power of a *curator bonis* to compromise was statutory at the date of the contract under reduction, *i.e.*, 1873. That question stands thus: Power to compromise is one of the general powers conferred on trustees by the 2nd section of the Trusts Act 1867 (30 and 31 Vict. cap. 97); but that section is not made applicable to curators *bonis*. It is, however, provided by the 2nd section of the Trusts (Scotland) Amendment Act 1884 (47 and 48 Vict. cap. 63), that in the construction of the recited Acts—one of these being the Trust Act 1867 — trustee shall include tutor, curator, and judicial factor, and judicial factor shall mean *curator bonis*. It appears to me that from the manner in which the provision is expressed, it must be held to be declaratory, and retrospective, and therefore to make it possible to affirm that in 1873 the Trust Act of 1867 conferred the power of compromise on curators *bonis*, or otherwise recognised the existence of that power. If so, the contract was *intra vires* of the *curator bonis*.

"I do not know whether this question has come up for determination, and I was not referred to any decision on the point. But I may refer to the *Attorney-General* v. *Theobald*, 1890, L.R., 24 Q.B.D. 557, in which a similar point was decided. It was there held that a provision in the Customs and Inland Revenue Act 1889, enacting that a prior Act should be construed so as to embrace a certain class of property passing under a settlement, was retrospective so as to subject to the provisions of that Act property of the class in question although payable before the date of the later Act.

"It is further pleaded by the pursuer that the contract is reducible because it was granted under mutual and essential error. It is said that parties acted under the belief that all parties interested were represented, and that this was an erroneous belief, because the pursuers were not represented, and it has now turned out that they are entitled to the whole of the ward's estate. I understand that this is the error referred to in the pursuers' plea, and it was maintained that it was a mutual error which vitiated the contract. I consider that argument entirely fallacious, and that there was no error of the kind. All the parties who had any right or interest were represented, and the pursuers had then no interest whatever, and, of course, could have none so long as Alexander Taylor lived. It may be also noticed that, as it

now appears, at the date of the contract, Mrs Scott, and not the pursuers, was Alexander Taylor's executor-nominate. I do not find any other error averred. It is, as I think, not averred that Mr Wink was under any error in regard to the extent of his ward's claims on Mrs Taylor's estate, and certainly it is not averred that Mrs Craig or those whom she represented misled the *curator bonis* to any extent. What is said or suggested is that the *curator bonis* was ignorant of the extent of these claims because he was careless; and no doubt it is intended to be alleged that his carelessness arose from the fact that he thought he was acting with the consent of all who could ever succeed to Alexander Taylor, and that he overlooked and disregarded the contingencies that Alexander Taylor might leave a will or recover his sanity. But I am not aware of any authority for setting aside a contract on such grounds against the will of the other parties to it, who did nothing to induce the error or ignorance of the former party, and who were, in my opinion, entitled to rely on the contract. I think that Alexander Taylor could not have reduced his deed had he recovered his reason, although he might possibly have had an action against the *curator bonis* and his cautioner. The mere fact that a contracting party is ill informed about the subject-matter of a contract has never, so far as I am aware, been held to be a reason for reducing it. The pursuers founded on *Dickson* v. *Halbert*, February 7, 1854, 16 D. 586, but that case was different, regarding, as it did, a discharge granted in error and *sine causa*, not (as I read the case) a compromise—*Mercer* v. *Anstruther's Trustees*, March 6, 1871, 9 Macph. 618, and 10 Macph. (H.L.) 39, which involved a question as to contract between a father and a daughter entered into under mutual error, and induced by the paternal influence of the father, to the loss of the daughter; and *Buchanan* v. *Hamilton*, March 8, 1876, 5 R. (H.L.) 69, in which a contract was set aside, because there was no *consensus in idem placitum*, a point which does not arise in this case at all.

"The defenders referred to *Kippen* v. *Kippen's Trustees*, July 10, 1874, 1 R. 1071, and to *Stewart* v. *Kennedy*, March 10, 1890, 17 R. (H.L.) 25, and maintained that a deed could not be reduced on error, unless the error was induced by misrepresentation. It occurs to me that the views expressed in the House of Lords in the latter case hardly apply, because they related to error as to the effect and import of the deed, not to essential error regarding the subject of the contract.

"But none of the cases quoted by the pursuer appear to me to be authorities which warrant reduction of this deed on the grounds pleaded; and I am unable to see that the conclusions of accounting can be reached if the deed be not reduced. Even if I had sustained the pursuer's title, I must therefore have decided against him on the relevancy."

Against the interlocutor of 1st December 1896 the pursuer James Edward Scott reclaimed and argued—(1) *On question of relevancy* — The action was relevant. The ground of reduction was essential error. The *curator bonis*, when he entered into agreement, did so on the understanding that the representatives of Mrs Taylor, with whom he was contracting, were the only parties having any interest then or prospectively in the estate of his ward. This was an error, as the lunatic left a will. The *curator bonis* never applied his mind to the terms of the agreement; he was confronted by those whom he considered to be the entire body of representatives having any interest in the property of his ward, and by reason of this error he failed completely in the performance of his duty. The error was thus, in the substance of the matter, an error underlying the whole transaction. The agreement was therefore reducible, Stair, i. 17, 2. (2) *On question of title to sue* — The pursuers sued "as executors and also as individuals," and he was entitled to continue the pursuit of the action notwithstanding that his co-executors had retired. One executor among several co-executors was entitled "to pursue for his share severally without concourse of the rest," Stair, iii. 8, 59. It had never been decided that a majority of executors were entitled to compromise an action begun by them all. None of the cases quoted by the other side covered the point. In *Coulter*, *infra*, a majority of the trustees were a quorum under the deed, and in *Grant*, *infra*, only two out of the three executors had been confirmed.

Argued for defenders, the executors of Mrs Taylor—(1) *On question of relevancy*—The pursuers' averments were irrelevant. This was an attempt to set aside an agreement embodying a compromise. The agreement had been entered into with a view of avoiding litigation, and was therefore a typical compromise. The right to compromise instead of litigating on the part of a *curator bonis* had been recognised by the Court—*Ross* v. *Devine*, June 30, 1878, 5 R. 1015. A business transaction of this kind, must be judged by the state of facts at its date. The *curator bonis* in 1873 had to deal with this situation—that while he had claims against the estate of Mrs Taylor, there were large counter claims against the estate under his charge. He, using his discretion, thought it a matter for compromise, and the compromise was embodied in the agreement. It was a plain business arrangement into which parties entered on an equal footing. There was no suggestion that any error was induced by the defenders; the *curator bonis* knew as much about it as they did. No essential error had been averred, but even supposing there was essential error, the pursuer, in order to succeed, must show that the *curator bonis* was induced by the defenders to enter into the agreement—*Stewart* v. *Kennedy*, November 10, 1890, 17 R. (H.L.) 25. There was no averment to that effect. (2) *On question of title to sue*—The action dealt with an executry matter. An executry debt was sued for, and the claim being essentially executorial, would not be

sued by the executors as individuals. The question therefore came to be—Could one executor out of six go on with an action after it had been compromised by the other five executors? This had been decided in the negative so far as trustees were concerned—*Coulter* v. *Forrester*, June 11, 1823, 2 S. 387. Executors as well as trustees were entitled to act by a majority—*Grant* v. *Campbell's Representatives*, July 11, 1764, M. 14,690; *Mackenzie* v. *Mackenzie*, February 3, 1886, 13 R. 507. The action having been compromised by five out of six executors, the remaining one had no title to pursue it.

At advising—

LORD YOUNG—The Lord Ordinary has stated the facts of the case fully and, I think, accurately, but a briefer statement will suffice to enable me to explain my opinion on the only question—one of law, and not of fact—decided by the interlocutor reclaimed against, and which does not involve any disputed matter of fact. That question is, whether the reclaimer James Edward Scott has a title to pursue this action—or, as I should prefer to put it, to continue the pursuit of it after and notwithstanding of the minute and the interlocutor of 19th January 1895 following upon it.

By that minute and interlocutor this action was settled and taken out of Court, the defender being assoilzied. It appears on the face of the minute that the reclaimer did not assent to the settlement, and we must take the fact to be so. If this fact invalidates the settlement and absolvitor, any person having legitimate interest may challenge the proceeding and have it set aside. But while it stands I am of opinion that we must regard the action as out of Court by legitimate settlement and decree of absolvitor. It follows that the reclaimer has no title to pursue it.

It is right, however, that I should express the opinion which I entertain that the reclaimer's dissent, or rather declinature to assent to the settlement which his five co-executors deemed prudent and proper in the performance of their executorial duty, and therefore resolved to make, was not necessarily an obstacle to their making it, or a ground for impeaching it when made. There may unquestionably be grounds on which one of six executors may interfere to hinder the settlement of a pending action (or anything else) proposed to be made by the other five, or take proceedings to set it aside when made, but I cannot countenance the proposition that the mere fact of his dissent or refusal to assent is sufficient. The reclaimer has really no ground on which to ask the Court to disregard the minute and interlocutor in question and allow him to proceed with the action as an action at his instance, except this, that his assent was not given but refused, and that his co-executors could not validly act without it.

I am disposed to agree with the Lord Ordinary in the opinion which he has expressed, to the effect that this action, which the majority of the executors pursuing it compromised and settled as they did, was irrelevant. There are certainly plausible and probable grounds for that opinion, and if it was held by the advisers of the executors and by all but one of their own number, it would be unfortunate if the law enabled that one to veto a compromise on reasonable terms by merely declining to assent to it. I allude to this matter of relevancy only to make this illustrative observation on the question of title.

LORD JUSTICE-CLERK—I am of the same opinion.

LORD TRAYNER—I concur in the judgment of the Lord Ordinary. The present action was raised by the executors-nominate of the deceased Alexander Taylor for the reduction of an agreement, the terms of which were said to be prejudicial to the interests of the executry estate, and for recovery of a large debt said to be due to that estate. The action was brought in the interest of the executry estate as a whole, and not for the enforcement of any individual beneficial interest. The pursuers are no doubt described in the instance of the summons as executors "and as individuals." But there are neither averments nor conclusions applicable to any individual claim. Such an action could have been brought by a majority of the executors, and I think it was within the competency of a majority of them to abandon or compromise such an action. If they did so to the prejudice of any beneficiary, they must of course answer for it. But the discharge by a majority of the executors of the action, just like the discharge of a debt, would be quite a sufficient discharge to the defender in the one case, and the debtor in the other to whom the discharge was granted. I think, therefore, the pursuer Mr James Edward Scott cannot now insist in that action which his co-executors have discharged. As an executor he cannot do so, because the demands of the executry estate made by the executors as a body have been satisfied. The case of *Torrance* v. *Bryson* does not decide anything to the contrary. It was a special case where the title to sue an action brought by one out of three executors was sustained, in respect that one of the executors was the debtor who was being sued, and the remaining executors declined to concur in the action. To have refused to sustain the title in such a case would have been to prevent the executry estate recovering its debt. But the case here is not that no other executor will concur with Mr Scott, but that having concurred with him, their claim, so far as they think they have a right or interest to enforce it, has been satisfied. As an individual, Mr Scott cannot, in my opinion, insist in this action (whatever other remedy may be open to him), because the form of action excludes him from claiming under it as an individual for his own interest. The case of *Watt* v. *Rodger's Trustees* (referred to by the Lord Ordinary as relied on by Mr Scott) certainly gives some

countenance to the view that a beneficiary under a trust may be allowed to sue the debtor of a trust-estate for payment of a debt due to the trust. I am not as at present advised prepared to follow that case, in which there was a serious division of opinion, as a conclusive authority.

On the question of relevancy I agree with the Lord Ordinary, and have nothing to add.

LORD MONCREIFF—Looking to the whole scope of the summons, I think the pursuers sue as executors for an alleged debt due to the executry, and as a majority of the executors might have raised the action, so in the absence of exceptional reasons to the contrary may they compromise it or decide in the interests of the executry not to proceed with it. I do not doubt that in some circumstances the Court may sustain the title of a minority of executors to raise or proceed with an action. But all that we see of this case leads to the conclusion that the five executors who have compromised their claim and withdrawn from the action exercised a very sound discretion in deciding not to proceed, because in my opinion their averments are utterly insufficient to infer reduction of the agreement sought to be reduced. I therefore think the Lord Ordinary's judgment should be affirmed.

The Court adhered.

Counsel for the Pursuer, James Edward Scott—Shaw, Q.C.—Cullen. Agent—Wm. B. Rainnie, S.S.C.

Counsel for the Defenders, Mrs Taylor's Executors—W. Campbell—M'Clure. Agent—R. Addison Smith, S.S.C.

Tuesday, January 19.

FIRST DIVISION.

[Lord Pearson, Ordinary.

GOVAN ROPE AND SAIL COMPANY, LIMITED *v.* ANDREW WEIR & COMPANY.

Sale—Continuing Contract—Rescission of Contract—Reparation—Measure of Damages.

In an action of damages for breach of a continuing contract of sale, which the Court after a proof found to have been wrongfully repudiated by the purchaser, *held* that there being no ascertainable market price for the goods in dispute, the true measure of damages was the difference between their contract price and the total cost to the seller of their production.

Observations (*per* Lord M'Laren) on the rights of the purchaser under a continuing contract if goods of inferior quality are tendered.

Process — Record — Amendment — Competency — Court of Session Act 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 29.

The pursuers in an action for damages in respect of breach of contract, in their original averments estimated the loss sued for as "the difference between the contract price" of the goods to be supplied by them "and the current price" at the date of the alleged breach. They subsequently, after a proof had been led, and when the case was at *avizandum*, proposed to amend their record by substituting for this, an averment that "the loss of profit occasioned to the pursuers through the said breach of contract, amounts to the sum sued for." No alteration was proposed in the amount concluded for in the summons. The reason given for the proposed amendment was that there was no ascertainable market price for the goods at the date of the alleged breach.

Held that the amendment was necessary for the adjudication of the case, and was accordingly competent under sec. 29 of the Court of Session Act.

In March 1892 the Govan Rope and Sail Company contracted with Andrew Weir & Company, shipowners, Glasgow, to supply them with 20 tons of Manila rope.

The contract was constituted by offer and acceptance. The offer made by the Govan Rope Company was contained in a letter dated March 8th, in the following terms:—"Referring to the writer's visit this afternoon and conversation with your Mr Weir, we offer you, say 20 tons pure Manila rope at £34 per ton, less 5% dist., 1/mo., free delivery U. K. or usual Continental ports. To be taken up as required by you, but on the understanding that you will give us a share of your orders regularly and not keep it all back until your other contracts are completed." This offer was accepted by Messrs Weir & Company on the 17th in these terms:—"We accept offer made us to-day for 20 tons of Manila rope of not lower quality than good seconds, at £34, say Thirty-four pounds p. ton, delivered to our ships U. K. or Continent free. Terms, monthly account, less 5% discount." Only about half a ton of rope was taken up by the Messrs Weir & Company during the years 1892-93, in consequence of which complaints were made against them and legal proceedings threatened. The parties eventually agreed upon certain alterations in the terms of the original contract, which are contained in a letter of 2nd March 1894:—"We have yours of y'day. We confirm the arrangement come to, viz., that your clients complete their contract with ours by the close of the current year—our clients supplying yours with 'current' hemp in place of that originally contracted for."

By the 31st December 1894 Messrs Weir & Company had only ordered and obtained delivery of about 5½ tons of rope, and as they refused to take delivery of the remainder, the Govan Rope Company on 6th November raised an action against them, concluding for payment of £182 as damages in respect of the defenders' failure to take delivery.