Wednesday, March 2.

SECOND DIVISION.

[Lords Wellwood and Low, Ordinaries.

MENZIES *v.* MENZIES AND ANOTHER.

(*Ante*, vol. xxvii., p. 721; 17 R. 881.)

Reduction — Misrepresentation — Fraud — Father and Son—Law-Agent's Duties and Responsibilities—Res judicata.

The only son and heir-apparent of a Baronet and heir of entail, an officer in the army, and dependent on his father except for his pay, had for some years lived beyond his allowance, and had more than once to apply to his father to pay his debts. His father did so. The son again fell into debt, and consulted the family agent, his most pressing liability being a bill for £3000 granted to a money-lender, on which he feared he might be made bankrupt, and so ruined in his profession. The son, if he survived his father, became absolutely entitled to the fee of the estates, which were worth upwards of £300,000. After much correspondence and consultation, it was arranged that the estates should be disentailed and conveyed to trustees to hold for the father in liferent, and the son in liferent alimentary allenarly, and for the heirs of the son's body, whom failing the heir to the baronetcy in fee. As part of the arrangement the son's debts were to be paid, and an increased allowance secured to him by charges on the estates. The son about three years afterwards raised an action against the trustees and his father for reduction of the deeds by which the arrangement had been carried out, on the ground that his father and the family agent, in pursuance of a joint scheme which they had laid some years before, to deprive the pursuer of the fee of the estates, induced him to enter into the arrangement by false and fraudulent representation and fraudulent concealment, and that the pursuer had consented to the arrangement (1) under essential error, (2) under essential error induced by the father and his law-agent, and (3) under essential error fraudulently so induced. A former action raised by the pursuer against the same defenders with the same conclusions, in which action, however, there had been no averment of any scheme on the part of the father and law-agent, and no averment or pleas of fraud, had been thrown out as irrelevant.

The Lord Ordinary (Low), in the present action, *held*, after a proof, that the pursuer was induced to enter into the arrangement by representations as to a matter of fact—viz., the possibility of raising the necessary funds in some other way—made by the agent, acting as agent for the father and with his authority, these representations being different from the representations averred in the former action, and being false, though not fraudulent or intended to deceive.

On a reclaiming-note, the Court by a majority *recalled* the findings of the Lord Ordinary, and assoilzied the defenders, on the ground that the facts now proved amounted to no more than had been averred by the pursuer in the previous action, and that the matter was therefore *res judicata*.

Opinions per the majority of the Court that the facts proved did not warrant reduction on any of the grounds pleaded by the pursuer—*diss.* Lord Rutherfurd Clark, who *held* that the representations on which the Lord Ordinary proceeded were false, and having been made without inquiry or consideration, were fraudulent, and therefore were not protected as *res judicata*, and warranted reduction.

This action followed on the previous action reported *ante*, vol. xxvii., p. 721, and 17 R. 881. The Lord Ordinary in the former action dismissed it as irrelevant, and to his judgment the Court adhered.

Captain Menzies now raised an action for reduction of the deeds connected with the disentail and resettlement of the estates, which he had attacked in the previous action, calling the trustees who now held the estate and his father as defenders. The reason which induced him to raise these actions was that he had again incurred debt, and had thus, as he said, for the first time discovered how far he had been placed under restraint by the trust-deed. The main difference in averment of fact between this action and the former was that he now averred that his father had "for sometime prior to 1885 determined, if and when possible, to deprive the pursuer of the fee of the estates of Menzies and Rannoch, which he had then in expectancy, for the purpose of re-selling them according to his own wishes, and had communicated his intention to Mr James Auldjo Jamieson, his personal friend and legal adviser, whom during the next two years" (the trust-deed was signed in December 1886) "he made his instrument to attain this object." He further averred that to carry out this scheme negotiations were prolonged and obstacles interposed by Sir Robert and Mr Jamieson to accelerate the pursuer's difficulties, to impress upon him that ruin was inevitable, and that there was no other means of escaping it than the resettlement which was eventually carried out. These representations, he said, were false, and were known to Sir Robert and Mr Jamieson to be false.

The pursuer pleaded—"The pursuer is entitled to decree as concluded for, in respect—1st. The documents of which reduction is sought were impetrated from him without consideration, to his lesion, by the exercise of undue influence on the part of the defenders Sir Robert Menzies and Mr Jamieson. 2nd. The pursuer was

induced to assent to the arrangement embodied in the said documents, and to sign the same, by false and fraudulent representations and fraudulent concealment, as above set forth. 3rd. The pursuer gave his assent to the said arrangement, and signed the said documents—(*a*) Under essential error, as above set forth; (*b*) under essential error induced by the defenders Sir Robert Menzies and Mr Jamieson, as above set forth; and (*c*) under essential error induced by false and fraudulent representations and fraudulent concealment, as above set forth."

The defenders stated what their actings had been in the way of borrowing money to carry out the various purposes of the trust, and denied the material averments of the pursuer.

The defenders pleaded—"(1) The pursuer's statements are irrelevant. (2) The pursuer's material averments being unfounded in fact, the defenders should be assoilzied. (3) *Restitutio in integrum* being impossible, the defenders should be assoilzied. (4) The agreement sought to be reduced being the result of a transaction between the pursuer and defender Sir Robert Menzies, the pursuer is not entitled to reduce the same."

The Lord Ordinary (WELLWOOD), before whom the case at first depended, dismissed the action.

On a reclaiming-note the Second Division, with consent of the defenders, recalled this interlocutor, and allowed a proof. No opinions were pronounced by their Lordships.

LORD WELLWOOD then proponed a declinature on the ground of relationship to the parties, and the case subsequently depended before Lord Low.

It was proved that the estates in question were worth upwards of £300,000. Sir Robert was born in 1817; Captain Menzies in 1855. The sum which Sir Robert would have had to pay his son if he had proposed to disentail without his consent was about £150,000. In 1874 Captain Menzies obtained a commission in the Scots Guards, and had an allowance of £300 from his father besides his pay. In 1878 his allowance was increasd to £500, and in 1883 to £600. Besides this he had no means. In 1876 Sir Robert paid out of his own funds £1200 of debt incurred by his son, and in 1881 he again paid £5000 which his son had gambled away on horseraces, and in 1883 paid £6000 to the Eagle Insurance Company, from whom, through the agency of Messrs Pawle & Fearon, London solicitors, Captain Menzies had borrowed a sum of £5500 to pay additional debts. The sums paid in 1881 and 1882 were charged upon the estates. For the sum of £6000 Captain Menzies had granted a *post obit* bond to the insurance company. When this company's debt was paid this bond was not discharged, but an assignation of it was taken in favour of trustees. This transaction was a leading topic in connection with the subsequent negotiations between Captain Menzies and Mr Jamieson.

The events which immediately led up to the execution of the agreement began in 1885. In the beginning of that year Captain Menzies was about to go on active service with his regiment, and wrote to Mr Jamieson, who had always been on friendly terms with his father and himself, and had long acted as family agent, that he was in debt again, had granted a bill for £3000 to Samuel Engel, a money-lender in London, and owed some £700 besides. From this point the correspondence and negotiations which the pursuer averred to be fraudulently carried on with him to induce him to surrender his rights for inadequate consideration started.

Captain Menzies, in support of his case, subsequently referred to a letter dated 1st December 1882 from Mr Jamieson to Sir Robert as the first indication of the scheme which he asserted to exist—"I venture to think it would be better for himself certainly, and also I think for you, that he should not completely give up his profession, but should go into some line regiment. I think also that some effort should be made to have the estates so put that they should be protected against the possibility of being affected by any similar charge, or being left, as they would be if he were to succeed at present, entirely in his power to do what he chose with them." This letter was written at the time of the advance of £6000, and was in reply to suggestions by Sir Robert that his son should leave the army and settle quietly at home. Sir Robert, in correspondence following immediately on this, recurred more than once to Mr Jamieson's suggestion—*e.g.*, on 12th March 1882 he wrote to Mr Jamieson—"I find that Neil's loss has been on the turf again, and I do not see my way to leaving him in the army at all—I mean out of the Guards. These changes seldom produce much good, and I do not care to send him to India. . . . I am seriously thinking of disentailing the estate and leaving him only the liferent of it"—and again on 12th May he wrote to Mr Jamieson—"What would it cost to disentail this property—I mean the whole—and leave Neil the liferent of it only, settling it on his son or the next heir."

When the Eagle Insurance Company was paid, Mr Jamieson, at Sir Robert's request, wrote to Captain Menzies to explain the effect of the assignation which was taken in place of a simple discharge being granted—"21st August 1882.—The object, as I thought I had explained to you, simply was this, that if the bond is discharged, as you propose, it would relieve the estate entirely of any charge on your interest in the property, and would enable you, so soon as the bond is discharged, again to raise a further sum just as you did before, while if the bond remains on the property, by being transferred to trustees it would be a prior security affecting your interests in the estate, and would therefore render it more difficult, or perhaps impossible, to raise a further sum on your succession during your father's life. This I thought I had explained, but, as you can understand, it is not a subject which I cared to put so prominently before you as I now do in this

letter in consequence of what you have said in your letter to Sir Robert. I thought it was quite sufficient to point out to you that in the one case the security would be entirely removed from the property; in the other case it would remain as an incumbrance on your interest in it during your father's life, and of course become exigible after your succession."

In this state of matters Captain Menzies wrote in 1885 the letter to Mr Jamieson already referred to; he asked Mr Jamieson not to disclose the state of affairs to Sir Robert, but Mr Jamieson thought it right to do so. While the regiment was abroad Sir Robert would not allow Mr Jamieson to communicate with Captain Menzies on the subject. In his evidence Mr Jamieson said on this subject—"I did not write to the pursuer before 18th June with reference to his letter of 20th February, because his father asked me, as he was on active service in Egypt, not to write to him about a matter which he thought would necessarily very much affect him and make him reckless when he was there. I explained that to the pursuer afterwards. With regard to Sir Robert's feeling about his son, I may say that I don't think I have often seen a father who has shown so consistent an affection for his son as Sir Robert has done. The consideration for his son's welfare which led him to prevent his son getting any news in Egypt which would lead him into recklessness is a specimen of the general tone of his conduct towards his son."

A correspondence began on 18th June which ended in the agreement now under reduction. To explain the terms of that correspondence it may be noted that the general provisions of the agreement as finally adjusted were these, viz., the estates were disentailed with Captain Menzies' consent, and conveyed to trustees to hold in trust for Sir Robert in liferent, thereafter for the pursuer in liferent for his liferent alimentary use allenarly, and for the heirs-male of the body of the pursuer, whom failing the person entitled to the baronetcy of Menzies, in fee. The deed further provided that although the pursuer should have large powers of management of the estates during his liferent, he should not be entitled to assign the liferent, nor dispose of the same in anticipation, nor should the same be liable for his debts or deeds, or be subject to the diligence of his creditors, and in the event of his 'assigning or otherwise disposing thereof in anticipation, or in the event of the same being liable for his debts or deeds, or becoming subject to the diligence of his creditors, then his liferent of the said lands' should *ipso facto* cease and determine. In the event of the pursuer's liferent being so terminated, the trustees were to enter into possession of the estates and pay the free income to the pursuer as an alimentary allowance. The trustees were given power to borrow a sum not exceeding £12,000, and were assigned into the right to borrow £10,700 which Sir Robert had in 1881 acquired by an agreement with his son. These sums, together £22,700, were to be applied (1) in payment of expenses; (2) in paying Captain Menzies' debts; (3) in purchasing an alimentary annuity of £300 for Captain Menzies, payable so long as his father and he were both in life; (4) in purchasing an annuity of £1430 on Sir Robert's life to pay the interest on these various sums charged on the estate. Sir Robert also bound himself to pay Captain Menzies an alimentary annuity of £600 (making with the annuity already referred to an allowance of £900 per annum), with power to the trustees if he failed to do so to borrow an annuity of £600 on the fee of the estate on the joint lives of father and son. There were other provisions for the event of the son's marriage, and of the father, who was a widower, marrying again.

Mr Jamieson then, on 18th June 1855, opened negotiations by making certain suggestions for Captain Menzies' consideration—"I have not troubled you on the subject previously, because I was desirous not to write to you on a matter which I feel cannot be otherwise than most painful to you while you were abroad on service, but it is necessary now to communicate with you on the subject, and see what is to be done, for unless some arrangement is made about these bills and Mr Engel's acceptance I see nothing for it but ruin to you, and I need hardly say that I would do anything in my power to prevent such a result. Sir Robert is, as you can quite realise, very much distressed and annoyed about this fresh debt, and he declines, at present at least, to do anything. The only suggestion which occurs to me for extricating matters from their present most painful position is, that he and you should arrange to disentail the whole estates, and put them in trust on the footing of paying these debts, making such terms as I best can with Mr Engel for taking a reduced amount for this bill, and making arrangements for paying you a certain annual sum, to be fixed during your father and your joint lives, and after his death for paying you the free income of the estate during your life, the fee to go to your eldest son, if you have one, or to the Baronet, whoever he may be. I write this letter to you without having Sir Robert's authority for this proposal, and merely with the object of ascertaining what your own views are upon the matter. Will you be so good as consider the matter carefully, and inform me what you think and would propose, for something must be done speedily in regard to these debts, otherwise I can only see one result, a result which I feel so anxious to prevent." Captain Menzies received this letter on his way home, and asked Mr Jamieson to meet him. Mr Jamieson before meeting him wrote to his father—"28th July 1885.— . . . I think he should give me a note of what he proposes to do, and that I would then consult with you on the subject, and see what can be arranged. I hope he will do this, and if he does, may I, at the risk of seeming to give advice where it is not asked, venture to suggest to you that, in the interests of your son and of the estates,

it would be desirable, on these and these accounts alone, to make a sacrifice to secure as far as possible him against a repetition of what has occurred, and if unfortunately he should again get into debt, the estates at least would be secure against the result of such an act, and he should be secured during his life at least in a sum which should be amply sufficient for his purposes, and which could not be touched by his creditors. I shall let you know if I hear anything further from your son, and I would venture to suggest to you that it would probably be better that you should not communicate with him on this subject, as I think the best chance of an arrangement lies in endeavouring to effect it without direct communication between you and him on this subject in the meantime at least." On the same date Mr Jamieson wrote to Captain Menzies—"If you have any suggestion to make about the settlement of your debts, could you not jot it down in writing and send it to me, and it would then form the text for my approaching your father. But in the present circumstances, whatever you and I may arrange would probably not be agreed to by your father, and hence time would be lost and expense caused, which I would regret to throw upon you, for, as you can understand, your father I am sure would not consent to pay at present any expenses connected with my going to see you, and though that would be a mere trifle I do not like even to incur that expense unless it is to do you some good."

Sir Robert, by return of post, acquiesced in the suggestion Mr Jamieson had made to him—"29th July 1885.— . . . I quite agree with you that any arrangements necessary for Neil's debts had better be made between you and him, at all events in the first instance, without my being so far implicated in them. At the same time I should be disinclined to go so far in a secondary way, by my agent and Neil coming to any arrangement that might, even in an informal manner, commit me to them. As you will well understand that if you and Neil come to an understanding, even to which, while I had been no direct party, never having been consulted on the subject, it would still be so awkward for me to refuse to agree, and if I did not agree I should be in rather a false position, and one that I had not made for myself. I think, if you are careful what is done, any such difficulty may be avoided, and under these circumstances I can in the meantime leave you to do the best you can for Neil." Mr Jamieson wrote again to Captain Menzies on 3rd August, repeating in substance the proposal of 28th June, which he stated was a suggestion from himself, and was not known to Sir Robert. Captain Menzies replied to this letter, but did not accept the suggestions it contained —"20th August 1885.— . . . It seems to me that the scheme you propose in your letter of the 3rd Augt., as to disentailing the estates and re-settling them, is unnecessary for the raising of so small a sum. Could not the money (£4000) be raised on the estate in the same manner as before, and I would agree to pay half the interest if necessary, which would be I suppose £200 a-year. Please let me know if this could be done, and, if not, what other scheme you would propose." Mr Jamieson had a meeting with Captain Menzies on 25th August, and next day wrote to Sir Robert an account of what passed between them—"26th August 1885.— . . . We discussed the matter very fully. He had written to me that he proposed that the amount required should be charged on the estate. I told him that this could not be done, and yesterday I had an opportunity of telling him very plainly the reason. He was extremely averse to any re-settlement of the estate, and pointed out that he would have the power of dealing with the estate as he chose should he happen to survive you, as things are. This I of course admitted, but I said that that did not alter the matter, because you might, and probably would, live for many years, and during that time he would have no income, and I did not see how he could pay the debts unless with your assistance, and upon your terms. I said that what had occurred before might occur again, and that you emphatically declined to make any arrangement which would make the estates subject to his disposal; that if he desired assistance from you he would have to take it on your terms or not at all; and I asked him to come back again after he had considered the matter, which I had explained much more fully to him than I have done here. I may say that he said he had not the least wish or intention to sell the estate even if he succeeded to it and had the power. I told him that might be so, but that the experience of the past went rather to show that unless things altered he might not have the option of saying whether he would sell the estates or not, because his creditors might be in the position of dictating to him in that matter, and you were resolved, if you could, to prevent a sale. When he came back, after an interval of some hours, he said he was prepared to entertain the proposal of a re-settlement of the estate provided a reasonable provision were made for him during his life. I said I had not received your authority (though he read me a letter in which apparently you said you would favourably consider whatever he and I arranged), and I therefore said that anything I might say was of course necessarily subject to your approval. In making the proposal which I did make to him I had in view both your position and also his. So far as you are concerned, I did not see how it was possible that you should, in your circumstances and at your time of life, have to pay further sums out of your income on account of his extravagances—for I could use no other term to describe what has occurred—and on his side it was necessary that he should, in my humble opinion, have such an income as would make him above the temptation of further extravagances, or at least if he should be tempted, that the world and all who knew the circumstances would be able to say that you had done everything in

your power to prevent the temptation being given to him, and I also think, if you will allow me to say so, that as he and he alone has incurred this debt, in addition to what he has already incurred, he and he alone should bear the penalty, and this, I am bound to say, he most cordially admitted." Mr Jamieson then explained the details of the re-settlement which he proposed.

The correspondence then proceeded, Sir Robert objecting strenuously to the amount of the allowance which it was proposed by Mr Jamieson to secure to Captain Menzies as too large, and insisting as a *sine qua non* that Captain Menzies should give his word to cease gambling. Captain Menzies in a letter to Mr Jamieson on 9th October pressed for some immediate settlement, and tabled an alternative—"In answer to your letter of the 7th October, I beg you will inform my father that I will not give any promise to abstain from anything. If he had only allowed me a sufficient income to live on to start with, I should not have had to recourse to what he calls 'those practices which have made it necessary for me to incur obligations.' As to my paying the interest of the sum borrowed to pay my previous debts, I shall be delighted to do so, provided the annuity is fixed at £1200. Engel, of Marlborough Street, has instituted proceedings against me, and I should like to know, as soon as possible, what my father intends doing, as I shall be obliged to borrow the money to pay him with soon if nothing is arranged." Sir Robert on 25th October wrote to Mr Jamieson suggesting a reference to three family friends to settle matters between him and his son—"What he" (Colonel Moray yr. of Abercairney) "proposed should be tried, seeing Neil refused to say he would not cease gambling by cards or the turf, should be, that his case should be submitted to the consideration of Lord Stormont, or the Duke of Athole, and Colonel Moray, all three or any one, and that they should abide by their decision, and, so far as I am concerned, I shall be quite ready to submit to whatever they say I should do and Neil should do, if he agrees." Captain Menzies on 26th October 1885 wrote Mr Jamieson a letter in which it was strongly maintained that Mr Jamieson and his father were entitled to deal with him as having independent professional advice—"Since I saw you on Monday last I have been thinking over my affairs, and I have come to the conclusion it would not be fair to myself to agree to the conditions you made in the proposal to pay off my liabilities. Surely by insuring my life, which is a good one, say for £10,000, I could borrow a sufficient sum on the policy to pay off my liabilities, always supposing my father would agree to an annuity being bought for me large enough to enable me to pay the interest on the policy, and on the money borrowed on it. I don't suppose for a moment my father would agree to this, but in the event of his not doing so I don't see what is to be done, as I am advised not to agree to the conditions mentioned in your proposal." Mr Jamieson's reply to it on 28th October was also much commented on—"The proposal I suggested was, as you know, made in your interests, for your father would make no proposal, and repudiates entirely any suggestion that he wishes to make any proposal on the subject. He says he regrets that any proposal is necessary on your part, but he maintains that if any proposal is made for his consideration, it must be accompanied by an arrangement for re-settling the estates, so as to prevent their being burdened or sold by you when you succeed. It was this statement of his decision that induced me to suggest the plan I did suggest. I never suggested that it was a proposal which gave you compensation to the full amount, or anything like it, for your consent to such an arrangement. But it is only when the heir in possession (your father in this case) asks his son's consent to a disentail that full compensation is given. If nothing is done, you, as things stand at present, if you succeed, can sell the estates, or burden them without any consent, and this your father can do nothing to prevent. But if you come to him, as, unfortunately, you are obliged to do, and ask him for money to pay your debts, and to give you a stated annual allowance, he is entitled to say, as he does say, that he will only agree to do so on certain terms, and I quite admit, and have stated to you, that these terms are, as you say, not fair to yourself in the sense that they are not compensation for your consent to disentail, but they are the terms which your father requires, and if you do not agree he can say, as I presume he will, that he does not agree to do anything. Do not, therefore, for a moment suppose or refer to my proposal as one which was fair if you were making terms for the disentail, and I certainly never 'advised' it; therefore, if you have, as you say, been advised not to agree to my terms, I can quite understand the propriety of the advice, but you must keep in view, and will, I hope, tell your adviser that it was not a question of fair terms of compensation, but a question as to the terms on which your father could agree to do anything. The proposal you suggest as to an insurance could be very easily effected if your father were to agree, but from what he said to me he will agree to no proposal which does not include as part of it a re-settlement of the estates, and your proposal as to the insurance leaves you with the same income as before (£600) for the future, and I thought you found that insufficient, and one great object I had in view was to give you an income from a source independent altogether of your father during his life."

Sir Robert had, at a somewhat later date, a meeting with his son, and on 8th December 1885 wrote to Mr Jamieson the result of his meeting, which seemed likely to lead to Captain Menzies consulting some one on his own behalf—"I hoped to hear from you about Neil, but have had no reply for some time, and,

as he was going to London, might get into further mess. I spoke to him. He will not hear of the three people I named, but he is not to do anything till he has consulted a respectable solicitor in London. He says that there is a gentleman of the name of Antrobus who is friendly to him, and he is to ask his advice both what to do and whom to consult, and that he will then say what he is to agree to. He says he is satisfied with his allowance of £600. It took a long time and much trouble and patience, but I had two very long conferences with him, and if the solicitors he consults advise him to adopt your proposal, things will come right yet, only he is very difficult to reason with. . . . but I think he will get good advice from what he says he intends to do." Mr Jamieson's reply to Sir Robert of 10th December ran thus—"I do hope Mr Antrobus will give him good advice. I am quite satisfied that he will find on inquiry that it will be impossible for him to raise more money by insurance or otherwise except at a perfectly ruinous rate, as the previous bond he granted to the Eagle Office is still on the register, and will now affect his power to do anything of the same kind again." Mr Antrobus, mentioned in the letter, was a junior partner in Coutts' bank, but it appeared from Sir Robert's evidence that he was under the impression that he was a solicitor.

Captain Menzies then agreed to refer the matter to the determination of the Duke of Athole, Lord Stormont, and Colonel Moray. Mr Jamieson prepared a memorandum and laid it before these gentlemen, and also attended a meeting of the three referees, which took place at Perth. The memorial laid before the three friends contained these clauses—"Sir Robert, however, proposes as a condition of his agreeing to these arrangements, and in consequence of the repeated debts contracted by his son at very short intervals, that the estates should be disentailed and put under trust in such a manner that Mr Menzies cannot, either now or on his succession, sell them or burden them with further debt. . . . The title to the estates would no doubt be held by the trustees, but they would have no right to interfere with the complete administration and management of the estates. In all respects, under the express provisions of the trust, Mr Menzies would be proprietor of the estate as Sir Robert is at present, would have entire control and management of it, and would be the sole person, under provision to that effect in the deed, to grant leases and deal with the tenants as he pleased. All he would be prevented from doing would be affecting the estates, as he had done in the past, by debts he might again hereafter contract during Sir Robert's life, or from selling or burdening the estates after Sir Robert's death."

After his meeting with the three friends at Perth, Mr Jamieson saw Captain Menzies and reported to the friends that he had explained to him the nature of the trust. A letter from the Duke of Athole to Mr Jamieson on 21st January 1886 was also produced to instruct this—"I have a letter from Neil Menzies, telling me you had explained the nature of the proposed trust to him—nothing more on the subject." Mr Jamieson in forwarding the draft of the proposed trust-disposition to the three friends made further explanations regarding it—"February 9, 1886—I have provided that the liferent right to be granted to Mr Menzies shall be held to be strictly alimentary, so as to prevent the possibility of it being burdened or attached by crs., and I have also provided that, in the event of the right being burdened or attached, it shall cease, and that the trs. shall then enter into possession of the estates, and uplift the rents, and pay over the free income to Mr Menzies as an alimentary provision, the trustees having power, at the same time, to allow Mr Menzies to occupy any part of the estate they think proper." The three friends approved of its terms with the exception of the amount of allowance proposed to be made to Captain Menzies. Lord Stormont on 1st May 1885 wrote thus to Mr Jamieson—"I have been asked by the Duke of Athole and Colonel D. Moray to inform you that we three, having considered the memorandum that was sent to us regarding the affairs of Sir Robert and Mr Menzies, are of opinion that the proposed trust for the Menzies estate does not meet with our approval, except Sir Robert makes a substantial increase to the allowance that he at present makes to Mr Menzies (we do not mention any sum), as a compensation for the possible loss that he might sustain by what is really re-entailing the estate, and also giving power to Mr Menzies, should he survive his father, to sell a portion of the estate, with the consent of the trustees, for the purpose of paying off any debt that has been incurred previous to the trust being formed. We wish this to be considered as our final decision."

Mr Jamieson was at this time in correspondence with the money-lender Engel, and was endeavouring to obtain delay from him. Mr Jamieson informed Captain Menzies from time to time of the course of this correspondence.

Sir Robert, in spite of the approval of the three friends, was still unwilling to execute the agreement, one of his main objections being to any increase in the allowance to his son. Captain Menzies, on the other hand, was anxious that it should proceed. On 18th March 1886 he wrote to Mr Jamieson—"If any change is made in the proposal, I shall of course consider myself quite at liberty to withdraw my consent, and to have the case again referred to a man of business on my own account." Mr Jamieson was pressing Sir Robert to go on, and wrote to Captain Menzies that he was doing so, and endeavouring to work on him through Lord Mansfield. On 13th May 1886 he wrote in these terms to Captain Menzies, concluding with a sentence on which the pursuer founded as being a false representation — "Failing

that, I see nothing, I am sorry to say, except your accepting Sir Robert's terms, or allowing Mr Engel to go on with the proceedings he threatened, and as to which he has been again writing to me."

Sir Robert still continued to hold out. Mr Jamieson in writing to Captain Menzies on 20th May 1886 to tell him so, stated plainly the impossibility of moving Sir Robert on the points on which he took his stand, and pointed out what he represented as the consequences of this — "It is necessary you should tell me your decision at once, because Mr Engel threatened to go on with the bankruptcy proceedings on Monday. I have got him to delay for one month, on the ground that I am endeavouring to arrange matters, but if you do not agree, I must tell him that he may proceed as the arrangement has fallen through, and, in that case, your right to succeed to the estates will be sold by the trustee in the bankruptcy for a comparatively small sum especially in these times, and then, if you survive your father, you would not succeed to the estates, but the purchaser of your succession would do so, and would be able to sell them out and out, as he would then acquire the right you possessed, were you to survive your father, of acquiring his estates in fee-simple. I think it right also to point out this result if the bankruptcy proceedings were to be pressed to the end." Finally a reference to Mr Mackintosh, Dean of Faculty, of the points remaining unsettled, and particularly the amount of the allowance, was agreed to. Sir Robert was not satisfied with the terms of the memorial, and in writing to Mr Jamieson on the subject stated that he had recommended his son to be separately advised—(no date, p. 222 of correspondence)—"I wished Neil to employ Mr Mann (of Hope, Mann, & Kirk, W.S.), but he preferred remaining with you, and I allowed it to be so, promising that, in all the transaction, I was not to be considered as other than ready to give attention to any proposal that Neil had to make."

Sir Robert continuing obdurate after the Dean of Faculty's award had been given against him, Mr Jamieson wrote to Captain Menzies deploring this. Captain Menzies' reply stated his view of the situation—"7th August 1886—I have received your letter of the 5th inst., in which you say, among other things, that you 'do not know what the result may be, or where the end is to come.' Now, I see clearly what the end will be unless something is settled at once. Failing a very early settlement of affairs, I see nothing for it but to sell the reversion rather than let Engel do so, as it is imperative that I should have money almost directly. As I suppose, having no security, it is impossible for you to get any money for me, I see nothing else for it." Sir Robert at last gave way, and the trust-disposition was executed.

On 30th April 1889 Captain Menzies wrote this to Sir Robert, viz.—"I regret to say I am in debt, and am threatened with legal proceedings of an extreme character. On asking a solicitor to raise money for me on my expectancy, he informed me that I had debarred myself from doing so by some deeds which were signed in 1886. The meaning of those deeds I never understood until now, and I was amazed at the information given to me. I know you are not able to pay my debts yourself, and I do not ask you to do so, but I ask you to agree to the cancelling of the deeds made in 1886, to the extent of enabling me to exercise the same powers over the estates which I had before they were granted. I need hardly say that had the import and effect of those deeds, as affecting my rights, been fully explained to me, I never would have signed them, and it is only fair to you to say that they must either be altered or set aside."

Captain Menzies was examined for himself as to the course of the transactions, and Mr Jamieson and Sir Robert for the defenders. The examination was in the main an explanation, *hinc inde*, of the understanding of the different parties of the phrases used in the correspondence, and a disclosure of what had taken place at their various meetings.

Captain Menzies deponed—"In considering whether I should consent to disentail or not, Mr Jamieson's statement that I would have no income, and that he did not see how I could pay my debts without Sir Robert's assistance and upon his terms, would certainly have a great effect upon my mind. I was impressed with the idea that it was the only way I could get out of the difficulty. (Q) Were you very unwilling to consent to the disentail?—(A) Very. (Q) If there had been any other reasonable plan proposed to you do you think you would have objected to it?—(A) No, certainly not. I understood at this time that Mr Jamieson's proposal was that the estate should be disentailed and re-entailed, so that I should be in the position of an heir of entail instead of succeeding to the property in fee-simple. He had not said anything to me about making me merely an annuitant with an alimentary annuity on the estate. . . . When I wrote to Mr Jamieson on 19th October 1885 I had no particular scheme in my mind as to how I was to get money to pay Engel, I merely put in that I would be obliged to borrow money if nothing was arranged, as a draw. . . . No other scheme occurred to me at that time for getting money except by giving in to Mr Jamieson's proposals. When I signed the documents requesting the intervention of the three friends I had no communication with them at all in regard to how they were to carry out their duty. That was attended to by Mr Jamieson; I left my interests entirely in his hands as regards that. . . . I did not consult a solicitor of any sort. I have no recollection of anything passing between my father and me about Mr Antrobus by name, but I suppose I must have mentioned him, otherwise my father could not have had his name. I certainly cannot have spoken to my father of Mr Antrobus as a solicitor. I may have said I was going to London to

consult a solicitor, as a draw, but I did not do it in point of fact. . . . I had various meetings with Mr Jamieson ranging over a long time, and I have no doubt he would explain to me to a certain extent the deeds that were to be prepared, but I cannot say I paid particular attention to them; in fact he bored me very much over the details. I ultimately signed the deed of consent and also the draft trust-deed. . . . When I signed the deed of consent on 1st November 1886 I had not found out any other mode of getting out of the difficulty except Mr Jamieson's proposal. All through these matters I did not consult any other solicitor than Mr Jamieson. I did not consult any other man because I thought Mr Jamieson was the best man for me to go to. I was not told by Mr Jamieson before this transaction was completed what was the money value of my expectancy. I was not told at any time that by going to an insurance company I could, without my father's consent, get my debt to Engel paid by giving a bond for £12,900, or that there was any mode of getting me out of my difficulty by a transaction with an insurance company without my father's consent. I think on one occasion my father suggested to me that I should consult Mr Mann, of Messrs Hope, Mann, & Kirk, and I said I preferred to leave my affairs in the hands of Mr Jamieson. I had an impression that he had always done his best for me, and I was satisfied with him as my agent. I was always told by Mr Jamieson that if the agreement was carried out I should be in the same position as my father was at that time. I was never told that I would not be in that position. . . . *Cross-examined*—I had borrowed money before that several times, but I was under the impression at this time that the bond held over the estate made it impossible for me to borrow. The money that I obtained from the Eagle Company was obtained from Pawle & Fearon, and I do not know how the transaction was completed. I don't think they told me much about how it was done. When I stated in my letter of 19th October that if nothing was arranged I should be obliged to borrow money to pay the Eagle, I suppose I meant that I was going to try and borrow it wherever I could. I suppose I meant I would go to the Jews. I had no particular method in my mind when I wrote that letter. Previous to that I had borrowed the sums I have mentioned simply upon my bill, and through the Eagle Insurance Company. (Q) And your statement of what you fear you will be obliged to do in this letter means one or other of these courses?—(A) I presume it meant that; I had nothing particular in my head. (Q) After receiving these two letters of 18th June and 3rd August 1885 did you not understand that what it was proposed to do was that you should receive a certain specified income during your father's life, and the free income should you survive him, and that the estates were to be so settled that you could not burden them or dispose of them after you succeeded?—(A) I understood I was to be exactly in the same position as my father was in at that time. Referred to letter of 18th June, I quite realised the meaning of the proposals contained in that letter. (Q) Did you understand that it was intended that after your father's death the estates were to be put in such a position that, although you had the income and management, you could neither burden nor dispose of any part of them?—(A) No, I did not understand that. I understood that I should be able to anticipate my rental—that I should be in the same position as an heir of entail. I understood that, instead of my being an heir entitled to succeed to property in fee-simple, the estates should be so arranged that I should succeed in the same way as if I were an heir of entail. I do not find that suggested in the letter of 18th June, but that is my impression. . . . I proposed what I say in my letter of 26th October, namely, to insure my life and borrow on the policy. I presume that at that time I saw no difficulty in the way of my doing so. (Q) Was there any difficulty, so far as you know, even in your going to the Jews again and borrowing?—(A) I always had in my mind at this time the fact of the bond being held over the estate. (Q) But the Jews did not seem to care the least about that?—(A) I did not know that. I had not borrowed any money from them since the bond had been put on the estate. They had not taken any steps to inform themselves what burdens were upon the estates to my knowledge, but I presume they would make themselves acquainted with these facts. When I said in my letter of 19th October to Mr Jamieson that if my father did not do anything I should be obliged to borrow money to pay the Jews, I meant that as a draw. I hoped it would be an effective draw. I hoped my father would think I was going to get money again at fabulous interest, and that he might give up the conditions he was making about our proposal. (Q) You meant rather to frighten your father and Mr Jamieson, because if they did not assent to what you proposed you would go back to the Jews again—isn't that it?—(A) I think that is it. I may have had some conversation with Captain Anderton prior to writing on 26th October, 'I am advised not to agree to the conditions mentioned in your proposal,' but he would be the only other person I would speak to about it besides the Duke of Athole. Captain Anderton was the gentleman who referred me to Pawle & Fearon. He did not suggest that I should communicate with them about this matter. It did not occur to me to go to Mr Fearon. All the conversation I had with Captain Anderton was that I had put my affairs in Mr Jamieson's hands, and what he said to me was very much the same as Colonel Farquharson had said, namely, to strongly advise me not to consent to any disentailment of the estates. He did not say that an heir of entail should not consent to disentail unless he was pretty well paid for it. I did not tell him that it was my father who wanted the disentail. I had no long conversation with him, simply a casual conversation in

the Guards' Club, probably of five minutes' duration. I think I explained to him and Colonel Farquharson sufficient to enable them to understand that my father made the condition for the payment of my debts that the estates should be disentailed. Both Colonel Farquharson and Captain Anderton advised that I should not agree to that condition. . . . When I used in my letter the expression, 'I am advised not to agree,' I did so for very much the same reason as I said in my letter of 19th October that I would be obliged to borrow money if nothing was arranged immediately, more or less as a draw. I suppose the draw was that I wished my father and Mr Jamieson to fancy that I had been taking independent advice. . . . At that meeting (*i.e.*, in January 1886) I think I went over again with Mr Jamieson the terms of the contemplated trust. (Q) Did Mr Jamieson explain to you what your own position and powers would be in the contemplated trust if the three friends recommended it?—(A) He certainly never explained to me the position I am in at the present moment under the trust. I cannot say offhand what he explained. (Q) Did he explain to you that when your father died your interest would be reduced to an alimentary liferent?—(A) I have no recollection. (Q) Did he explain to you that the liferent would be alimentary and protected from your creditors?—(A) No, to the best of my recollection he did not. . . . (Q) Do you wish to represent that your father had for some time prior to 1885 determined if possible to deprive you of the fee of the estates of Menzies and Rannoch?—(A) Yes. (Q) Do you say now that you believed that your father had entered into a scheme for depriving you of the fee of the property from 1885 downwards?—(A) Yes. (Q) And that his treatment of you since, using Mr Jamieson as his instrument, has been the carrying out of that design?—(A) Yes. (Q) You state that your father and Mr Jamieson conceived a fraudulent scheme for inducing you to place absolute confidence in Mr Jamieson as a friend and as a professional adviser; do you charge your father with conceiving a fraudulent scheme to your injury?—(A) I charge him with conceiving a scheme, fraudulent or not. (Q) A fraudulent scheme—do you stick to that?—(A) I stick to it. (Q) You recognise the meaning of fraudulent—it has not a technical legal meaning there. Do you wish to charge your father with conceiving a fraudulent scheme?—(A) Well, if you assure me that it has no technical meaning, I do not. (Q) Do you wish to charge him with conceiving a fraudulent scheme?—(A) I wish to charge him with what is stated in this record. (Q) What was, in your mind, meant by fraudulent scheme?—(A) I meant to charge him with conceiving a scheme, and I presume this is the legal way of putting it. (Q) Then you do not attach any meaning to fraudulent?—(A) Yes, I do. (Q) What meaning?—(A) I attach the meaning that it is a fraud. (Q) You further say that these two gentlemen in carrying out this fraud attempted to get you to abstain from taking any independent professional advice, and that they endeavoured to procure your consent to give up your rights by pressure, misrepresentation, and concealment?—(A) That is my belief. (Q) You now charge your father with endeavouring to get you to surrender your rights by misrepresentation?—(A) Yes. (Q) And by concealment?—(A) Yes. (Q) And that he and Mr Jamieson entered into such a scheme to carry out a fraud upon you?—(A) Yes. (Q) Do you wish to say so at this moment?—(A) Yes, I do; that is my belief. . . . (Q) Do you say now that your father made the proposal to consult the three friends in order to give an appearance of good faith to transactions which otherwise were fraudulent?—(A) If that is what is meant by the article, I do. It has no other meaning that I can suggest. (Q) Is it not the case that that involves either that the three friends were deceived by your father and Mr Jamieson or that they were parties to the scheme?—(A) I should say they were deceived."

Mr Jamieson deponed—"When I wrote in my letter of 18th June to the pursuer about 'the position I occupy with reference to Sir Robert and yourself,' I meant my being Sir Robert's agent. I never acted for Captain Menzies as his agent. Further on in the letter I explained to the pursuer that without his father's assistance it was utterly impossible for me to make any arrangement. The impossibility arose because I was Sir Robert's agent alone. When I said further on in the letter that unless an arrangement was made about the bills I saw nothing for it but ruin, I meant that unless the bills were paid Engel would certainly take proceedings which would result in bankruptcy, and Captain Menzies losing his captaincy, and I could do nothing as Sir Robert's agent, because Sir Robert would not give me authority. The only capacity in which I could act was as Sir Robert's agent. It is the case that the only suggestion which occurred to me as Sir Robert's agent 'for extricating matters from their present most painful position' was what is set forth in the letter. . . . The idea of suggesting to Captain Menzies that he should again have recourse to money-lenders or to a *post obit* bond upon the estate never entered my mind at the time; I could not have suggested such a thing owing to the fact that I was the father's agent, and the position I held with regard to the son. (Q) Would you have considered it a breach of your duty to have done so?—(A) Yes. . . . I had a very full discussion with the pursuer. I explained to him that his interest in the estate under the trust proposed would be an alimentary interest, that is to say, I told him he would not be able to pledge the income during his life, the object being to prevent him getting into debt. I stated that the income would be protected from his creditors. That had been my intention from the first initiation of the scheme. (Q) Did you explain to him that the proposal that you thought should be carried out would not serve its object if Captain Menzies' interest in the trust had

been extended to creditors or left in such a way that he might anticipate or assign it?—(A) The great object of the thing was to prevent him doing that. (Q) Was that explained to him?—(A) Most clearly. (Q) Have you any doubt he understood the meaning of it?—(A) Not the least. . . . I received from Captain Menzies the letter of 26th October 1885, and in reply I wrote the letter of 28th October. When I found him writing 'I am advised not to agree to the conditions mentioned in your proposal,' I had no doubt that he had been taking the advice of some solicitor as he had done before. . . . From what pursuer said in his letter of 26th October, and from statements in Sir Robert's letter of 8th December, I remained from that time onwards under the belief that the pursuer was consulting separate advisers, lawyers in London. I entertained that belief throughout. I never, either in conversation or in writing, learned anything from the pursuer to shake that belief on my part. There is no foundation for the statement on record that I knew the pursuer had no independent advice, or that he was entirely relying on Sir Robert and myself. There is no ground either for the statement that in consequence of anything said or done by me the pursuer was induced to refrain from employing an independent solicitor or adviser; I, on the contrary, always told him I was solely Sir Robert's agent. I did so in consequence of what he wrote to me in connection with Engel's debt; I let him know my position clearly. I was under the impression that Mr Antrobus, who is mentioned in my letter to Sir Robert of 10th December, was a friend whom the pursuer was to consult. That letter expressed my opinion at the time, and the opinion which I still have, that the pursuer could not have raised money except at a ruinous rate. I had not at that time made any inquiry at any insurance office on the subject. I never entertained the idea of suggesting to him to raise money upon a *post obit* bond. I was aware that such bonds are in disfavour with many leading offices, and that some offices will not enter into such transactions, and I thought that would be still more marked where it was found that there was a previous *post obit* bond upon the register. I am aware that the opinion of counsel had been taken on the matter, and had seen the opinion. The counsel consulted were of opinion that such a transaction would not afford perfect security to the company, they thought it would be questionable in the case of the bankruptcy of the borrower. . . . They [the three friends] asked me what would be the effect of the trust proposed, and I explained fully. I explained to them what Captain Menzies' position would be if he survived his father. I explained that the trust would alter his position very materially in this respect, that it would make him a liferenter of the estates. He could not get into debt, otherwise the trustees would resume possession; all these matters I fully explained to them. . . . I think that clearly appears from my letter to the Duke of Athole when I sent him the trust-deed. I state in that letter 'I have provided that the liferent to be granted to Captain Menzies shall be held to be strictly alimentary so as to prevent the possibility of it being burdened or attached by creditors,' and so on. I also explained to them that there would be provision in the trust-deed by which the father and son together might alter it, so that if Captain Menzies in the future should cease the practices which he had followed in the past, this restriction might with mutual consent be altered or modified. . . . I am quite certain that explanation was put before the three friends at their meeting in Perth; I went there for that purpose. . . . (Q) Is there any truth in the allegation that Sir Robert had communicated to you any such intention as is mentioned in the condescendence?—(A) Not the least; it is utterly false. (Q) Or that during the next two years he made you his instrument to attain that object?—(A) No. (Q) Is it the case that Sir Robert and you entered into any scheme to induce the pursuer to put confidence in you?—(A) Not the least; on the contrary, I always told Captain Menzies I could not act for him. (Q) Was there any fraudulent device suggested as between you and Sir Robert for that purpose?—(A) Never. (Q) Was anything done by you, or, so far as you know, by Sir Robert, and by you and him in conjunction, to induce the pursuer to abstain from asking any independent professional advice?—(A) Certainly not. (Q) On the contrary I think you have told us you were under the belief that he was taking that advice?—(A) I think so. (Q) Arising from statements he had written and made to you himself?—(A) Yes, and to his father. (Q) Did you take any step by way of pressure to procure the consent of the pursuer to renounce his fee?—(A) No. (Q) Or by way of misrepresentation or concealment?—(A) Never to my knowledge. (Q) Were the representations alleged in the condescendence made by you?—(A) Never. (Q) In so far as it was explained to the pursuer by you that you saw no other course open, and that you thought if he did not accede to the proposals that were made it might lead to his ruin, these explanations were made merely in the circumstances you have already detailed to us?—(A) Yes, in those circumstances. (Q) And that it was not his father who was going to him but the pursuer that was coming to you?—(A) Yes, that he came to me as his father's agent. . . . (Q) Did you make any misrepresentation of his position to him?—(A) Not that I am aware of. (Q) Or do anything to prevent him taking independent advice and making inquiries for himself?—(A) No, and I knew he had taken it. . . . (Q) Was there any scheme whatever in connection with this matter between you and Sir Robert Menzies except to do the best that was possible?—(A) That was our only scheme, to do the best for the son, for the estates, and for the father. . . . *Cross-examined*—(Q) In your letter to Sir Robert, on 28th July 1885, you informed him that

if the proposed arrangement was carried out Captain Menzies' income could not be touched by his creditors. In the letter of 3rd August 1885 to the pursuer you make no allusion to that matter; have you any reason for that?—(A) None, except that it was always the distinct understanding on the part of his father, and, so far as I understood, of himself, that his interest should be protected so that his creditors could not come in. (Q) You put that distinctly in your letter to Sir Robert, but when explaining the proposed scheme to Captain Menzies you made no allusion to it; why did you not explain that to him in the same way as you did to Sir Robert? (A) I don't know. I had no reason in the world, so far as I know. It was quite an understood thing that it was part of the arrangement. (Q) Were you afraid that, if you explained that to him, he would break away?—(A) Not at all. I explained it to him afterwards most distinctly, if I did not do it in that letter. . . . (Q) I suppose you will assent to this, that this scheme for disentailing and resettling was rather out of proportion to the requirements of the next heir at the time?—(A) Observe, the scheme was the only one to which the father would agree. He came to me as his father's agent to ascertain on what terms he could get money to pay his debts, and I told him. (Q) But you were the author of this scheme?—(A) I certainly suggested it on account of Sir Robert's telling me he would not help his son unless on the footing of the estates being resettled. (Q) Did it appear to you at the time that the disentailing and resettlement was somewhat out of proportion to the requirements of the heir?—(A) Certainly, if he could get money otherwise. (Q) You saw at the time that no heir would accept of such a scheme if he could possibly do anything else?—(A) It was in his power to do anything else, and I protected the heir most carefully in the matter, because if he ceased to be so expensive in his mode of living, his father and he could alter the the whole arrangement. . . . (Q) When you said you did not see how he could pay his debts unless with his father's assistance and upon his terms, you, of course, intended him to accept that as the result of your opinion?—(A) Yes, as acting for Sir Robert. (Q) Did you express that opinion to him as to the possibility of his getting his debts paid, in the capacity of agent for Sir Robert?—(A) As agent for Sir Robert. (Q) For what purpose did you say that to him? (A) Because that was the only capacity in which he came to me. When he wanted to borrow money from other people he did not come to me; when he came to me, it was to ask on what footing his father would assist him. (Q) For what purpose did you make the representation to him at that meeting that his debts could not be paid unless he would agree to Sir Robert's terms?—(A) I did not see how his debts could be paid while the bond which he had assigned appeared on the register. (Q) Was it for the purpose of inducing him to agree to Sir Robert's terms?—(A) Not at all. (Q) I suppose you have no doubt that if he thought he could get his debts paid otherwise he would not have agreed to Sir Robert's terms?—(A) I do not know, he had done that before. (Q) Have you any doubt that as the result of his interview with you he came to the conclusion that he could not get his debts paid in any other way than by accepting Sir Robert's terms? (A) I don't know. (Q) Have you any reason to think that was not his state of mind?—(A) I have no reason to think it was. (Q) Or that it was not?—(A) I really don't know. I am not aware whether anything took place at the meeting to remove his aversion to Sir Robert's terms. He went away for some hours, and when he came back he said he would agree. (Q) Do you know what led him to get over his aversion?—(A) The reason, I think, was that he told me that if he had a sufficient annual income for his purpose it would prevent him getting into debt, and I certainly sympathised with that opinion, contrary to the opinion of his father, as you will probably see from the correspondence. . . . In your letter of 26th August you say, 'In making the proposal which I did to him, I had in view both your position and interests, and also his;' is that correct?—(A) I think it is. (Q) If you had in view his interests, did that not necessarily involve your considering the question whether the money he wanted could be got on more favourable terms?—(A) The interest I had in view there as Sir Robert's agent was what, in my view and Sir Robert's, was best for his son. Captain Menzies was Sir Robert's only son, and he wanted this money, and the arrangement was that he might get it from his father on the footing that if in the future things improved his father and he could resettle the estates again. (Q) Do you refer in that paragraph to his interests as opposed to Sir Robert's?—(A) I thought of the interests of them both and of the estate. (Q) In that paragraph did you refer to his interests as opposed to Sir Robert's?—(A) I never viewed them as opposed to each other, I viewed them always as joint. . . . (Q) I find this matter of his income even after he succeeded—any anticipation of his income being entirely beyond his power—again and again mentioned in the correspondence with Sir Robert?—(A) Yes. (Q) My reading of the correspondence shows me this, that in not a single written communication to Captain Menzies from the beginning to the end did you ever allude to that matter; can you explain that?—(A) I explained it to Captain Menzies, I am quite certain. When the three friends were appointed I explained it fully to them, and Captain Menzies told me himself that whatever the friends assented to he would assent to, and so did the Duke of Athole. . . . (Q) Did you not abstain from telling him that he was merely an alimentary annuitant in case he would not enter into the transaction at all?—(A) Not at all; on the contrary, I thought it rather in his favour that arrangement, very much in his favour in the sense of protecting himself

against himself, with this qualification, that if things changed his father and he together might remove that limitation. (Q) Will you show me anywhere in the correspondence with Captain Menzies from beginning to end the idea suggested that this transaction is proposed for the purpose of protecting himself against himself?—(A) In the assignment of the bond I put that expressly to him. (Q) Anything else?—(A) It was unnecessary, I think, to put that too prominently before a man who knew that the whole arrangement was to protect himself against himself. . . . *By the Court.*—What Captain Menzies and I were considering was only how his debts could be paid with his father's assistance, and not the question as to how they could be paid by any other method; that was the only capacity in which I ever spoke to him. . . . *Cross-examination continued.*—(Q) Could you, do you think, say now that you could with propriety have carried through this transaction with Captain Menzies without applying your mind to the question whether he could get his debts paid otherwise?—(A) Certainly, in the capacity in which I alone could speak to him. (Q) Do you suggest that you could have negotiated with him as you did without applying your mind to the question whether his debts could be paid otherwise?—(A) I did not require to apply my mind to that question. I did not think it my duty to say so; he knew how to do it as he had done it before. (Q) Then although you had known an easy unobjectionable mode of his getting money otherwise, you would not have considered yourself bound to tell him?—(A) I never considered that. (Q) Would you have considered yourself bound to tell him?—(A) I never thought of such a thing. (Q) Suppose you had known of an easy unobjectionable mode of his getting money otherwise, would you have considered yourself bound to tell him?—(A) I would not, I was not his agent. I do not know that he would have broken away from the disentail if I had told him of another method, but I suppose he would. That was a matter between him and his father. . . . (Q) Did the referees meet you at Perth for the purpose of consulting with you as to what decision they should come to?—(A) No, you will find that distinctly set forth in the letter where I think I say I went simply to answer any legal question. The referees were non-professional gentlemen, but gentlemen knowing very well about entailed estates in Perthshire, and about Captain Menzies and his father. (Q) Did you consider you represented Captain Menzies at that meeting at all?—(A) No, I think the three friends represented him. (Q) They were the referees?—(A) Well, I mean they were looking to his interests; Captain Menzies told me so. (Q) And also Sir Robert's?—(A) They were much more Captain Menzies' friends. (Q) Do you suggest they were not referees to do justice between the two?—(A) Certainly I am quite sure they meant to do justice between the two. I do not dispute that they were referees; the minute speaks for itself as to that. (Q) Does it come to this, that the agent of one of the parties to the reference met the referees, and nobody represented the other party at all—(A) Merely to explain legal points. . . . (Q) In what capacity were you acting when you went over the deed with Captain Menzies?—(A) I never acted in any way except as Sir Robert's agent. I acted in that capacity exclusively. (Q) Do you remember what you said about his position in regard to the estates if this was carried through, or are you merely inferring what you would say?—(A) I am perfectly certain I explained to him more than once his position; I cannot charge my memory as to what I said beyond that. . . . (Q) I understood you to say yesterday that, as acting for a borrower, you would never have suggested a bond on the estate payable after Sir Robert's death; was that because you were Sir Robert's agent?—(A) In this case I never thought of it. I know that such transactions were entered into, and that Captain Menzies had entered into one. The legal difficulty as to the security of such a transaction did not at all enter into my mind in not suggesting it to Captain Menzies. I know that quite respectable insurance companies advance money in that way, and I also know it is not increasing in favour. I did not make any inquiries at any insurance company as to the terms upon which Captain Menzies could get money before making the suggestion to him which I did. I suppose the sale of the reversion by the trustee in bankruptcy would have been a very disastrous result. Apparently Captain Menzies saw no alternative except to sell the reversion or accept his father's terms. (Q) Why was he not told there was another mode much more easy than that if he would not sell the reversion?—(A) Because he knew himself. (Q) He says—'I see nothing for it but to sell the reversion'?—(A) The same course was open to him as before. (Q) Did you not see when you got that letter that he saw no other way?—(A) It did not occur to me; I knew he had raised money before. (Q) When you got that letter, did you think there was no duty upon you as Sir Robert's agent to tell him he was mistaken?—(A) I don't think so. (Q) You probably knew that he was mistaken?—(A) I do not know that I ever realised it. (Q) You must have known that a *post obit* transaction would be much less disastrous?—(A) I did not know whether he would get a *post obit* transaction. There was one on the register already, and the principal objection to *post obit* bonds would arise just because there was one before. I did not inquire whether or not there was sufficient margin to get another; it was not my duty. (Q) If one could have been got, it would have been much less disastrous than a sale?—(A) I did not know if one could be got. . . . I was not sure that he was not separately advised, but I did not know. I knew that he had been taking advice. (Q) Would it not have relieved you from a complicated position if he had been in separate hands?—(A) Not in the view that his father had made certain con-

ditions which he might take or not, as I told him. (Q) If you thought he was in another law-agent's hands at that time, why did you not ask him to tell you the agent's name, that you might communicate with them?—(A) Because Sir Robert's conditions were either take or want, it did not matter what his adviser said, and I told him so in my reply to his letter. (Q) Do you say now that all this correspondence between you and Captain Menzies went on whilst you thought he had a separate agent?—(A) It did not occur to me. I told him that whatever his adviser might say, he must either take his father's terms or not. I never asked who the separate agent was."

Sir Robert Menzies deponed—"I heard the statements made on record put to my son and Mr Jamieson as to the fraudulent scheme, misrepresentation, concealment, and so on. There is no truth in any of these allegations. I concur in all Mr Jamieson said as to that. There is not a word of truth in the suggestion that the reference to the three friends was intended to give an appearance of *bona fides* to a fraudulent transaction."

Mr Sprague, the manager of the Scottish Equitable Life Assurance Society, Mr Sorley, actuary and secretary to the Scottish Life Asssurance Company, and Mr Gunn, colonial secretary to the Standard Insurance Company, and lately assistant actuary to that company, deponed that Captain Menzies would have had no difficulty in getting an advance of £6000 in the circumstances on a *post obit* bond. Such bonds were ordinary, and in their opinion legitimate business, and were dealt in by the offices they represented, by the North British and Mercantile, the Edinburgh Life Association, and a number of English offices of high standing. They were aware that questions had been mooted as to the security afforded by such bonds in the event of the bankruptcy of the borrower before he succeeded, but these questions were not considered by the officer named to be serious.

On the other side, Mr Meikle, actuary to the Scottish Provident Society, deponed—"If I were asked to advise my office with reference to the lending of a sum of £6000 on a *post obit* bond, I would make inquiry into the whole circumstances of the applicant. I would inquire as to his previous history, and as to what the money was wanted for. I think it would be a material element if it was ascertained that the money was to pay gambling debts. We should not like any one to borrow money from us to pay gambling debts. (Q) In short, would you take into account the moral risk?—(A) Yes, we would. *Cross-examined*—Mutual offices do business of this class, I have had actual experience in many such calculations. It is quite legitimate business for a mutual office to go into a transaction under which the heir of entail will, for a bond postponed till his succession, and contingent upon that succession, acquire a sum down from the company. For £6000 the insurance company would require a bond of £11,900. I do not see anything to hinder that being a legitimate insurance business if the security is complete. (Q) Excepting the moral question which you referred to?—(A) Yes. (Q) Is it the morals of the borrower or the morals of the insurance company you desire to protect?—(A) It is to protect the morals of the insurance company. *Re-examined*—What I mean is that we would protect the interests of the insurance company by looking to the moral risks which surround such a transaction by providing against them."

Mr Hewat, secretary of the Edinburgh Life Insurance Company, deponed that that office did not lend on *post obit* bonds, as they were not satisfied that they afforded a good security.

On 10th September 1891 the Lord Ordinary (Low) pronounced this interlocutor:—Finds that the pursuer was induced to enter into the agreement for the disentail and resettlement in trust of the estates of Menzies, Rannoch, and others, embodied in the documents sought to be reduced, by representations in regard to a material matter of fact made to him by the defender James Auldjo Jamieson while acting as agent for and with the authority of the defender Sir Robert Menzies; that the said representations, although not made fraudulently, or with intent to deceive the pursuer, were not consistent with fact; and that the said agreement was to the lesion of the pursuer, he having thereby surrendered rights of great value for a wholly inadequate consideration: And finds that in law these facts constitute a sufficient ground for reduction of the documents libelled: With these findings, appoints the cause to be put to the roll for further procedure, &c.

"*Opinion.*—[*After narratiny the effect of the transaction*]—The practical result of the transaction so far as Sir Robert is concerned, therefore, seems to me to be that on the one hand he was relieved of the payment of some £500 a-year of interest upon money borrowed to pay his son's debts, while upon the other hand he became bound to pay an allowance of £600 a-year to his son, which he had previously paid voluntarily. . . .

"It was contended for the defenders that the only respects in which the averments in the present action differ from those in the former case are, that it is now averred (1) that prior to 1885 Sir Robert had determined when possible to deprive the pursuer of the fee of his estates; (2) that Sir Robert and Mr Jamieson entered into a fraudulent scheme for the purpose of inducing the pursuer to place absolute confidence in Mr Jamieson and abstain from taking independent professional advice; and (3) that the alleged misrepresentations and concealment are now said to be fraudulent. The defenders maintained that all that it was competent for me to do was to consider whether these additional averments were established by the proof, and that if I was of opinion that they were not established, I must throw the action out upon the authority of the decision in the previous case. I do not think that I can assent to this view, even upon the assumption that

the only material differences between the two cases are as maintained by the defenders. The Second Division allowed a proof of the whole case, and evidence covering the whole case has been led before me. I therefore think that I am bound to consider the case as presented upon record and in argument, and to express my opinion upon it, although, of course, in doing so I must recognise the judgment of the Second Division in the previous case as an authority binding upon me in regard to any point which was clearly then discussed and disposed of.

"It may be well, however, to say at once that in my judgment the averments in regard to a fraudulent scheme and fraudulent dealings are not established. I think that it is impossible to read the correspondence which constitutes the most important and reliable evidence in the case without being convinced that whatever may be said as to undesigned misrepresentation of fact, there was nothing of the nature of imposition or deceit. The pursuer having got into difficulties applied to the family solicitor. Sir Robert, naturally irritated at his son's extravagance, was of a mind to allow him to bear the consequences of his own folly, and would make no proposals for his relief. Sir Robert was, however, most anxious to save the estates, to prevent them being squandered, and to keep them in the family. He therefore intimated that he would consider any proposal made to him by his son, and Mr Jamieson then suggested a re-settlement of the estates upon the lines of the agreement ultimately concluded. During the negotiations which succeeded the suggestion, although it may be thought that Sir Robert drove somewhat a hard bargain with his son, he made no attempt to deceive him. He stated what he was willing to do, and put it to the pursuer to take it or leave it. Mr Jamieson, on the other hand—although in my opinion he committed a grave error in judgment in not insisting upon the pursuer having independent legal advice—was obviously actuated by no other motive than a desire to do what was fair and right for Sir Robert and for the pursuer. He urged upon Sir Robert again and again in the strongest way the necessity of making some arrangements for paying the pursuer's debts, and giving him an income amply sufficient for all reasonable requirements, while he told the pursuer distinctly that under the proposed arrangement he was not getting compensation for the rights which he was asked to surrender. In short, Mr Jamieson did his best to make such a family arrangement as would do justice to both parties in the very difficult circumstances which had emerged. If, therefore, the pursuer is entitled to set aside the agreement which he made, it must in my opinion be upon some other grounds than that of fraud and deceit.

"The question therefore comes to be, whether the pursuer was induced to enter into the agreement by undesigned misrepresentation as to material matters of fact, or by concealment of something which ought to have been disclosed to him, or whether he was under essential error as to the nature of the agreement induced by Sir Robert or Mr Jamieson?

"By far the most serious aspect of the case to my mind is that which is rested upon alleged misrepresentation.

"It is said that the pursuer was induced to enter into the agreement by representations made to him by Mr Jamieson, acting as Sir Robert's agent, to the effect that by reason of his existing liabilities there was no other way open to him of avoiding ruin than to consent to a re-settlement of the estates upon Sir Robert's terms. If such a representation was made, I do not think that it can be disputed that as matter of fact it was not true, however honestly it may have been made. The pursuer's then liabilities were under £6000, while the value of his interest in the estates was very large, and there seems to be no doubt that he could without difficulty have raised a sufficient sum to pay his debts without his father's consent, and without any re-settlement of the estates. In fact he could have borrowed the money required to pay his debts without burdening his prospective fee to anything like the extent to which it was actually burdened under the re-settlement. Further, if such a representation was made to the pursuer, and he believed it, it seems obvious that he was put into a position in which it was impossible for him to judge of the propriety of agreeing to the re-settlement, because in that case the alternative put to him was re-settlement or ruin instead of the question merely being whether it was better for him to agree to the re-settlement or to borrow upon his expectancy. Again, if Mr Jamieson made the representations imputed to him, I do not think that Sir Robert can plead that it was not known to or authorised by him. A principal cannot take advantage of a contract obtained by his agent's fraud, and in the same way I do not think that he can take advantage of or maintain a contract obtained by his agent's misrepresentations made when negotiating the contract with his authority.

[*His Lordship then reviewed the evidence and the contentions of parties upon it, and proceeded*]—"Such being the contentions on either side I think that the questions I have to decide are—(1) Whether the fair and natural meaning of what Mr Jamieson said and wrote to the pursuer, when considered in view of all the surrounding circumstances, was that the only alternative open to the pursuer was either to accept the terms to which Sir Robert would agree, or to face bankruptcy with all its consequences? and (2) In the event of the previous question being answered in the affirmative, whether the pursuer was induced to enter into the agreements by Mr Jamieson's representations?

"In regard to the first question I have come to the conclusion, after most anxious consideration, and, I confess with great reluctance, that the pursuer's contention is well founded.

"I think that it is plain that the pursuer placed complete confidence in Mr Jamieson. He did not regard him as the agent of an opposing party, but as the family solicitor, as a man on whom he could rely, and as a lawyer whose ability and experience would suggest the best means of getting him out of his difficulties. So when Mr Jamieson, who in 1883 had informed the pursuer that the Eagle bond had been so dealt with as to make it practically impossible for him to borrow again upon his expectancy, wrote to him on 18th June 1885, 'without Sir Robert's authority . . . and merely with the object of ascertaining your own views on the matter,' and told him that unless an arrangement was made about the debt he saw nothing but ruin for the pursuer, and that the only suggestion which occurred to him—the experienced and trusted lawyer—was a re-settlement of the estates, I think that the natural, and indeed the only inference for the pursuer to draw was that Mr Jamieson—who had taken four months to consider the matter—was of opinion that there was no means of meeting the debt except such an arrangement as he suggested. I think, further, that the pursuer was not to blame for having accepted Mr Jamieson's opinion. I think that he was entitled to assume that if a gentleman of Mr Jamieson's standing and experience could suggest no other means, it was because no other means were, in fact, available. Further, it seems to me that Mr Jamieson really misled the pursuer by the very friendliness of his letter. Mr Jamieson now says that he wrote only as Sir Robert's agent, and that he was only considering what was possible in the way of an arrangement between the pursuer and Sir Robert. But he did not say so to the pursuer. On the contrary, he told the pursuer that Sir Robert 'did not see how it is possible to make any arrangements,' and he is careful to explain that his suggestion—the only one 'which occurs to me'—is made without Sir Robert's authority. I think that the pursuer would naturally conclude that Mr Jamieson was writing to him not merely as Sir Robert's agent, but as a friend, or, at all events, as the family solicitor giving a member of the family his opinion in regard to the position in which he was placed. Then Mr Jamieson's statement to the pursuer at the meeting of 25th August 1885, when the pursuer first consented to a re-settlement, and the subsequent letters of 13th and 20th May 1886, repeat the representation made in the letter of 18th June 1885. In the letter of 13th May 1886 in particular Mr Jamieson tells the pursuer specifically that he saw no alternative between accepting Sir Robert's terms and allowing Mr Engel to go on with bankruptcy proceedings. Now, if Mr Jamieson was looking at the matter solely from Sir Robert's point of view, and had not considered what the pursuer could do without his father's consent and assistance, I think that he was bound to say so. He should have told the pursuer that if he would not consent to Sir Robert's terms, he would have to consult some one else as to what he could do without his father's assistance, because as to that he (Mr Jamieson), being Sir Robert's agent, could not advise him. Instead of saying anything of the sort, however, Mr Jamieson stated it as his opinion, without any qualification, that the only alternative was acceptance of the terms offered, or bankruptcy. Then in the letter of 20th May 1886 Mr Jamieson sets before the pursuer the disastrous results which, by reason of bankruptcy, would follow his rejection of Sir Robert's terms, and he intimates that if the pursuer did not at once accept Sir Robert's terms 'I must at once tell him' (*i.e.*, Engel) that he 'may proceed.' Now, if Mr Jamieson was acting only as Sir Robert's agent, and had not considered, or had any duty to consider, what means were open to the pursuer to escape bankruptcy without his father's assistance, what duty lay upon him, or what right had he in the event of the pursuer refusing Sir Robert's conditions to assume the part of the pursuer's agent, and tell Engel that he might proceed to make the pursuer bankrupt unless Mr Jamieson had made up his mind that as matter of fact there was no other course open to the pursuer, and was willing to take the responsibility of advising him that that was the case. It seems to me that his plain duty was to tell the pursuer that if he refused his father's terms he must consult an independent agent as to how the threatened bankruptcy proceedings were to be met. When therefore Mr Jamieson said that if the pursuer did not accept Sir Robert's conditions he 'must' tell Engel that he might proceed, it seems to me he said what was equivalent to declaring himself satisfied that no other alternative was open to the pursuer.

"But then it is said that for Mr Jamieson to suggest to the pursuer that he had any other means of escape from his difficulties would have been equivalent to suggesting that he should borrow money upon a *post obit* bond, a suggestion which Mr Jamieson had not only no duty to make to the pursuer, but which, as Sir Robert's agent, it would have been improper for him to make. I agree that Mr Jamieson, as Sir Robert's agent, was not bound to suggest any other means to the pursuer, but he was also bound not to mislead the pursuer, and if he made statements, as I think he did, the natural meaning of which was that there were no means of paying the pursuer's debts except an arrangement with his father, then he did mislead the pursuer, because the statements were untrue in point of fact.

"Again it was suggested that Mr Jamieson's statements were at all events true in this sense, that no other legitimate or reputable means of paying his debts were open to the pursuer. Now no doubt raising money by *post obit* bond is generally looked upon with disfavour. It is of course an expensive mode of raising money, and for that reason is seldom resorted to except by young men with good expectations who have got into debt.

But there is nothing inherently wrong or immoral in borrowing upon the security of an expectant estate. If the pursuer had consulted an independent law-agent, the first thing, I apprehend, which that agent would have done would have been to ascertain, at all events approximately, what was the then value of the pursuer's interest in the estates, and having done so, he might have given the pursuer any advice he liked, but he would have been bound to tell him that his interest in the estates was worth a large sum of money, and that there was no difficulty in borrowing £6000 upon that interest in consideration of an obligation to pay £11,000, or whatever the sum might be, on his father's death, if he survived him. Unless the pursuer knew that this was as matter of fact his position, I think that it is clear that he had not the means of forming an opinion as to whether he ought or ought not to agree to the resettlement.

"It was also suggested that the pursuer, having referred the proposed arrangement to the three friends to say whether in their opinion it was fair and reasonable, is barred from challenging the agreement. I think, however, that if the pursuer was induced to consent to a resettlement by the representations to which I have referred, these representations must be held also to have induced him to consent to the reference.

"The next question is, whether the pursuer was in fact misled by Mr Jamieson's representations, and induced thereby to enter into the agreement? I am of opinion that he was. He all along viewed the proposed resettlement with disfavour, and he was constantly casting about for some other means of paying his debts. He suggested borrowing upon the estates with the consent of his father, and he suggested insuring his life and borrowing upon the policy, but as these things could not be done without Sir Robert's consent, he was driven back upon the resettlement as the only means of avoiding bankruptcy and ruin. It is worthy of notice that the pursuer never threatened either to Mr Jamieson or his father that if the latter pressed him too hard he would raise the money by *post obit* bond. Judging from his letters and his evidence, I think that he would have done so if only as a 'draw,' as he himself phrases it, if he had not believed that such a thing was out of the question, and that the threat would not even act as a 'draw.' I have no doubt upon the evidence before me that if the pursuer had known that his interest in the estates was of a large present value, and that the money he needed could be borrowed from an insurance company, he would never have hesitated to adopt that course rather than consent to resettlement upon Sir Robert's terms.

"It is said that the pursuer could not have been misled by Mr Jamieson, because he knew about borrowing upon a *post obit* bond. In proof of this the Eagle Company transaction is referred to. But, in the first place, Mr Jamieson told the pursuer that the Eagle transaction had been so arranged that he could not borrow again upon his expectancy. And, in the second place, I do not think that the pursuer ever clearly understood the nature of the transaction with the Eagle Company. He employed Pawle & Fearon to raise the money, and so long as he got it he did not trouble himself with the methods employed. Indeed, he seems to have thought that the money was borrowed upon the security of a policy of insurance on his life.

"I am therefore of opinion that it is proved that Mr Jamieson represented to the pursuer that the only alternative open to him was to accept Sir Robert's terms or be made bankrupt, and that it was that representation which induced the pursuer to enter into the agreement under reduction. If I am right in this view, I think that the pursuer is entitled to have the transaction set aside. It was a family arrangement, and not an agreement made by two parties dealing with each other at arm's length. The pursuer had no independent legal adviser, as he ought to have had, and he surrendered rights of great value for altogether inadequate consideration, so far as immediate benefit to himself was concerned. It is true that by the trust he was protected against himself, was secured in a sufficient income during his life, and the estates were preserved in the family. I do not think, however, that protection against himself, or the preservation of the estates in the family were considerations which had much weight with the pursuer, while the additional income which he received during his father's life was purchased with money borrowed upon the fee to which he had an indefeasible right of succession, and his liferent after his father's death was fettered with irksome and even humiliating conditions. Sir Robert, on the other hand, got an addition of £500 a-year to his income, and the change of his position from heir of entail to liferenter appears to me to have been only nominal. Such a transaction, I take it, is not difficult to upset if it can be shown that the party surrendering his rights has in any material respect been misled. The considerations upon which the Court will proceed in such a case are succinctly stated by Lord Westbury in the case of *Tennent* v. *Tennent's Trustees*, 8 Macph. (H. of L.) 10, Lord Westbury's opinion, p. 27. That was a case in which a son sought to reduce a transaction by which he had surrendered his rights under a partnership of great value in consideration of his father paying a debt of £8000 which he could not otherwise meet. Lord Westbury said—'If I found it carried out with any speck of imposition on the son, if anything was told or represented to him which ought not to have been told or represented, if anything was withheld from him which ought not to have been concealed, if he was placed in the hands of an adviser who leant more to the father and to the brother than to him, I should have thought that this family agreement, with respect to which it is required that there should be on all sides *uberrima fides*, ought not to be upheld.'

"Now, in the present case, my opinion is that representations were made to the pursuer which ought not to have been made, which were not true as matter of fact, and which were calculated to mislead and did mislead the pursuer. I therefore think that the agreement should not be upheld.

"I have come to this conclusion unwillingly and with regret. It is perhaps the worst thing which could have happened to the pursuer that the agreement should be reduced. That, however, is not in my judgment a consideration to which a court of law can give much, if any, weight. The pursuer's right as heir-apparent under the entail was absolute. He was in law entitled to deal with that right as he chose, and he cannot be held to an agreement surrendering it if he was induced to enter into that agreement by misrepresentation in regard to material matters of fact by the other contracting party or those for whom that party was responsible.

"In coming to the conclusion that Mr Jamieson misled the pursuer, I repeat that I believe that he had no intention of doing so. As I have already said, his intention appears to have been to do what was best for both parties, and I have a strong impression that by the agreement which he carried through he accomplished the object which he had in view. But it was not for Mr Jamieson, nor is it for the Court, to judge as to what was best for the pursuer. He was entitled to form his own judgment, and in my opinion he surrendered his rights without knowledge of facts which it was essential that he should know if he was to form an intelligent and deliberate opinion for himself.

"There are two other points to which I must allude before leaving this branch of the case. The first is the plea that the transaction cannot be reduced as *restitutio in integrum* is impossible; and the second is the bearing of the judgment in the previous case upon the point which I have been considering.

"As regards *restitutio in integrum*, the defenders say that the trust having come into operation, and money having been borrowed on the faith of it, it is impossible now to restore matters to the position in which they were prior to the agreement. I understand that no instrument of disentail of the estates was executed or recorded, and that the effect of reduction of the deeds libelled would be to revive the entail. Then Sir Robert is, I apprehend, the only person who has a title to state the plea, and the pursuer offers to restore matters, so far as he is concerned, to the position in which they were prior to the agreement, and I see no reason to suppose that it is impossible to do so. I shall not, however, pronounce any decree at present, but merely put the conclusion at which I have arrived in shape of findings, so that the parties may have an opportunity of being further heard upon the matter, and that the pursuer may state specifically what his proposals are.

"As regards the bearing of the judgment in the previous case, I do not think that the particular representation with which I have been dealing was made the subject of judgment at all. Apparently the ground of reduction which was mainly relied on in the previous action was the failure of Sir Robert and Mr Jamieson to disclose that there were means by which the pursuer might have obtained the money necessary to pay his debts without entering into the agreement. Not to tell the pursuer that there were other means of raising money open to him is, however, a very different thing from telling him that there were no other means open to him. It is true that the Lord Justice-Clerk refers to the alleged representation that there were no other means of raising the money, but his Lordship says—'Nor if he (Sir Robert) made a representation that he would not deal with his son except upon these terms, was there anything in it of the nature of a representation.' It therefore appears that the Lord Justice-Clerk read the not very specific averments in the first record as amounting to no more than an agreement that Sir Robert told the pursuer that he would not deal with him except upon his own terms. It seems clear that such a representation is one which Sir Robert would have been perfectly entitled to make, but the representation averred in the present record, and which I hold to be proved, is of a totally different character.

"The second ground of reduction is that the pursuer was induced to enter into the agreement by concealment on the part of Sir Robert and Mr Jamieson. The allegation is that with the intention and effect of inducing the pursuer to consent to the resettlement Sir Robert and Mr Jamieson concealed from him that there was another method of obtaining all that he required. This was the principal ground upon which reduction was asked in the former action, and I do not think that anything more is proved in regard to concealment in this case than was averred in the previous case. I must therefore hold that as regards this part of the case the previous judgment is directly in point, and that it is settled that there was no duty upon Sir Robert or Mr Jamieson to disclose any other method of raising the money, and that their concealment of any other method is not a good ground of reduction.

"It was argued, in the last place, that the pursuer was under essential error as to the meaning and effect of the deeds which he signed, that error being induced by Sir Robert and Mr Jamieson.

"The pursuer says that he understood from Mr Jamieson that the estates were to be disentailed, and practically re-entailed after being charged with a sufficient sum to pay his debts, and that upon his father's death he would be in the same position as a fettered heir of entail. He says that he did not know that it was proposed to make him a mere alimentary liferenter, and that he did not know that he would have no power to use his income as a fund of credit, or that if he anticipated his income to the smallest degree his liferent should

terminate, and the trustees enter upon the management of the estates. On the contrary, he says it was represented to him that he would be in the same position as an heir of entail in possession, and that the restriction upon his rights and liferent was designedly concealed from him in case that he should refuse to sign an agreement containing such stringent conditions. It is clear that these allegations amount to a charge of actual fraud against Sir Robert and Mr Jamieson.

"In support of his allegation the pursuer founds (1) upon the fact that in Mr Jamieson's letters to Sir Robert he repeatedly refers to tying up the pursuer's income and similar restrictions, while he never mentions such a thing in his letter to the pursuer; (2) upon the statement in the memorandum which was laid before the three friends that 'In all respects under the express provisions of the trust, Mr Menzies would be proprietor of the estate as Sir Robert is at present'; and (3) upon the letter of Lord Stormont of 1st May 1886, announcing the decision of the three friends, in which he speaks of the transaction as 'really re-entailing the estate.' The pursuer contends that this shows that Lord Stormont was under the same erroneous impression as regards the effect of the transaction as he was. I shall deal shortly with these points in the order in which I have stated them:—(1) Mr Jamieson says that he told the pursuer distinctly at an early meeting that it was an essential part of the proposed arrangement that his liferent should be strictly protected against creditors and the contracting of debt. He says that the pursuer quite understood what he was told, and that being the case it was unnecessary again to refer to an unpleasant matter in correspondence. The only reason why he mentioned the matter several times in writing to Sir Robert was—Mr Jamieson says—because of Sir Robert's anxiety that his son's creditors should be excluded from the estates in every possible way, and also because Sir Robert thought that he was inclined to give too favourable conditions to the pursuer. I have no doubt of Mr Jamieson's truthfulness as a witness, and his explanation appears to me to be a natural and intelligible one. (2) There is no doubt that the statement in the memorandum which I have quoted is inaccurate. The passage in which it occurs, however, was inserted to meet an addition which the pursuer had made to the memorandum pointing out that to put the estate under trust would destroy his interest in it, and in the tenants. I am satisfied that there was no desire to mislead the three friends, and that the intention was to state what would be the result of the transaction in popular language. (3) The expression in Lord Stormont's letter is not to my mind very inaccurate, because the estates were practically re-entailed. At anyrate it is quite certain that before Lord Stormont wrote the letter the three friends had seen the draft of the trust-deed, and that Mr Jamieson had told them, both verbally and in writing, that the pursuer was to be restricted to an alimentary liferent only.

"Further, the deeds were sent in draft to the pursuer for his revisal. He read and understood the agreement, but he wrote to Mr Jamieson on 22d October 1886 saying that he could not understand the trust-disposition. I may remark that this was not to be wondered at, because it appears that he had not taken the trouble to read beyond the preamble. Mr Jamieson, on the 25th October, wrote to the pursuer saying, 'Of course you should not sign the trust-disposition until you quite understand it, and get the explanations you desire.' Mr Jamieson and the pursuer accordingly had a meeting, and Mr Jamieson swears that he went over the deed, clause by clause, with the pursuer, and explained it to him. The pursuer does not contradict this statement, and I have no doubt of its truth. If therefore the pursuer did not understand precisely the meaning and effect of the deed it was his own fault. I do not mean to say that the pursuer is telling an untruth when he says that he never understood the way in which his liferent was restricted until lately. I think that it is quite possible that he did not. It may have been on account of his confidence in Mr Jamieson, but he certainly showed extraordinary apathy in regard to deeds which so largely affected his whole future life. I have already pointed out that when the trust-deed was sent to him he did not read further than the preamble, and he says in his evidence in regard to Mr Jamieson's explanations, 'I cannot say I paid particular attention; in fact, he (Mr Jamieson) bored me very much over the details.'

"I am, therefore, of opinion that the plea of essential error cannot be sustained."

The defenders reclaimed, and argued—1. No case of fraud had been proved; it was quite plain that Sir Robert was not fraudulent, and indeed that had not been maintained. Of Mr Jamieson it might truly be said, as Lord Glenlee had said in another case—See footnote at p. 421 of *Stewart* v. *Stewart*, 1839, M'L. & Rob. 401—"It was a very poor compliment to say he had acted blamelessly. . . . I think it right to say that he acted a most friendly and judicious part throughout." The proposal to refer the matter to the judgment of three friends came, not from Sir Robert or Jamieson, but from Colonel Moray; the reference to them was on the footing that the money was to be found, and they were to say whether there should be a trust or not. These facts make it vain to attempt to say that the whole matter was a scheme or conspiracy between Sir Robert and Mr Jamieson. On this point the Lord Ordinary's judgment was well founded. Mr Jamieson had no duty to advise the pursuer, and even if it were conceded that he might have had such a duty, if he knew that Captain Menzies was without assistance, he was clearly relieved of any such duty when Captain Menzies wrote to him telling him that he was "advised" not to accept his terms. The pursuer admitted

that this letter of his was "a draw," *i.e.*, intended to make Mr Jamieson believe that he had independent advice. Could he complain if his "draw" succeeded? 2. There was here a *res judicata* of the whole case. All that was new in this action the pursuer had failed, in the judgment of the Lord Ordinary and on a sound view of the facts, to prove. That being so, even if he had proved all his other allegations, he could not prevail, for in the former judgment they were assumed to be true. *Upon the law of the case*—Cases where family arrangements had been impugned fell into two classes. The first was when the father got nothing for himself, but became a party to the arrangement for the honour and in the interest of the whole family. In such cases the advantage, *i.e.*, the preservation of the family honour, is a thing that cannot be estimated in money, and accordingly there are no elements for estimating the individual advantages gained or foregone *hinc inde*. Such arrangements will be favourably considered and will be upheld if possible—*Hoghton* v. *Hoghton*, 1852, 11 Beav. 278; Kerr on Fraud, p. 156; *Stapilton* v. *Stapilton*, 1 Atk. 2, and 2 White & Tudor, 920-937; *Westly* v. *Westly*, 1842, 2 Drury & Warren, 502; *Gordon* v. *Gordon*, 1819, 3 Swans., Lord Eldin at p. 463; Snell's Prin. of Equity, p. 526. This principle had been carried so far that the Court had refused to disturb an arrangement between father and son, tenants of an estate in tail, which was fair in itself, although the bargain between them had been contrived by a solicitor for his own benefit with a view to his purchasing the son's interest when the father had been bought out. The scheme succeeded, and a fortnight after the transaction between father and son the solicitor acquired the estate. The son died without issue and the next remainderman was not allowed to set aside the bargain—*Bellamy* v. *Sabine*, 1835, 2 Phill. 425. Now Sir Robert here was no gainer; the Lord Ordinary's summary of the result showed that; he was relieved of payment of interest to the extent of £500 per annum, but he became bound to pay £600 to his son. The money charged on the estate was as much for the benefit of the one side as the other. Sir Robert's only aim then, the aim of the whole arrangement, was the preservation of the estate for the family. That made this case quite different from the case where a father got something for himself, a case in which the Court would jealously require the most rigorous good faith and see that the son did not sacrifice anything under parental pressure. It was to that class of cases that *Tennent's* case, May 27, 1868, 6 Macph. 840, and 40 Scot. Jur. 408—*aff.* March 15, 1870, 8 Macph. (H. of L.) 10, and 42 Scot. Jur. 353, and *Binny's* case, December 5, 1879, 7 R. 332, belonged. But, again, the cases of misrepresentation on which the pursuer relied were all cases of misrepresentations of fact, whereas Jamieson's statement here was a statement of opinion or of law. In *Smith* v. *Chadwick*, 1882, L.R., 20 Ch. Div. 27, Jessel, M.R., had said that good intentions would not protect a person, who made careless statements, in an action of deceit, from the consequences of these statements; but that statement of the law had been corrected in the House of Lords, *per* Lord Herschell, p. 359 of *Denny* v. *Peck*, 1889, L.R. 14 App. Cas. An incorrect statement of law would impose no responsibility in damages—*Rashdall* v. *Ford*, 1866, L.R., 2 Eq. 750; Mellish, L.J. p. 802 of *Beattie* v. *Lord Ebury*, 1872, L.R. 7 Ch., and Lord Cairns, p. 111 of same case in 1874, 7 Eng. & Ir. App. Mr Jamieson's duty could be taken by no more severe standard than the standard of what was required of a person seeking to effect a policy of marine insurance, and in such a case all that was required was an honest statement of "expectation, opinion, and belief" — Addison on Contracts, p. 686; Arnold's Marine Assurance, pp. 519-21. There was no trace in the correspondence of any request by Captain Menzies for advice as to when, in the abstract, he could obtain assistance. His letters all discussed the best means of getting assistance from his father; that was what he spoke of, and it was that and that alone accordingly that Mr Jamieson spoke of in his answer. That was the well understood footing on which both parties were proceeding, and that must be read into all letters. But further, it was not difficult to maintain that, even in the abstract sense, Mr Jamieson was right in what he said. *Post obit* bonds were a security which some insurance offices would not look at, and which were perilous for all if the debtor fell bankrupt before his succession opened. Now, if to that risk were added the additional risk of the subsisting bond on the register, it might very well be that Mr Jamieson should honestly think it "difficult, perhaps impossible," to get further advances. Again, where a misrepresentation, or at least a concealment, was not fraudulent, the party to whom it was made might very well be bound to make inquiry—*New Brunswick and Canada Railway, &c., Company* v. *Conybeare*, 1862, 9 Cl. H. of L. Cas. 716, Lord Chelmsford, 742.

Argued for the pursuer—The issues in fact were—(1) Was a certain representation made, viz., that there was no alternative but ruin if Captain Menzies refused his father's terms? (2) Was this representation, if made, false? (3) If false, was it also fraudulent? (4) If it were false or fraudulent, did it lead to the agreements now under reduction? Two and four could be answered without any difficulty. The representation, if made, was certainly false, for the evidence showed that several insurance companies took such transactions. That some did not, or that such transactions did not afford complete security was nothing to the point; the fact was that companies were found to take such risks as part of their ordinary business, and if they imposed expensive terms to meet the necessary risks these terms were at all events more favourable than those of persons like Engel, and in any event should have been submitted to Captain Menzies for his consideration. Four must also plainly be

answered in the affirmative; it was clear that Captain Menzies would never have consented to the proposed terms had he thought there was any escape, they were so distasteful to him. It was said that Sir Robert was not fraudulent, but he was liable for any wrong committed by his servant or agent in the course of his service and for his benefit—*Houldsworth* v. *City of Glasgow Bank*, March 12, 1880, 7 R. (H. of L.) 53, Lord Selborne. Now, the purpose which Sir Robert and Mr Jamieson had in view was to tie the hands of the pursuer for his whole lifetime. Sir Robert's instructions came to this—"Get Captain Menzies tied up; I leave the means of doing it to you." Mr Jamieson from the first put himself forward as Sir Robert's agent, and he never swerved from that position. It had been represented that the measure adopted was the best for all parties, and necessary for the preservation of the family position as Menzies of Menzies. But the answer to that was that the apprehensions of Sir Robert and his agent were quite unsubstantial; some extravagance there had been, but nothing to call for any such heroic remedy. The indebtedness was not sufficient to warrant the placing of the son under curatory for life. The scheme was as old as Sir Robert's letter to Mr Jamieson of 1st December 1882. From that time on there were constant references by Mr Jamieson in his letters to Sir Robert to the alimentary nature of the enjoyment of the estate to be conceded to Captain Menzies, but not a word of such restriction in the letters to Captain Menzies himself, nor in the memorandum laid before the three friends. The reason was obvious, because Captain Menzies was very shy of assenting to be limited even as Sir Robert was, *i.e.*, to the powers of an heir of entail; he would certainly have broken away if the true effect of the arrangement had been explained to him. Mr Jamieson was not under any obligation to give advice to Captain Menzies at all, for he was Sir Robert's agent, but if he volunteered advice he must speak the truth, and if he had not made inquiry, or did not know, he should say so. Captain Menzies was not entitled to ask Mr Jamieson for any advice, but if Mr Jamieson volunteered advice to him it must be honest. It was said that Mr Jamieson believed that Captain Menzies was separately advised. Mr Jamieson could not be heard to say that that was his belief, for no professional man who thought so would have failed at once to reply, asking who the adviser was that he might correspond with him. To do otherwise was a breach of professional usage, of the same kind as the other breach of that usage and duty also committed here by Mr Jamieson, viz., his failure to make sure that Captain Menzies was advised independently. Captain Menzies' confidence in Mr Jamieson was shown by the facility with which he agreed to the former arrangements, and the attitude of Mr Jamieson and Sir Robert to Captain Menzies was indicated, *inter alia*, by the fact that no account of these previous transactions had ever been rendered to him. It was said that Mr Jamieson's representation in saying that there was nothing for it but ruin if he refused his father's terms meant that his father would not help him on any other terms. That could hardly be, for he told Captain Menzies that if he did not accept his father's terms he would have to tell Engel he might go on with the bankruptcy proceedings. That showed that Mr Jamieson's alternative was meant to be an absolute alternative. The reference to the three friends did not by any means exclude the notion of a scheme between Sir Robert and Mr Jamieson. As had been pointed out, the memorial laid before them did not notice the crucial point of the arrangement, and Mr Jamieson, who was Sir Robert's agent from first to last, alone attended the meeting with them. Captain Menzies was not represented. Such conduct as this amounted to fraud, but it was sufficient for the purposes of the case to say that Mr Jamieson failed to give information which was or should have been within his knowledge to the pursuer, who was, as Mr Jamieson knew, relying on him for a fair statement of the bargain that was to be made. That Mr Jamieson's statement was a statement of fact was plain; it came to this, "No insurance company will take such security as you have to give." That was not true, and to a professional man, must have been known not to be true—*Smith* v. *Land and House Property Corporation*, 1884, L.J. 28 Ch. D., as to distinction between statement of fact and expression of opinion. But Mr Jamieson did not say in the witness-box that he thought so. He said he had not applied his mind to it; if so, he should not have led the pursuer to think that he had. The nearest case to the present was that of *Gray* v. *Binny*, 7 D. 332; the adequacy of the consideration might be different, but the principle was the same. The pursuer accepted Lord Eldin's doctrine in *Gordon's* case, 3 Swans. 463. The transaction must be perfectly frank. *Stapilton's* case, Atk. 2, 2 White & Tudor, L.C. 920, was said to be against the pursuer's contention. If it was, and in so far as it was, it was met by *Hoghton's* case, 15 Beav. 278, but it was not true to say that Sir Robert had got no advantage here. He had charged a considerable payment of interest against the estate, and he had charged his son's reasonable allowance to the extent of £300 against the interest which that son himself had in the estate. A statement might be false but yet might be made with good intention; that would still entitle the person to whom it was made to obtain rescission of a contract induced by it—Anson on Contracts, p. 141. Nor could he retain the benefit of a contract obtained by a false statement if he might on inquiry have found out that his statement was false—*Smith* v. *Chadwick*, 20 Ch. Div. 44; *Redgrove* v. *Hurd*, 1881, L.R., 20 Ch. Div. 1. The only questions were, were these representations false, and were they relied on; if so, rescission was due—*Adam* v. *Newbigging*, 1868, L.R., 13 App. Cas. 308; *Smith* v. *Land and House Property Corporation*,

1884, L.R., 28 Ch. Div. 7. As regarded the *res judicata*, the Lord Ordinary's view on that point was sound.

At advising—

LORD JUSTICE-CLERK—This case is one of very great importance to the parties, and that from more than one point of view. It is an altogether exceptional case, and I doubt if anyone in the least degree resembling it has ever come before a court of justice. The pursuer, who in 1886, when he was thirty-one years of age, signed certain documents along with his father, now alleges that his father entered into a conspiracy with the family agent to defraud him, and that not by merely inducing him to sign documents of which he did not understand the import, but by knowingly stating falsehoods to him, and that both of them did, in pursuance of the conspiracy, actually impose upon him by wilful falsehoods, uttered with fraudulent intent. All this is said, not by mere statement in pleadings but in evidence upon oath—[*His Lordship then referred to the pursuer's evidence*]. The fraud of which complaint is made is not a fraud by which anything has been taken from the pursuer and given to the defender. The fraud complained of is a fraud whereby the pursuer is protected from the extortions of the money-lender and saved from squandering and bartering away on iniquitous terms the property to which he has the hope of succeeding. The fraud is one by which the pursuer is maintained in the position to which he was born by protecting him against himself, and it is impossible not to concur in the view of the Lord Ordinary that success in this litigation would probably be "the worst thing which could happen to the pursuer."

The history of the case, in so far as it is necessary for the understanding of the question involved, is not complicated. The defender is proprietor of a large estate in the Highlands, which is considerably burdened, and for which he has incurred much debt for improvements. Shortly before the transactions in question he had also been compelled by the agricultural depression to take large sheep-farms into his own hands and to pay for stocking them. Thus, although his gross rental was large, his actual income was comparatively small, and he was not in the position for the time being of a wealthy proprietor, having to let even his residences and shootings. The pursuer, who is his only son, became an officer in the Guards in the year 1874. The defender, after consulting officers of experience, gave his son an allowance at first of £300 a-year, afterwards raised to £500, and in 1881 to £600. It is now alleged that his allowance was so insufficient that he was driven to gamble in order to increase his income. Whether it was or was not sufficient is of no consequence; the fact is that the result of his gambling was, as any sensible person would have expected, that instead of increasing his income he fell rapidly into debt, so that early in 1881 he was already not only in debt to tradesmen to the extent of £1000, but was in the hands of the Jews and pressed for payment of bills to the extent of nearly £4000 for money borrowed at 60 per cent. interest.

He was cleared of these debts at the end of July 1881, he is found only thirteen months afterwards sunk in debt to the extent of no less than £5500, £3650 of which is on promissory-notes at three months to the Jews. He had thus, besides his pay and allowance, which together cannot have amounted to less than £600 at this time, squandered in gambling and by resort to money-lenders for relief, upwards of £5000 in one year, having been relieved of debt to the extent of £5000 only the year before. For these new debts he borrowed money from the Eagle Insurance Company through a firm of solicitors in London upon a *post obit* bond for £5500 on somewhat unfavourable terms. This transaction came to his father's knowledge through it being necessary that the charge should be intimated to him. The pursuer intended the transaction to be kept secret from his father, as appears from the insurance company's solicitors' letter of 30th April 1883, where they say "he is more than disgusted at your having given notice of his dealings with the Eagle Office to his father." This new revelation of the pursuer's extravagance and folly caused the defender great distress, and he and Mr Jamieson set themselves once more to endeavour to bring matters straight. They endeavoured to induce the pursuer to promise to give up gambling, but he distinctly declined to give any promise to do so, and ultimately arrangements were made by which the pursuer's bond to the Eagle Insurance Company was cleared out of the way. But as the pursuer would give no promise of amendment, it was arranged that the bond should not be discharged but should be transferred to trustees, the purpose, as was clearly explained to the pursuer, being to put an obstacle in the way of the pursuer raising money on his prospects of succession in the future. The father was very anxious that every obstacle should be put in his way for his own sake, and thought himself quite entitled to make a promise in writing not again to bet or gamble on the turf part and portion of the arrangement, "it being the fact," as he said, "that Neil is no sooner, so to speak, out of one scrape than, quite regardless of what has happened, he gets into one just as bad, in fact rather worse, and I should be very unhappy to think that he had left it open for himself to repeat the same misfortune again." As before mentioned, the effort to obtain a promise from him failed entirely. The arrangements, however, for taking up the Eagle bond proceeded, and were combined with certain financial arrangements connected with the estate which it is unnecessary to particularise, except to say that these were such as might quite properly have been carried out between father and son even had there been no question of paying the son's debts. Provision for the pursuer's bond was included, and the bond was ulti-

mately taken up, the amount of the bond being charged upon the estate.

These transactions were completed in the end of 1883, and within a year the pursuer was again deep in debt, and had raised money by bill, the amount in the bill being £3000, besides having £700 odd of debts. As he was leaving for Egypt with his battalion he informed Mr Jamieson of these facts.

It was this condition of debt which led up to the transactions which the pursuer now impugns, and it may suffice to say that they eventuated in the agreement and trust-disposition under reduction. It is unnecessary to give any narrative of them at this point, as I shall have to refer to them in what it will be necessary to say in regard to the record in this case and its narrative of these transactions.

Your Lordships will remember that after this case had been heard upon relevancy upon a reclaiming-note from an interlocutor of Lord Wellwood dismissing it as irrelevant, it was thought desirable, without pronouncing any judgment on the relevancy, to allow a proof before answer, so that whatever the future of the case might be it should be finally disposed of once and for all, and the parties not exposed to the risk in a certain possible event of its being sent back to this Court to be put through a new course. I shall not now conceal my opinion that had we dealt with the case directly upon relevancy I should have concurred in the judgment arrived at by the Lord Ordinary. But the case having been gone into upon evidence, it is, I think, desirable to treat it with reference to that evidence on the assumption of relevancy. In doing so, it cannot be left out of view that this is not the first case relating to the same matter between the same parties. It will therefore be desirable to consider first the evidence in regard to those averments of the pursuer, which differ from those contained in that former action which was held by the Lord Ordinary and in this Division to be irrelevant—I mean the first litigation raised on the 18th November 1889, and of which the present action is the sequel. For if these allegations have been proved, then we may be held to have a new case before us, as to which we are not tied up by our former judgment on relevancy.

On the other hand, if the pursuer has failed to prove these averments which are new, or if they have been disproved, then the case before us comes back into the position of the previous case, and directly falls under the operation of our judgment by which the pursuer was held to have no relevant case.

I proceed therefore to consider what are the averments made by the pursuer in the first case, which it has been decided were irrelevant, and what are the averments of the present case differing from those contained in the first.—[*His Lordship then narrated these averments*].

When we turn to the pleas in the present case it is found that if the adjective "fraudulent" is deleted from them, they are, though not in exact words, yet in their actuality, an echo of the pleas in the former case. The misrepresentation, the undue concealment, the undue influence, and the essential error are repeated in practically the same connection, the word "fraudulent" being added or substituted in each case.

I turn now to the consideration of the evidence adduced by the pursuer for the purpose of proving his case of conspiracy and fraud. First, is there any evidence of the defender and his agents having conceived a fraudulent scheme to induce the pursuer to confide in the latter and not to take independent advice, and to procure his consent to the defender's wishes by pressure, misrepresentation, and concealment? I have studied the evidence over and over again, and I can find nothing whatever to suggest that the defender and Mr Jamieson formed any such scheme. On the contrary, the evidence satisfies me that there was no scheme arranged or even tacitly adopted between them; that both of them were moved by the most uncorrupt motives, and were sincerely desirous that the best thing that could be done for the true interests of the pursuer as they honestly estimated them should be done, and that neither of them was actuated by any motive but such as was honourable and of kind intention towards the pursuer, and free from all sinister intent. I consider the whole correspondence, which records the feelings and actions of the parties at the time, to be highly creditable to the defender as a kind and forgiving father, who did not allow his just disapproval of his son's gambling and disreputable dealings with the Jews to rouse in him any unfriendly resentment towards the pursuer. Although evidently a man who is stiff in adherence to his own views about business matters, and not very easy to deal with, he throughout never deviated from a friendly attitude towards his son, or allowed his natural distress at the foolish and discreditable conduct of the pursuer to cause him to harbour harsh or unjust intentions towards him. The documentary evidence convinces me that throughout he was actuated by an honest desire worthy of his position, both as a man and a father, to consider what was best for every interest in the circumstance in which he and his son were, he being the heir in possession, and his son the heir to succeed to an estate which he was very anxious to save, that it might go with the baronetcy. I believe also that it was his sincere conviction—a conviction which was, I think, the right one in the circumstances—that unless his son could be placed in a position which would protect him from himself, irretrievable ruin was the certain and speedy end which was before him, and that his refusal to consider any proposal which would not protect the son from himself was the result of this conviction. As regards Mr Jamieson, I can find nothing in the correspondence which took place between him and his client in the slightest degree indicating that they had entered into any arrangement as to how the pursuer was to be dealt with. The correspondence which, it is not

disputed, is complete, is exactly such as a father who had a spendthrift son might have with his legal adviser. The father will do nothing unless there is a re-settlement which will save the estates from being squandered, and is at the same time most reluctant to increase his son's allowance for the future. On the other hand, Mr Jamieson pressed strongly upon his client that the allowance should be increased largely so as to remove the temptation to the son to endeavour to add to his available funds by gambling. And so far from there being any appearance of their having combined to concoct a scheme and to force it upon the pursuer, Mr Jamieson had evidently the greatest difficulty in inducing the defender to continue the negotiations, and in getting the defender to sign the documents carrying out the very thing which had, according to the pursuer, been long before concocted as a fraudulent scheme by him with the defender, the defender refusing to sign on grounds relating to minor matters, which would never have been considered by a man perpetrating a great fraud as grounds for refusing to complete the fraud; and Mr Jamieson, the alleged conspirator, had great difficulty in persuading him that they should not be considered objectionable, and as we shall see afterwards, was driven almost to despair by his contentiousness. Nothing is more certain than that the negotiations were begun and carried on without the defender and Mr Jamieson having concocted a scheme, far less a fraudulent scheme of any kind. Upon that matter of fact I have no doubt, and my opinion is the same as that of the Lord Ordinary. Not only does the evidence fail to substantiate the pursuer's averment of a conspiracy—it absolutely negatives it, and that so clearly that I think it quite unnecessary to consider it in detail. If there were any evidence at all pointing in that direction, it might be right to examine and to consider its weight, but there is none that I can discover. An examination of the evidence would only tend to prove a negative—to prove that it contained no evidence to support the conspiracy averment. There are no parts of it which might by a stretch of construction be held even plausibly to support the plea of conspiracy, and which therefore require to be dealt with separately.

There is one particular matter which is alleged to have been part of the conspiracy but which, whether it was done in pursuance of a conspiracy or not, would be very important to the pursuer's case if it were true. It is averred that inducements were used to prevent the pursuer from taking independent advice. Had this been done, either by the defender or by his law adviser, whether by arrangement between them or not, it would have been a very important fact for consideration on the question of fraud. No more deadly adminicle of evidence in support of an allegation of fraudulent impetration of a deed could possibly be brought forward than proof that the party accused of the impetration or his agent had used artful means to prevent the other party from having neutral advice.

I consider this point to be the most important in the case, for upon the truth or falsehood of the pursuer's evidence in regard to the matter, the complexion of nearly the whole of the rest of the case must necessarily depend. If, on the one hand, it be true that means were used to prevent the pursuer having independent advice, the colour of the fraud would much more easily spread itself over the whole case. On the other hand, if the pursuer's averments on this matter are false, and if he not only never was influenced not to consult a separate legal adviser, but as matter of fact intentionally induced the defender and Mr Jamieson to believe that he was obtaining legal advice elsewhere, he is in the record here either knowingly stating a false case, or had when he instructed his lawyers how to frame his case been afflicted with a sad want of memory. Either of these latter views must necessarily seriously affect the aspect of his own evidence, on which his whole case depends. It seems to me therefore that it may be well at this stage to turn to and consider the evidence as it bears upon this particular point. But in order to do this with effect it will be necessary to consider some general questions in regard to the evidence first. For it is of importance to have it ascertained at the outset which evidence in the case presents itself as most satisfactory in its general aspect. If on the face of it the evidence for one side produces an unsatisfactory impression as to its trustworthiness, whether from witnesses being either forgetful or uncandid or directly untruthful, or from such causes combined, the view to be taken of the evidence on any special point may be very seriously affected. And the same will follow if evidence on one side commends itself generally as straightforward and accurate, either by itself or in contrast with the evidence upon the other side.

Now, there is no evidence which relates to the facts of the case upon the part of the pursuer except that of the pursuer himself. And I feel bound to express the opinion which I have formed after earnest study of the whole case that the evidence of the pursuer is most unsatisfactory and most untrustworthy. It is a very remarkable feature of his case that in order to support it he makes part of it to represent himself as being an untruthful man who makes statements which are inconsistent with facts in order to gain his own ends. It is a somewhat novel way of supporting one's own case, and has the one merit of courage. On not fewer than five occasions, when pressed to explain, if he can, what he said at the time, and bring it into consistency with what he says now, he states with almost brutal frankness that his statements at the time were the reverse of the truth. He indicates that it was quite according to his ideas of honour in dealing with his own father and the family solicitor to state what was false on

all these occasions, to use his own slang expression 'as a draw,' which put into ordinary language just means that where he had an end to gain he had no scruple about being untruthful in order to be successful. This is a very curious feature of the case. But it is not so remarkable as the next, which is, that while the pursuer has to admit that for his own purposes he falsely stated certain things intending the defender and Mr Jamieson to believe them, it is as regards those very things that he comes forward and avers in a charge of fraudulent conspiracy against them, that they knew the opposite of that which he told them, and asked them to believe to be the fact.

I feel justified in saying that the pursuer's testimony gives me a most unfavourable general impression, and makes it impossible for me to accept it in any important particular where it stands by itself, and makes my choice not doubtful where it conflicts with that of other witnesses or with contemporaneous documents. The opinion which I have formed is that where the pursuer speaks to any fact, corroboration is necessary before I can give it credence, and that where in speaking to any fact he is contradicted by the evidence of any ordinarily credible witness, his evidence must be rejected. In a word, it does not inspire me with any confidence. Its own intrinsic qualities compel me to distrust it.

I turn back now to the first special point in the pursuer's allegations for which an examination of the evidence is necessary, and proceed to examine it in the light of the judgment I have formed upon the parole evidence for the pursuer, which consists of his own deposition and nothing else. That point is the allegation that the defender and Mr Jamieson in carrying out a predetermined fraud induced the pursuer not to take independent advice. The point is one of such general importance that it was referred to in connection with the question of the pursuer's credibility from a general point of view, and sufficient was said then, in my opinion, to demonstrate its untruth. But the point is so important, being indeed that on which in one view the case principally turns, that I feel bound to examine it more minutely.

I shall first recapitulate the pursuer's averments in order to compare them with the evidence—[*His Lordship then quoted these averments*].

It is certain that the pursuer was no novice in the art of raising money on his expectancy, as he had in 1882 done so on an extensive scale, and had on that occasion employed solicitors in London to act for him, Messrs Pawle & Fearon, expressly intending to keep the matter secret from his father. The fact that he was so raising money without using Mr Jamieson as his agent is certain, and he intimated it in cold blood to Mr Jamieson by his letter of 16th September 1882, in which he says—"I am borrowing a sum of money on a policy of life insurance;" and asked Mr Jamieson to send him a copy of the deed of entail of the property. It is noteworthy that the pursuer requested him to keep it to himself, and that Mr Jamieson at once meets this by intimating that he holds "the deed of entail only as the father's agent," and declines to send a copy without the father's sanction. The pursuer by his answer on 20th September 1882 makes it plain that he does not desire Mr Jamieson's aid in his affairs, and Mr Fearon his solicitor's letter of 30th April 1883 makes it plain that he desired to act without his father's knowledge. This proceeding in 1882 indicated distinctly that the pursuer, when he wanted to raise money without the concurrence and aid of his father, and without regard to his father's pleasure as to the mode, could do so without Mr Jamieson's aid, and indeed I think it indicated also that he did not expect aid from that quarter in raising money in such a way. It certainly became quite plain to him that Mr Jamieson could not approve of such a course, and would be no party to it. For Mr Jamieson expresses himself as "extremely sorry" at hearing of it, and the whole effort of Mr Jamieson, acting for the defender in 1882 and 1883, was to get rid of the Eagle transaction, as one that the defender and Mr Jamieson thought objectionable, and that never should have been entered into in the opinion of both of them. The pursuer made it quite clear by his own conduct that he already knew he could get no advice in such a direction from Mr Jamieson, and Mr Jamieson made it equally clear that this view was right by directly expressing his disapproval. It was also made plain that the pursuer knew where to go if, in disregard of his father's wishes and his father's agent's views of what was right, he was determined to raise money by such means. Therefore when the negotiations opened in 1885, it was not and could not be a question of what might be done regardless of the defender's approval. The pursuer knew quite well that Mr Jamieson would give him no advice applicable to such a course. They opened, according to the view I take, solely upon the understanding that the pursuer was coming to his father for aid, well knowing what was the only footing upon which any negotiation could take place through Mr Jamieson, and that Mr Jamieson could not and would not be his adviser in any other capacity than that of the father's agent, responsible not to advise the son as to any course which the pursuer knew that the father would disapprove of. The pursuer also knew that his father and Mr Jamieson had taken practical steps to indicate how much they disapproved of the previous transaction, for they had made it a *sine qua non* in spite of his remonstrances that the Eagle bond should be assigned and not discharged, and this with the avowed intention expressed in writing to the pursuer of putting difficulty so far as possible in the way of any similar transaction for the future. That this was distinctly brought home to the pursuer is proved by the fact that Mr Jamieson so expressed

himself in clear terms to the pursuer in his letter of 21st August 1883, and the pursuer admits in his evidence that Mr Jamieson gave him "to understand that it was held over, so as to prevent my being able to borrow money in the same way again." No one can doubt therefore that the pursuer knew perfectly well that, whether such a mode of raising money was possible in the future, it was a mode which Mr Jamieson would never be his agent either to suggest or to carry out. In this connection it is worth noticing, as showing how thoroughly this was understood by the pursuer, that the moment the pursuer desires to raise money again after the transactions now under discussion, he passes by Mr Jamieson, who he now says was his agent, and he consults a solicitor who is not Mr Jamieson. For on 30th April 1889 he writes to the defender that "on asking a solicitor to raise money for me on my expectancy, he informed me," so and so. Therefore the pursuer, both before and after the transactions now impugned, knew where to go when he wished to raise money by modes which he was conscious—and could not but be conscious—would not be countenanced by his father or Mr Jamieson, and his confidence in them did not lead him to abstain from so resorting without any previous communication with either of them. They had not been and never were his advisers when he desired to raise money on *post obit* without steps being taken to protect him from further injury to his own future prospects. He knew well they would never be parties to his providing himself with funds in a way which went in the direction of dissipating, and would leave it open to him to dissipate, his prospective fortune, and that they had kept up the bond of a previous transaction for the express purpose of obstructing him in such a course. And when the pursuer, "as a draw," intimated to his father that he was taking independent advice, it is not easy to see in what the "draw" could consist unless it were in this, that his father was to understand, and Mr Jamieson was to understand, that failing his obtaining the "more favourable terms" from his father which he expected from his "draw," he would cast aside regard for his father's wishes and resort to modes disapproved of by his father for raising the money he wanted. How, after intentionally leading father and agent to believe he would do this, he can complain that they did not advise him as to other courses than that under negotiation I cannot see. It is true that he says he did not consult any solicitor. I am not prepared to say that I am certain of the truth of that statement. I have the gravest doubts of its truth. But whether it be true or not, he is responsible for having made his father and his father's agent believe that he had done so. He is not entitled to say that they did not believe it.

But I am satisfied that not only did he wish them to believe that he was taking independent advice, but that they did believe it, and that they knew at the time that they did believe it. The evidence in the correspondence upon this matter is remarkable. On 26th October 1885 the pursuer wrote to Mr Jamieson a letter which upon the face of it bears that he was in consultation with advisers who knew the arts of money-raising by heirs who are in debt. I cannot do otherwise than hold that the pursuer desired Mr Jamieson by that letter to understand that the scheme he proposed was one which he was advised was preferable to that which he was negotiating with his father, and that he had advice from a person who understood such matters not to agree to the conditions on which alone his father would negotiate. Whether that person was a legal adviser in the sense of being a legal practitioner is of little consequence. He was held out as being a person of legal knowledge as to the raising of money. I think any reasonable person would read his letters as meaning that he had competent advice upon the subject. It would not be reasonable to suppose that he meant that some irresponsible, ignorant person had given him this advice, and that without any aid from a trustworthy adviser routined in such matters he had accepted the advice. Let it be that the words "as I am advised" were used "as a draw." The pursuer says so. It is clear that the draw was successful, for Mr Jamieson understood him to mean that he was advised by a man of legal knowledge in such matters, and he so expressed himself in his letter as to indicate this to the pursuer, and the pursuer never disabused him of the impression, for he takes up what the pursuer says as meaning that the advice he got was to the effect that what was proposed did not compensate him for what he was agreeing to.

When Mr Jamieson says that he can quite understand the propriety of the advice he can only be referring to the advice of a person of legal knowledge, acquainted with the rules of compensation to heirs of entail on a disentail, and it is in that view he asks him to tell his "adviser" what was the real question. Now, it is very remarkable that from that date, 28th October 1885, onwards there was no correspondence between the pursuer and Mr Jamieson for nearly two months. The pursuer sent no answer to the letter I have read. He tacitly accepted Mr Jamieson's reading of his communication. But we know that between that time and 16th December, when he next wrote to Mr Jamieson, a very important conversation had occurred between his father and him, and we know that this conversation was a considerable time before 8th December, when Sir Robert wrote in reference to it, for Sir Robert so depones. Before reading this letter I desire to refer to Sir Robert Menzies' evidence, where he says—"I think I mentioned the name of Mr Mann to my son at Rannoch Lodge as a person he had better consult." . . . The pursuer admits that his father on one occasion advised him to consult a solicitor, but does not recollect Mr Mann being named, but I have no doubt of the defender's accuracy. The pursuer says it was in June 1886. He

does not pretend that the suggestion was not given in perfect *bona fide*, but only differs with his father about the date. It does not matter when it was; if it did, I should prefer the defender's evidence. But the true point is that Mr Mann is a practitioner of repute, from whom no father would have commended his son to seek advice if at the time he was engaged in a fraudulent conspiracy to impetrate deeds from him. This circumstance also gives the lie direct to the pursuer's averment with which we are dealing. And accordingly when I read the letters to which I am now going to refer, I read them in the light of this admission extorted from the pursuer, that his father advised him to consult a solicitor for himself, and named one whose character was a guarantee that if the son took the father's advice his interests would be well attended to. I now read the letter of the defender to Mr Jamieson on 8th December 1885—[*His Lordship read the letter*]. I cannot doubt that that letter truly narrates the facts and truly expresses the feelings of the writer. I turn now to Mr Jamieson's answer to Sir Robert's letter intimating that his son was to consult a solicitor. Does it in any way indicate the dread which would naturally be in a man's mind who was engaged in a knavish scheme to defraud another at the prospect of his proceedings being overhauled by an independent lawyer?—[*His Lordship read the letter.*]

This conspiring lawyer expresses his satisfaction that a delay by him in answering a letter has led to conversations between son and father, the only practical result of the conversations being, so far as he is informed, that the son is to consult a solicitor for himself, the very thing which the pursuer now avers both the father and his correspondent desired should not take place, and in concert took fraudulent means to prevent. Can anyone doubt that this is a perfectly genuine expression of Mr Jamieson's feelings? And if it be so, can anyone refuse to believe him when he says—"I understood he was being advised upon the main point whether it was an advisable thing for him to go into." I see no ground for disbelieving him, and I disbelieve the pursuer, finding ground for doing so in his own evidence—[*His Lordship also read the pursuer's letter of* 18*th March* 1886].

I have, I think, referred to every part of the written evidence which touches upon this matter, and it all points one way and tends to confirm the parole evidence for the defence, and to discredit that of the pursuer. I therefore find the second point of the pursuer's charge of fraud to be disproved by the evidence. Not only has the pursuer failed even to make a presentable case upon it, but it is effectively negatived by his own evidence and his own conduct, and it is proved that the defender did the very opposite of that which is alleged against him, for it proves that the defender advised the pursuer that he should take advice on his own account, and this with the approval of his alleged co-conspirator.

The next averment of fraudulent proceeding is to the effect that the defender and Mr Jamieson, in pursuance of their pre-arranged scheme for defrauding the pursuer, purposely created delays in order to accentuate the pursuer's difficulties. Upon this I remark, in the first place, that the averment is a novelty in the history of impetration of deeds by fraud. The usual case of impetration is one of hurry, the purpose being to induce the victim to sign the deeds by which he is to be defrauded as quickly as possible, leaving him as few opportunities as may be of finding out the intended fraud, or getting advice which may prevent its success. I never heard before of a case in which the perpetrators of the fraud delayed the carrying of it out, and I confess myself unable to understand how it could benefit them to do so. Upon the question of fact I can only say that there is not one tittle of evidence to prove that the defender and Mr Jamieson ever combined to do anything of the kind. On the contrary, it is, I think, impossible to read the letters without being convinced that all the delay which took place was due to the defender's raising points which to him seemed of importance, and objecting to the allowance which Mr Jamieson pressed upon him as proper to be given to his son. Mr Jamieson had great difficulty in getting the defender to proceed, he being evidently a gentleman who holds strong views on minor points on matters of business, holding on to every point which strikes him, with equal tenacity, without discriminating between the important and the unimportant. This appears throughout the whole correspondence—[*His Lordship then referred to the correspondence*]. I find the third point of the pursuer's case of fraud negatived by the evidence.

The fourth allegation of fraud is to the effect that the defender and Mr Jamieson impressed upon him that ruin would follow unless he adopted the terms which alone Sir Robert would accept.

This averment is based upon one or two passages in Mr Jamieson's letters, and in particular upon one in the letter of 18th June 1885, in which Mr Jamieson says—"I see nothing for it but ruin to you." But in the connection in which these words were used they were quite accurate. This was the first letter in which Mr Jamieson referred to what should be done about Engel's (the money-lender's) proceedings, and followed on a letter from Sir Robert to him, in which Sir Robert stated that he had "no instructions to give as to Neil's bills for £3000 to the Jew in London," and that he preferred to wait and "see what arrangements might be proposed for me to consider about." Mr Jamieson is careful in his letter to make the pursuer understand that he can do nothing without his client Sir Robert's authority. He then says—"Unless some arrangement is made about these bills and Mr Engel's acceptance, I see nothing but ruin for you." Now, this was literally correct. Unless an arrangement

was made Mr Engel would make the pursuer bankrupt, which would have ruinous results. That Mr Jamieson meant anything more than this I see nothing to show, and it was perfectly true. He repeats in his letter of 28th July his statement that it was impossible for him to do anything for the pursuer without Sir Robert's authority, and asks the pursuer if he has any suggestion to make about the settlement of his debts as a text for approaching his father. And Mr Jamieson, so far from magnifying the likelihood of this ruin of bankruptcy falling on the pursuer at once, reassured him upon that matter, for on learning from the pursuer that a bankruptcy notice had been served on him, he says, "I do not think the bankruptcy proceedings will be pressed. I feel confident they are intended simply as a further pressure, but will not be carried to extremities, because it would serve Mr Engel no good to get you sequestrated, as he would not get his money, and that, and that only, is what he wants." This is the exact opposite of what he would have said had the pursuer's case been true. I think that Mr Jamieson when he spoke of ruin did so in an entirely general sense. But even if he meant more, he may also very reasonably have thought that the pursuer would get deeper and deeper into debt, and that relief, however obtained, from his present difficulty would be only temporary unless he was protected from himself. And I may here say that I think he was right in his prognosis.

The next averment is, that as part of the conspiracy of fraud the defender and Mr Jamieson combined to impress upon the pursuer that he had no alternative but to accept the re-settlement of the estates, and knowingly to conceal from him that he could get all he wanted on less onerous terms. There is no evidence that any such fraudulent scheme was formed between Sir Robert and Mr Jamieson—none whatever. The correspondence between Sir Robert and Mr Jamieson, which bears the stamp of candour upon the face of it, is negative of any such idea. As regards Mr Jamieson, certain passages in his letters are referred to and founded upon as showing that he made such representations, and it is said that he made them fraudulently. I shall have to examine these letters more closely, in connection with what the Lord Ordinary has found apart from fraud, and I shall therefore content myself with saying at this point that I concur with the Lord Ordinary in holding that whatever may be said about Mr Jamieson's actions in this particular, that there was nothing in them of the nature of "imposition or deceit,' and that if the pursuer is to succeed it must be upon "some other ground than fraud and deceit." This observation equally applies to a fraudulent concealment of other modes of raising money. If there is anything certain in the case it is, that, rightly or wrongly, Mr Jamieson believed that the pursuer could not get what he wanted otherwise than from his father on any terms that were not prohibitory from the point of view of good business, and did not mean a breaking up of the prospects of the pursuer as to keeping up his position as a baronet when he should succeed. That he held that view all along from 1883 downwards is demonstrated by the correspondence. If wrong, he was certainly not fraudulently wrong in not suggesting any other mode to the pursuer. I am satisfied that he would have held it dishonest as Sir Robert's agent to have done so, and that he would have been right in so holding. It is next alleged that the proposal to lay the matter before three friends by a reference was devised with a view of giving an air of *bona fides* to the transactions. This allegation is wholly groundless. I am at a loss to see why this very base accusation is made against his father by the pursuer—made not only as matter of ingenious pleading by his lawyers, but spoken to in evidence by the pursuer himself. It has as little the look of fraud as any proposal could have, taking it without the surrounding circumstances, and when the surrounding circumstances are looked at the absurdity of the accusation is apparent. It appears from the letter of 25th October 1885 that the proposal to refer to three friends came not from Sir Robert but from Colonel Moray, in view of the pursuer's refusal to reform, and that the other two friends were named by that gentleman, and so little were Sir Robert and Mr Jamieson anxious to press the proposal upon the pursuer that it is after this, and on his not taking to the proposal, that Sir Robert advised him to consult Mr Mann, and that the pursuer went to London saying he was to consult a solicitor, and the next reference to the matter of the three friends is in a letter of the pursuer's written eight weeks after it had been broached to him. It then appears that the pursuer and defender agreed at a meeting on 22nd December to a reference to the three gentlemen formerly named, viz., Colonel Moray, the Duke of Athole, and Lord Stormont; and it is noteworthy that in doing so Sir Robert knew that his son had been consulting the Duke of Athole, and that his advice was that the pursuer should resist being put under trustees. This appears from the pursuer's letter of 28th December 1885.

In my opinion he then deliberately and of his own free will, without any inducement, and knowing that he was free to go to any lawyer or to follow any course he chose, selected to have his future financial position settled by these three friends. I am therefore not surprised that in a case in which he desires to reduce an agreement to refer certain points in the award of the friends to a referee, and the referee's awards thereon, he should attack the submission to the three friends as having been fraudulently brought about. For if it was not, it is difficult to see how reduction of the award following it is to be obtained. For what was referred to the three friends was whether the proposal by Sir Robert, as the condition of his clearing the son of debt was, in the words of the memorandum, "a fair and reasonable condition in the circumstances, and one which Mr Menzies should

be asked to assent to in consideration of his father agreeing to the additional charge being made on the estates for payment of his son's debts after debts by him having been more than once previously similarly incurred and charged." And the agreement is to abide by their decision. There is here no question of other modes of raising money. It is true that the memorandum does not in words make it plain that the restriction is to go the length of limiting the pursuer to an alimentary liferent, but this I agree with the Lord Ordinary was not intended to mislead, and in point of fact it did not mislead either the pursuer or the three friends. I hold it to be proved that Mr Jamieson fully and repeatedly communicated to the pursuer that this was an imperative condition, and that the pursuer knew it—[*His Lordship referred to Mr Jamieson's letters*]. All this makes it plain that the three friends understood the proposal to be as it actually was carried out, that they held that the proposal was a fair one on Sir Robert's part in the circumstances, subject to certain conditions, and that they gave their award accordingly. But not only this, it shows that the friends through the Duke of Athole made sure that the pursuer understood it in the same sense that they did. And the pursuer does not venture to call any of the three friends as witnesses in the case. They were men like himself. If they could understand the documents, so could he, and he submitted the matter to their decision knowing that they saw the draft of the trust-deed, and decided that he should accept it in the circumstances. They could have taken any advice they pleased, considered any other modes of relieving the pursuer of his debts that anyone could suggest to them and rejected Sir Robert's terms. The fact that the three friends are not called is conclusive upon the question how they understood the proposed trust, and what, in deciding that that trust must be accepted, they intended to require the pursuer to do, and that they ascertained before giving their award that he understood the matter in the same sense as they had themselves, and in respect of what was so required ordered the defender to give certain concessions to the pursuer.

It was impossible to pretend that the pursuer did not understand the references and know what he was doing in agreeing to it otherwise. Every circumstance connected with it is at variance with any such idea. Therefore it was necessary to endeavour to ascribe it to a fraud, an effort which has entirely failed. There is an important fact to be noted in connection with the matter, that the sudden change of the pursuer from sullen stubbornness to reasonable action in taking steps to give up gambling and racing, thus giving practical promise of amendment, and the reference to the three friends, occurred shortly after the pursuer had told his father that he would take the advice of a lawyer, and when the defender and Mr Jamieson say that they believed that he did so, I believe them. If they did they might well assume that if the lawyer was a worthy man, and the pursuer was frank with him, his agreeing to the reference was the result of the advice he got, which if it was sound advice would be advice not only as to what he had the power to do, but what in the circumstances it was wisest to do. Can it be doubted that any honest adviser who knew all would have advised him to place himself in the hands of his three friends?

Lastly. It is said that the pursuer was under essential error as to the nature of the transactions, the essential error being induced by fraudulent representations and fraudulent concealment. Upon this matter the pursuer avers that the restriction to an alimentary liferent, and preventing him from using his expectancy as a fund of credit, was (1) not referred to in the negotiations, nor (2) placed before the friends in the submission; that (3) it appeared for the first time in the agreement and trust-disposition; (4) the pursuer did not understand it, and that it was not explained to him; (5) that he did not agree to it; and (6) that it was no part of the bargain between the parties; (7) that the terms and effect of the deeds were not explained to him; and (8) that he did not peruse them. It is only necessary to say, without going into detail, that each of these averments is in its substance untrue in point of fact. The only plausible ground for stating any one of them is that the memorandum laid before the three friends was not distinct upon the matter of the alimentary liferent, but this was, as the Lord Ordinary points out, in no way intended to mislead and did not mislead, as the draft of the trust-deed was put before them, and they had both verbally and in writing been distinctly informed that the pursuer was to have an alimentary non-assignable liferent only. That the pursuer understood this I am convinced, and his statements as to his perusing and understanding the documents are quite untruthful. He wrote at the time that he had carefully read the agreement, and that he did not understand the trust-deed. Mr Jamieson replied that he "ought not to sign the trust-deed until you quite understand it," and they had a meeting at which Mr Jamieson did explain it to him. The pursuer himself admits that Mr Jamieson explained to him what he had difficulty about, and says—"My impression is that I did ask the meaning of the expression 'in liferent for his liferent alimentary use allenarly,' and I think Mr Jamieson explained it." I can only say that when the pursuer says he did not understand the passages which restrict his powers over the liferent, and say that he "shall not be entitled to assign or dispose of it in anticipation," and that it "shall not be liable for his debts and deeds," or be subject to the diligence of his creditors, I do not believe one word of what he says.

Further, I do not believe that he was—as he said he was—amazed to find that he could not assign away his liferent in 1889. I consider his evidence on this matter, as on many others, to be destitute of truth. The pursuer says he believed he could raise

money after the deeds were executed, and was amazed to find he could not. Why this amazement if he had been convinced before the deeds were signed that he could not raise money on his expectancy, and signed the deeds because he was persuaded it could not be done so as to admit of his obtaining money in any other way. He surely cannot say that he thought these deeds opened a source of credit to him which was closed before. In 1889 he is proposing to raise £10,000 on his expectancy, and says he was amazed he could not do it. Yet there is no trace of his having up to that time discovered the fraud he now alleges. He is therefore in this dilemma—either he believed that the deeds signed in 1886 facilitated his raising more money afterwards, which is absurd, or he never was under the induced belief that he could not raise money by *post obit* in 1886. Either view is destructive of his case. I hold that his averment of essential error is false, and therefore the allegation that it was induced by fraud falls to the ground.

I have now gone over all the allegations of fraud made by the pursuer, and, with the Lord Ordinary, I find that they are unfounded. But, as I pointed out in alluding to the record, if the case of alleged fraud fails, there is no case left different from that which was formerly dealt with in this Division. We are left practically with the same case which Lord Trayner in the Outer House held to be irrelevant, and in which we affirmed his judgment. The result therefore must be, that following that judgment we must throw out the whole case. That would be the direct way of dealing with the matter. But the Lord Ordinary has not proceeded upon this footing. Although he has absolutely negatived the case of fraud, and has therefore considered the case apart from fraud, he has practically held the averments of the pursuer relevant with all allegations of fraud negatived, and with practically no averments apart from fraud other than those contained in the former case. It is true that his Lordship draws a distinction in one point. He says—"Apparently the ground of reduction which was mainly relied on in the previous case was the failure of Sir Robert and Mr Jamieson to disclose that there were means by which the pursuer might have obtained the money necessary to pay his debts without entering into the agreement. Not to tell the pursuer that there were other means of raising money open to him is, however, a very different thing from telling him that there were no other means open to him." I cannot agree with the Lord Ordinary in this matter. I find that in the former record it is alleged that Mr Jamieson "urged the scheme upon him as the only one that could be devised," and at a subsequent interview repeated that it was the only scheme that could be devised, and did induce the pursuer "to believe that no relief was possible for him which did not involve surrender of the expectant fee of the estates," and that "the pursuer gave his consent to this proposal" (viz., the proposal to refer to the three friends) "with the greatest reluctance, under extreme pecuniary distress, and only upon Mr Jamieson's assurance that it was the one way of escape from impending ruin and disgrace." I am therefore at a loss to understand the distinction which the Lord Ordinary draws between the former averments on this matter and those in the present case when he says, in the passage which I have read from his opinion—"Not to tell the pursuer that there were other means open to him is, however, a different thing from telling him that there were no other means open to him;" and therefore holding, as his Lordship does, that apart from allegations of fraud this record is different from the record in the former, it seems to me that the passages I have quoted are distinct allegations of that which the Lord Ordinary says it does not contain, and I cannot agree with him when he says that the representations averred in the present record are of "a totally different character from that contained in the former." One would be inclined to look with some suspicion upon a record which stated the crucial facts of a case so as to make the case of a totally different character from that contained in a previous record relating to the same matter. But in point of fact it is not so here. The record, apart from allegations of fraud, which the Lord Ordinary negatives, is in its essence the same as the former one, and the Lord Ordinary erred in holding otherwise. Had he not done so, he would, according to all rule of procedure, have given effect to the judgment already pronounced, by which the allegations made by the pursuer—fraud being out of the case—were held irrelevant, and would have dismissed the action. Accordingly the logical result of the opinion I have already expressed would be to throw out this action, as the last was thrown out. But while I should be quite prepared to take that course, I prefer, in view of the fact that the Lord Ordinary has thought that he had legal grounds for dealing with the case as relevant, although there was no case of fraud on the merits, to consider the case on the footing that our former judgment was erroneous, and to express my opinion upon it as a case of fact, on the assumption that if the pursuer's case were true upon the facts, he would in law be entitled to succeed in his action. I proceed therefore to consider those points of fact as to which what I have said in dealing with the case of fraud does not directly or fully apply.

The first is, that it is alleged that Mr Jamieson misrepresented to the pursuer his position by telling him that there was no way out of his difficulties except by consenting to a re-settlement of the estates. This, it is said, was untrue in point of fact, and its untruth is based upon evidence of insurance officials, who say that the pursuer could have got payment of his debts and an annuity equal to his present allowance on a *post obit* bond for a sum of £25,500. On the other hand, other persons of equal

professional position declare that there are grave legal doubts of the soundness of the security in such a transaction, and that upon the advice of counsel they refuse to enter into such transactions as being speculative, it not being certain that the security is valid. Mr Jamieson, whose view of this matter is in question, had seen the opinion of counsel, who thought that the lenders in such a case would not have a perfect security in case of bankruptcy of the borrower. It is quite certain that Mr Jamieson believed that keeping in view the Eagle bond, any attempt of the pursuer to raise a large sum of money by a second bond could only be successful at a ruinous rate. I pause here to note that Mr Jamieson evidently contemplated that the pursuer would be advised on this matter, and if he so believed, as it is not suggested, and cannot be suggested that he did not, he had a perfect right to believe that the pursuer was fully advised upon the matter. But in any case the misrepresentation here alleged is not, as the Lord Ordinary puts it, a misrepresentation of a fact known to the person making a statement to be untrue, or which he ignorantly but innocently made an incorrect statement about. It is an expression of an opinion as to the feasibility of getting somebody to lend money in a certain state of circumstances. That is a question of likelihoods, not a question of fact. It may be a fact to-day that people will lend money in certain circumstances, and to-morrow it may be the fact that they will not. It may be the fact that people will lend money to A B in certain circumstances, and refuse to lend to C D in exactly similar circumstances. I do not consider an expression of opinion on such a matter to be a representation of facts at all. I must take leave also to say that I am not quite as certain upon the matter in this particular case as the Lord Ordinary seems inclined to be. Actuaries and insurance officials may say with perfect truth that such transactions can be done, and are done. But anyone who has knowledge of insurance business knows quite well that while officials can make the necessary calculations for working it out, each such transaction has to stand the ordeal of a board of directors, who consider the whole surrounding circumstances, the character and mode of life of applicants, their past financial history, and many other circumstances, and deal with the case not as a cut and dry matter of figures, or as a thing which must be done as a matter of course, but as it presents itself in all its aspects, and I take the liberty of doubting whether it would have been so easy a matter to pass this transaction out of a board-room as officials who look only to the skeleton figures suggest. It is certain from the evidence that if it had been tried with some offices it would have been at once rejected, and when rejected by one office such a proposal may be easily blown upon, so as to make it, as Mr Jamieson expressed it, difficult, if not impossible, to accomplish what is wanted without accepting ruinous terms. Mr Jamieson had from 1883 downwards the opinion, as the pursuer knew, that the Eagle bond would be a very serious difficulty at least, and if he, as Sir Robert's agent, expressed that opinion, leaving the pursuer to take what advice he pleased, and the pursuer represented to him and led him to believe that he did take advice, I cannot hold that to be a misrepresentation of fact which forms a ground for interfering with a transaction solemnly entered into after long deliberation and ample time for reflection and advice, and upon the pursuer's representation after advice.

The whole structure upon which the pursuer's case rests in this matter consists of one or two isolated passages in the early part of the correspondence. The first is one already referred to, in which Mr Jamieson says that "unless some arrangement is made about these bills, and Mr Engel's acceptance, I see nothing for it but ruin to you." I have already pointed out that this is quite an accurate observation. Some arrangement was necessary, and without some arrangement ruin would follow. This is all it means. The next is in a letter to Sir Robert, where Mr Jamieson says that he told the pursuer that "he did not see how he could pay the debts unless with your assistance and on your terms." This also is an expression of the most general kind, and must be taken along with the whole context, which plainly shows that Mr Jamieson was tied up to Sir Robert, and could not act for the son in any way by advice or otherwise, except with the full knowledge of the father, and only within the limits of the father's instructions. And that this expression of Mr Jamieson's view did not make the impression upon the pursuer which he now says it did, is proved by his refusing doggedly the promise his father required, by his resisting the father's terms upon advice, and coming to no arrangement, until ultimately, on the suggestion being made of a reference to three friends, he, as I believe, in an interval of better feeling as regards his past conduct, agreed to place his future in their hands, they having full power to deal with the whole case as they considered best for the true interests of both. The only remaining passage is one in a later letter, in which Mr Jamieson says —"But if you come to him" (the father), "as unfortunately you are obliged to do, and ask him for money to pay your debts, &c." It is said that the expression "you are obliged to do" means that no other course was open to him for relief. I consider that to be a strained reading of the passage, which I think means only that the pursuer, being sunk in debt, is obliged to look for means of clearing himself, and naturally looking to his father as his best friend, comes to him. Mr Jamieson in this very letter expresses himself distinctly that he has never "advised" the pursuer, and asks him to tell his adviser that the question was not fair terms of compensation, but the terms on which the father would agree to do anything. Now, the pursuer takes no notice of that letter. He accepts

Mr Jamieson's statement that he has never advised him to the course proposed. But, if so, how can he now pretend that it was by the advice of Mr Jamieson that he yielded without advice from anyone else? The pursuer, a man of thirty-one years of age, and his own master, states in express terms that he is advised not to accept certain conditions which his father's agent had put before him. The agent replies indicating plainly that he understands the advice is legal advice, and says in effect—I never advised you to accept your father's conditions. Does not that mean that the pursuer must not look to him for advice, and that he must understand that all his communications are fenced with the condition that he can only act within what his client will allow, and that he cannot be the son's adviser as to courses which the father will not sanction? And if the pursuer allows such a statement, as that Mr Jamieson did not give him any advice, to pass unchallenged, how is he to be allowed now to say that he relied solely on Mr Jamieson's advice, and that Mr Jamieson's client is to suffer because of isolated statements of his agent's ideas about feasibility of obtaining money to pay his debts without his father's assistance? Even taking these passages as if they had been much more pointed and deliberate in their character than they are, I do not think it can be said for a moment that by them Mr Jamieson represented, or that the pursuer understood him to represent, that there was no way at all by which the pursuer could get out of his difficulty for the time except by agreeing to the re-settlement. It is quite plain that this was not so. The pursuer himself cannot suggest such a thing, for in one of his letters he says that he will "sell the reversion of the estate," and he had previously said that he must "borrow" money to pay the debt to Engel. This, he states in his evidence, he said "as a draw," and hoped "it would be an effective draw." And Mr Jamieson did not in any way push that idea aside. He did point out to him, what was quite true, that such a sale would only bring a comparatively small price in the circumstances. He never suggested that it would not pay the debts or leave the pursuer with a sum over, but only that it would be a most imprudent proceeding, as it most certainly would have been.

It is certainly a very remarkable circumstance in this case, that while it is put forward as a misrepresentation by Mr Jamieson that the pursuer was told that he could not get the debts paid without agreeing to the re-settlement, it seems never to have occurred to the friends who advised him, or to Mr Engel, the lender, or to Mr Engel's legal adviser, that there was this easy way out of difficulties. He took the advice of Captain Anderton, who was a man who "had experience in borrowing money." He spoke to numerous friends, many of whom advised him to resist his father's terms, and on their advice he did so for a long time. Surely when he intimated that he was advised to refuse these conditions it was reasonable for Mr Jamieson to suppose they were giving him some aid as to how he could be freed otherwise. Advice to refuse to do a particular thing in order to get rid of pressing liabilities must, if it deserve the name of advice, take into account the pressure of the debts, and suggest some alternative to relieve the friend advised. The pursuer knew that no other terms would be agreed to by his father, and presumably told this to his advisers.

The Lord Ordinary says the pursuer did not know that there was this mode of raising money. But if such a course is open, how is it that he did not know? It is curious that Mr Jamieson should be held bound to know, and therefore bound to say, for unless bound to know he could not be bound to say, that which upon the face of it the money-lenders and their advisers did not know. Surely they must be held to be quite as well up in the moves of raising money, and keeping their grip on heirs of entail, as a respectable Edinburgh lawyer. Engel had every interest not to bring the pursuer down if he could get his money and keep him up. It was Engel's interest to keep the pursuer up, while threatening him with bankruptcy. He surely knew all about raising money, and could have kept his pigeon from perishing by a little advice as to how to proceed so that he might have a few live feathers left to pluck later on. Yet it never seems to have occurred to him, or to anybody versed in the modes of dealing with embarrassed debtor's affairs, that the pursuer had this easy mode at his hand, which it is now said it was a misrepresentation on Mr Jamieson's part to say that he did not see. I am of opinion that Mr Jamieson was not bound to know the mode, even if it was a certain mode, and that he did not know it. If Mr Jamieson had used false arts to induce in the pursuer the belief that he was studying for him the mere financial modes of getting out of the difficulty regardless of Sir Robert, his client, and of the future of the son, if there was a case of that kind, that he had as acting for him studied money-lending as a specialty, and having ascertained that there was such a mode open to the pursuer, and then assured him that he had done so on his behalf, and that there was no mode, I could imagine a case such as that being relevantly stated as a fraud. But I find nothing of that kind here. Mr Jamieson honestly believed that there was no such mode except at ruinous rates, and he left the pursuer perfectly free to get any contrary advice if it was procurable, and believed the pursuer when he said that he was engaged in consulting other advisers, who advised him to refuse the father's conditions, and was entitled to assume that they were his advisers as to what he should do instead.

But it is said that Mr Jamieson was acting as the family agent in this matter, and therefore he made any representation on it as the pursuer's agent. I do not assent to this. This was not a case of a father proposing that his son should do

something which he considered advantageous to himself, and professing to give the son compensation, as in *Tennent's* case, the family solicitor attending to the rights of both. It was the case of a scapegrace son loaded with debt endeavouring to get out of his difficulties by an appeal to his father through the father's agent, to whom he applied as an intermediary with the father. If in such circumstances the agent plainly indicated that he can do nothing and advise nothing, except what he knows the father will approve, as Mr Jamieson did here, I think he does his duty. His client was asking nothing, was refusing to move even in the way of suggestion, he was being applied to to see whether he would do something. He would have nothing to do with his son except on certain conditions, and Mr Jamieson, in dealing with him, was tied up to representing his own client, the father, wherever the father's wishes and the son's did not coincide. When Mr Jamieson says—"He came to me solely as his father's agent," I believe Mr Jamieson. And the correspondence is clear to the effect that Mr Jamieson could do nothing without Sir Robert's express authority, and that he over and over again laid this fact before the pursuer.

The Lord Ordinary says that the pursuer "did not regard Mr Jamieson as the agent of the opposing party, but as the family solicitor, as a man on whom he could rely, and as a lawyer whose ability and experience would suggest the best means of getting him out of his difficulties." To the first part of this sentence I assent, to the latter part I distinctly demur, and to the deduction the Lord Ordinary makes from it. I hold that the whole history of the proceedings makes it certain that the pursuer did not and could not expect Mr Jamieson to "suggest" any means of getting out of his difficulties except such as his father, his client, would countenance. The only matter he brought before the son was what proposal he might make to the father, and it never was a question what could be done regardless of the father. I think that the pursuer knew quite well that Mr Jamieson would make no suggestion and give no aid to any scheme of such a kind. Accordingly when the pursuer speaks of other modes, he never does so as if Mr Jamieson could act for him, but says "I shall have to borrow. I see nothing for it but to sell the reversion." The Lord Ordinary seems to me upon this matter to state the case in a somewhat curious manner; he says—"Now, if Mr Jamieson was looking at the matter solely from Sir Robert's point of view, and had not considered what the pursuer could do without his father's consent and assistance, I think he was bound to say so. He should have told the pursuer that if he would not consent to Sir Robert's terms he would have to consult some one else as to what he could do without his father's assistance, because as to that he (Mr Jamieson), being Sir Robert's agent, could not advise him. Instead of saying anything of the sort, however, Mr Jamieson stated it as his opinion, without any qualification, that the only alternative was acceptance of the terms offered or bankruptcy."

I think he did so. He not only invariably said that he could only act under Sir Robert's authority, but he distinctly told the pursuer that he did not "advise" him—that what was suggested and considered between them was what occurred to Mr Jamieson as what Sir Robert might be got to agree to, but that he did not "advise it," but left the pursuer to consider it for himself, without a suggestion that he should not take any advice he pleased, and Mr Jamieson so expressing himself as to show that he understood the pursuer was taking advice, which was what the pursuer himself wished he should understand. I therefore think that the Lord Ordinary's view of what should have been done was distinctly satisfied. But the Lord Ordinary goes on—"Then in the letter of 20th May 1886 Mr Jamieson sets before the pursuer the disastrous results which, by reason of bankruptcy, would follow his rejection of Sir Robert's terms, and he intimates that if the pursuer did not at once accept Sir Robert's terms 'I must at once tell him' (*i.e.*, Engel) 'that he may proceed.'"

The Lord Ordinary seems to me to have fallen here strangely into error. He seems to forget or misunderstand altogether the position in which Mr Jamieson stood to Mr Engel. This money-lender had instituted bankruptcy proceedings against the pursuer, and it had become necessary to stave these off, if both the pursuer and defender were to escape the disgrace attaching to them. Accordingly Mr Jamieson had most properly applied to him to stay his hand, upon the footing that an effort was to be made to take the pursuer out of his difficulty, and had obtained delay. Mr Jamieson says in his letter of 31st December 1885, "The result of my correspondence with Mr Engel is that he agrees to postpone further proceedings on our undertaking to let him know if there is any likelihood of the arrangement you have in contemplation not being carried into effect within a reasonable time." It thus appears that Mr Jamieson obtained the delay on an honourable understanding which would compel him to intimate to Mr Engel any failure of the negotiations, and when the Lord Ordinary asks, "What duty lay upon him (Mr Jamieson), or what right had he, in the event of the pursuer refusing Sir Robert's conditions, to assume the part of the pursuer's agent, and tell Engel that he might proceed to make the pursuer bankrupt?" The answer is, that having obtained delay from Engel by assuring him that active steps were being taken for a settlement, he was in honour bound, whenever the negotiations definitely failed, to inform Mr Engel of the fact. Accordingly, when several months elapsed, Mr Engel threatened to proceed, Mr Jamieson succeeded in getting a further delay for a month on assuring Mr Engel that the negotiations had not yet been broken off; and as he truly said to Sir Robert, "If your son declines to agree, I must inform Mr Engel and let

him do what he can." All this was exactly as it should be. Mr Engel was of course entitled to proceed, and if anyone got him to delay proceedings on an honourable understanding, as Mr Jamieson did, there was no alternative the moment the negotiation was known to have failed but to fulfil the honourable understanding and inform Mr Engel that the condition on which he delayed acting having failed, his correspondent could no longer in honour keep him dangling off and on, but must inform him that he could act as he thought fit in his own interest. This I consider Mr Jamieson was bound to do, as an honourable undertaking having been given, honour required that it should be fulfilled, whoever might be the person to whom it was given. The Lord Ordinary's reasoning on this matter appears to me to be the result of a misconception of the situation.

It is necessary still to notice one other contention of the pursuer, viz., that Mr Jamieson always told him that he would be in the same position as his father. This I entirely disbelieve, although with the distorted views of the pursuer as to what is true and what is false, he may possibly be stating this without conscious falsehood. I have no doubt whatever of the truth of Mr Jamieson's statement that he made the very opposite plain to the pursuer, and that the pursuer knew perfectly well that his powers were to be restricted in the way and to the extent which he is compelled to admit were explained to him. What enables the pursuer to make the statement at all is, that it was intended, and was also explained to him, that while he would be restricted and restrained by the trust, yet externally in his management of the estate, dealing with tenants, &c., &c., he would be ostensibly in the same position as his father—would, in short, be the real manager of the estate, and nothing noticeable to those with whom he had to deal to distinguish his position from his father's. This I have no doubt was thoroughly understood at the time, and that Mr Jamieson is to be believed when he says, "I told him always that his income would be in such a position that he could not pledge it."

I have now, I fear at tedious length, gone over the principal points of a very serious case. I felt that it was one in which a careful analysis was a duty, that no consideration of convenience could justify dealing with it only in a general way, but that it must be dealt with fully as regards all its aspects. The Lord Ordinary has negatived all fraud by his judgment, and I concur with him entirely in his opinion upon that matter. But he has found for the pursuer in the case notwithstanding, and although I see no relevant case apart from fraud, and hold that the case apart from fraud falls under our former judgment, I have thought it proper to consider it upon the basis he has taken. I have considered it upon the footing that there is in law issuable matter in the record apart from fraud, and I am called upon to give a verdict in fact on the whole case, as on a direction that misrepresentation without fraud was sufficient for a verdict for the pursuer, and my verdict upon the facts is for the defender. I have therefore to move your Lordships to recal the interlocutor of the Lord Ordinary and to assoilzie the defender.

LORD YOUNG—The Lord Ordinary has dealt with the case under four heads. The first relates to the pursuer's averments of a fraudulent scheme and fraudulent dealings which he says resulted in the execution by him of the agreement which he now seeks to reduce. With respect to these averments, the Lord Ordinary is of opinion, and I agree with him, that they have not been proved. To go into details and explain at length why I reach that conclusion is unnecessary. The second head relates to the averments of concealment. The Lord Ordinary's verdict on this head also is against the pursuer—that there is no case of concealment made out. He is satisfied that there was no concealment. The third head is essential error—that the agreement sought to be reduced was gone into and ultimately executed by the pursuer under essential error, and the Lord Ordinary here again upon the evidence gives his verdict against the pursuer. The last head is misrepresentation, and it is only upon it that I shall have a few words to say. The Lord Ordinary with respect to it says—"The question comes to be whether the pursuer was induced to enter into the agreement by undesigned misrepresentation as to the material matters of fact;" and he proceeds—"By far the most serious aspect of the case to my mind is that which is rested upon alleged misrepresentation." And I read the few words which he says in his note on that subject as giving the gist of the matter—"It is said that the pursuer was induced to enter into the agreement by representations made to him by Mr Jamieson, acting as Sir Robert's agent, to the effect that by reason of his existing liabilities there was no other way open to him of avoiding ruin than to consent to a re-settlement of the estates upon Sir Robert's terms. If such a representation was made, I do not think that it can be disputed that as matter of fact it was not true, however honestly it may have been made;" and he expresses his verdict on that head, his verdict here being in favour of the pursuer and against the defender. He says—"I am of opinion that it is proved that Mr Jamieson represented to the pursuer that the only alternative open to him was to accept Sir Robert's terms or be made bankrupt, and that it was that representation which induced the pursuer to enter into the agreement under reduction. If I am right in this view, I think that the pursuer is entitled to have the transaction set aside."

Now, before stating my opinion on this head, I wish to call attention to the defender's plea of *res judicata*, dealing with it only with reference to this, the only ground of action sustained by the Lord Ordinary. It is the first plea-in-law of the

defender's, and we must dispose of it. If we sustain it, the case must be decided upon it. I do not mean that we may not go on to consider the case upon its merits irrespective of that plea of *res judicata*, and it may be right that we should do so for the satisfaction of the parties, and also looking to the possibility of the case going elsewhere; but if the plea of *res judicata* is in our opinion well founded, it is *per se* sufficient for the decision of the case, and I repeat that we must express our opinion, and indeed give a decision upon it. As I have already said, I confine my consideration of it to the case which the Lord Ordinary has held to be established—his affirmance of the pursuer's allegation as to Mr Jamieson's perfectly honest, he says, but erroneous representation that assenting to his father's terms and agreeing to the arrangement which was submitted to him on the part of his father was the only way of avoiding ruin. I agree with your Lordship in thinking that the record in the previous action to which you referred, and which we decided to be irrelevant, contains averments upon this head substantially the same as the averments in the present record, and I am unable to agree with the Lord Ordinary in the passage which your Lordship read where he refers to this matter as follows—"As regards the bearing of the judgment in the previous case, I do not think that the particular representation with which I have been dealing was made the subject of judgment at all." That is what I have read his judgment upon. "Apparently the ground of reduction which was mainly relied on in the previous action was the failure of Sir Robert and Mr Jamieson to disclose that there were means by which the pursuer might have obtained the money necessary to pay his debts without entering into the agreement. Not to tell the pursuer that there were other means of raising money open to him is, however, a very different thing from telling him that there were no other means open to him." Now, the distinction between these two things is intelligible, and if the averment in the previous record was of the one, and in this record of the other, the records would not correspond in that respect, and a judgment finding the first record to be irrelevant would not be *res judicata* of the irrelevancy of the present record. Lord Wellwood, before whom this case first came, sustained the plea of *res judicata*, and I rather collect from the note which he gave us of his opinion that he agreed with the majority of the Court in conformity with whose judgment the case was decided, but at all events he sustained the plea of *res judicata*. His judgment came before us upon a reclaiming-note, and I was myself, I think, the first to suggest to the parties that it might be the most expedient course not to decide upon the plea of *res judicata* at once, but to allow a proof before answer, and speaking for myself—and I rather think I express the view of all your Lordships—we were induced to take that course because of the averments in the present record under the three heads on which the Lord Ordinary's judgment upon the evidence is adverse to the pursuer, viz., averments in regard to a fraudulent scheme and fraudulent dealings to fraudulent concealment and essential error. We did not mean to decide contrary to the view of Lord Wellwood that these averments were such as to be an answer to the plea of *res judicata*, but as they were new, and at all events different language was used with respect to them, we thought it might be expedient, on the whole, to allow a proof before answer. But confining myself now, as I have said already, to the head of misrepresentation, I repeat that I agree with your Lordship in thinking that we have here the same averments not only substantially but exactly and almost literally the same with respect to the alleged misrepresentation by Mr Jamieson as to the possibility of escaping bankruptcy by resorting to other means of raising money. [*After referring to the former record his Lordship proceeded*]—I think I need refer to nothing else to show that under this head, in which the Lord Ordinary's verdict is for the pursuer, there is no stateable distinction between the former record and the present. Now, we held that to be irrelevant, which means that we judicially affirmed it to be irrelevant, and assuming it to be proved—dealing with the pursuer as in the same position which he would have occupied had a proof been allowed and he had established those averments—he was not entitled to the relief which he asked. We decided that only by a majority it is true, but we decided that by a majority of three to one, affirming the judgment of the Lord Ordinary (Lord Trayner).

Now, is that *res judicata*, or is it not?—that if the pursuer should prove those averments regarding this misrepresentation ever so clearly and satisfactorily, he is not entitled to the relief which he asks. Is that *res judicata* to that effect, or is it not? I had intended—I may supply the omission now—to refer to the opinion of Lord Trayner, who decided the former case as Lord Ordinary, and whose judgment we affirmed as I have stated. He deals with the averments in the record which we held to be irrelevant as we did in affirming his judgment. He says—"The misrepresentation said to have been made by Mr Jamieson is this—that he informed the pursuer that there was no other way out of his difficulties except that which was carried out by means of the challenged agreement." It is not that he failed or omitted to point out another way, but stated there was no other way. Now, that shows that the Lord Ordinary who decided the case, and whose judgment we affirmed, read the averments as I am doing now—that is to say, that they are exactly the same as the averments under the same head in the present case. Now, it is quite true that every judgment upon relevancy is a judgment with an "if" in it. It is this—if the pursuer should prove that, he is nevertheless not entitled to succeed; he is

not entitled to the relief which he asks. It has that "if" in it, but that does not prevent it being *res judicata*. I remember this question, or one similar to it, being argued in the House of Lords in a case in which I was counsel. In the course of the argument the Lord Chancellor (Lord Campbell) put it in this way—I do not know that it will be put in the reports, but it struck me at the time as worth remembering although a plain and simple and commonplace-enough looking observation—he said the question is, what was adjudicated? That is the criterion of *res judicata*—what was adjudicated? Now, what was adjudicated by us in the former action under this head? We adjudicated on these averments assuming them to be proved that the party making and proving them is not entitled to the relief asked. The Lord Ordinary has held here that the pursuer has proved these averments, but he has held further that he is thereby entitled to the relief which he asks. But that is contrary to what we adjudicated in the former case. I am not now dealing with any of the other heads of action. I have already stated my own opinion, agreeing with that of the Lord Ordinary respecting those other heads, and it is upon that assumption, I repeat, that I am dealing with this plea of *res judicata* which is applicable only to this head of misrepresentation, the pursuer's averments as to which the Lord Ordinary thinks have been proved. Can we say now that proof of these averments entitles the pursuer to the remedy which he asks without violating our judgment in the previous case, in which we held that it did not? My opinion therefore is, that upon this head, without reference to the soundness or unsoundness of the Lord Ordinary's opinion upon the facts as to whether they have been established or not, that his conclusion in point of law that the pursuer is thereby entitled to the remedy which he asks is excluded by the plea of *res judicata*. We have decided upon the same averments relating to the same matter between the same parties that proof of these averments does not entitle the pursuer to the remedy which he asks. But although sustaining the plea of *res judicata* might decide the matter, it may nevertheless be expedient to express our views upon the merits irrespective of it.

Now, upon that I must refer to what I said in the previous case, for it expresses my view of the case which is now before us. I do not think there is any case of misrepresentation, wilful or not, relevantly averred or proved. The Lord Ordinary think sotherwise both in law and fact; he thinks there was misrepresentation—that Mr Jamieson told the pursuer that there was no other way of avoiding ruin than by assenting to the proposal which was made to him on behalf of his father, and he says that was untrue. He thinks it was honestly made and with good intention on Mr Jamieson's part, but that it was inaccurate and misleading, and therefore affords a good ground of reduction. Now, I doubt the inaccuracy of anything which Mr Jamieson said, or is alleged to have said. There is really no doubt about what was said—we have it in writing—and I think it must be judged of with reference to the business in hand and to the relations of the parties. A good deal was said in the course of the argument on the propriety of the son being provided with another agent, and not being dealt with until he had provided himself with another agent. I cannot agree in the observations for the pursuer on this topic. I think there was no impropriety in allowing a man of full age—he was over 30—to judge for himself as to whether or not he should have a separate agent to attend to his particular interests. He was certainly invited, and even urged by his father and Mr Jamieson to consult a man of business for himself. Sir R. Menzies was, I think, induced to take action, not by any desire of gain for himself or any others, but by the pursuer's own conduct and for his protection against its continuance. I do not want to use any avoidable harsh expressions in speaking of that conduct. For ten years prior to 1886, when he was just over thirty years of age, he had been foolishly extravagant, and had repeated recourse to money-lenders, the result of which was debt to a serious amount having regard to his father's estate which was not very large at the best, and was already heavily burdened. He had repeatedly got into debt to money-lenders, from whom, I suppose, he got very much less than the amount of the obligation which he gave them in return. His father was apprehensive that if this went on the family estate would disappear, leaving his son in poverty even during his own lifetime, and with nothing to succeed to. These were no doubt fears and apprehensions about the future, and nobody could say that they were well founded in the sense that they were certain to be realised, for there is nothing certain to be realised in the future—nothing of that kind at least. The only question is, whether there were grounds for them—whether they were warrantable. Now, I cannot doubt—I agree with the Lord Ordinary in not doubting that the father's fears and apprehensions were natural and reasonable—that the son, if he proceeded in this course of life, might bring himself to absolute ruin, and leave nothing for himself to succeed to, not to speak of his heirs. His reformation was a thing to pray for, but like other things to be prayed for, it was precarious. He might pull up and enter upon a course of life more creditable to himself; but that he should continue as he had begun and continued for so many years was very probable—and in fact he did. It was reasonably to be apprehended, and not the less because of what your Lordship has noticed, that when his father entreated him to promise to give up this course of life—betting, gambling, extravagances which led him into the hands of money-lenders—he declined to give such a promise. When I mention that, I am far from doing so to his dis-

credit; I think it is to his credit. It is one of the redeeming features in his rather sad story which this case puts before us, that he refused to give that promise to his father, because, as he candidly explained at the time, he had no confidence in his power to keep it, and indeed thought he could not keep it. That of course would only increase his father's fears or apprehensions that if something was not done to restrain him and protect the estate, the result would be ruin. Well, his father expressed his fears to him, and informed him quite distinctly of the resolution which he had come to in consequence. He stated both as distinctly as words could well express them orally and in writing. The son had no doubt about what his father intended—not to deprive him of the succession to the estate, but to secure it to him, to protect him against the continuance of that unfortunate course of conduct which he himself had no confidence in his ability to leave off or reform. He knew his father's views. Now, it was in his communications with Mr Jamieson about these, that the alleged misrepresentation is said to have been made. I cannot for a moment believe that it was in his mind to consult Mr Jamieson as to the possibility of raising money irrespective of his father's wishes, and in a way that would frustrate them, by doing the very things which his father said he was resolved, if he could, to prevent being done. That could not be in his mind. And what did Mr Jamieson mean? I think he meant this, and could mean nothing else, and that the pursuer understood, and could understand him to mean nothing else but this—"If you don't assent to your father's proposal, I see nothing for it but ruin." How was the ruin, in view and referred to as probable, to come about? By his going on in that course which he said he had no confidence in his power to break off—his persisting in those extravagant habits, and continuing to resort to money-lenders. That was the road to the ruin which was apprehended by the father and his agent Mr Jamieson, and the pursuer knew it. And what does the Lord Ordinary say about this? It is instructive. He says in his note—"In coming to the conclusion that Mr Jamieson misled the pursuer, I repeat that I believe that he had no intention of doing so. As I have already said, his intention appears to have been to do what was best for both parties, and I have a strong impression that by the agreement which he carried through he accomplished the object which he had in view"—that is, that he accomplished what was best for both parties—that which was best for the pursuer; and why was it best for the pursuer? Why did Mr Jamieson honestly think so, and why does the Lord Ordinary agree with him? The only possible answer is, because it was, if not the only way, at least the most obvious, and what sensible men might reasonably think the best way of avoiding ruin.

With respect to the annuity which the pursuer's father gave him, it is not my duty to express any opinion as to whether it was a liberal and generous annuity or not; I am not looking to the conduct which the pursuer had been pursuing, and was continuing to pursue, but it was urged upon us that money-lenders, or even a respectable insurance office, would have given him an annuity of £900 a-year during his father's lifetime upon cheaper terms, and would have advanced as much money as would pay off the debts of the rather pressing Jews who were urging him, upon cheaper terms. To take the annuity first. Any annuity which he could have got from a money-lender or insurance company would have been saleable, or a fund of credit on which money might be raised, so that the annuity would cease so far as he was concerned, and he would be left to starve until he bought another, which would be subject to be dealt with in the same way. It was very desirable to avoid that. Was there any other way of avoiding it than that taken? His course of life continues. He goes on contracting debts. He borrows money upon the prospect of succession from speculative money-lenders. I do not say that some insurance offices do not enter into those speculative transactions, but these are the things which lead to poverty and ruin with a man of those habits which the pursuer unfortunately had, and which he stated distinctly and honestly that he had no power to leave off. Now, I think that is what Mr Jamieson meant. I cannot see anything in the expression of his mind to find fault with. I should like to take the opportunity of saying, and I think it is only just to Mr Jamieson to say, that I can find nothing in his conduct throughout which is open to censure. I think he acted not only legally and regularly, but as a sensible and experienced man of business and of right and gentlemanly feeling ought to do. I think in all respects his conduct in this matter was unexceptionable. I do not think there is anything here which was calculated to mislead, or did mislead. I think what I have said disposes of the whole case according to my view of it. For a man of sound mind—I do not speak of good sense and judgment or right feeling, and desire to avoid expressing any opinion upon these things—but for a man of sound mind, capable of managing his own affairs, quite understanding what he was asked to do, and meaning to do it, and what he did being, in the opinion, I think, of every judge who has considered the matter, the best for himself, to get rid of it must be a very hard matter indeed. I think the plea of *res judicata* ought to be sustained. I think, however, whether we put it in our judgment or not, it is quite right to give our opinion on the merits of the case irrespective of that plea.

LORD RUTHERFURD CLARK—The purpose of this action is to set aside certain deeds granted by the pursuer through which his right of succession to the Menzies estates was reduced from a fee to a liferent.

Before these deeds were executed the estates were held under a strict entail. Sir

Robert Menzies was the heir in possession. The pursuer being his eldest son was the apparent heir.

These estates, after deducting existing burdens and charges, are worth in round numbers £245,000, subject to a reduction of £21,000 if Sir Robert has exercised or chooses to exercise the power of making provisions for his younger children. It may thus be taken that before the execution of the deeds, which are now challenged, the pursuer had a right of succession to estates of the value of £224,000.

Sir Robert, the heir in possession, was entitled to disentail, but on the condition of paying to the pursuer the value of his chance of succession. The sum which in that event would have been payable to the pursuer was nearly £150,000. In no other way could the pursuer's right of succession have been defeated.

The pursuer was born after 1848. By consequence he was entitled on his succession to execute an instrument of disentail and acquire the estates in fee-simple. He could do so without making any payment whatever.

Such was the position and such were the rights of Sir Robert and the pursuer when the deeds were executed which are now under challenge.

The pursuer was improvident, and incurred debts of considerable amount. They were paid with the aid of his father. The debts which were due in 1884 were paid off in that year. The money was raised on the estate by the joint consent of Sir Robert and the pursuer in terms of an agreement dated 15th November 1883 and 5th February 1884. But the sum so raised was not limited to the debts of the pursuer. On the contrary, it amounted to £70,000. Of this sum £10,731, 7s. 8d. was applied in payment of the pursuer's debts. The balance was to enable Sir Robert to pay certain road debts, to take over the stock on certain farms, to cover expenditure in estate improvements, and to compensate his younger children. I do not profess to give a complete detail of the purposes to which it was to be applied, but only to show that the money was not raised for the benefit of the pursuer alone.

It is proper to notice one particular in regard to the application of this money. The pursuer had in 1882 obtained an advance from the Eagle Insurance Company on a *post obit* bond. An arrangement was made with that company by which they agreed to take a sum secured on the estate in lieu of the amount due under the bond. Their debt was paid out of the money which had been borrowed on the estate on an assignation of the security to the trustees of that money. It remained therefore an apparent burden on the estate to the amount in round numbers of £10,000.

Unfortunately the pursuer incurred new debts. They amounted at the date of the deeds which are now under reduction to about £6000.

The extravagance of the pursuer caused Sir Robert grave and natural anxiety. He feared lest his son's improvidence might ultimately deprive him of the means of livelihood, and lest the family estate might be carried off by his creditors. I cannot say that these fears were without foundation, nor am I surprised that Sir Robert should have been desirous to provide against the evil consequences of his son's improvidence. He communicated his fears and anxieties to his agent Mr Jamieson, and sought his assistance.

This matter had been the subject of discussion between Sir Robert and Mr Jamieson before the agreement above mentioned. So early as 1st December 1882 Mr Jamieson wrote to Sir Robert—"I think also that some effort should be made to have the estates so put that they should be protected against the possibility of being affected by any similar charge, or being left, as they would be if he were to succeed at present, entirely in his power to do what he chose with them." Sir Robert had thought of disentailing. This idea was definitely put aside as it involved the payment of so large a sum to the pursuer. Sir Robert, however, approved of Mr Jamieson's suggestion. The evidence shows very clearly that Sir Robert very anxiously desired that if his son's new debts were to be paid by a charge on the estates some plan should be devised for protecting the estates against his future extravagance; that Mr Jamieson devised a plan to that end; and that Sir Robert employed him to carry it out.

By a letter dated 18th June 1885 Mr Jamieson communicated to the pursuer "the only suggestion" which occurred to him for relieving him of his existing embarrassments. His words are—"The only suggestion which occurs to me for extricating matters from their present most painful position is that you and he should arrange to disentail the whole estates and put them in trust on the footing of paying these debts. . . . and making arrangements for paying you a certain annual sum, to be fixed during your father's and your joint lives, and after his death for paying you the free income of the estate during your life."

This was the plan which was carried out by the deeds under reduction.

If the improvidence of the pursuer continues, it may well be that this arrangement would be to his advantage. But in no other sense is it beneficial. On the contrary, it seems to me that he has surrendered very large pecuniary interests for a small consideration. His debts to the amount of £6000 were paid, and he got a right to an annuity of £900 during his father's lifetime instead of being as theretofore dependent on his father's bounty. He did not, however, receive that benefit without consenting to burden the estates and thereby diminish his prospective liferent with a charge of £22,700. But from the evidence of the officers of two very respectable insurance companies it is clear that the pursuer could have obtained the same benefit by charging his expectant succession with £25,000. If this be so, it is to my mind very plain that in consenting to the disentail and to the arrangements consequent thereon he made a very bad bargain.

It is true that a question might be raised as to the sufficiency of the security in the event of the pursuer's bankruptcy before the date of his succession. But we are told by Mr Sprague and Mr Gunn, as the representatives of the Scottish Equitable and Standard Insurance Companies, that that question has been considered, that these offices are satisfied with the security, and that a loan on such a security and on the terms above mentioned is an ordinary transaction. Mr Sprague says that he is advised by his solicitor that the legal difficulty "need not interfere with a transaction of the sort." Mr Gunn says—"We take our risk of the bankruptcy of the borrower occurring before the death of the heir in possession." With such evidence before me—given by witnesses to whose truthfulness no exception was taken—I am bound to hold that the pursuer could have obtained all the pecuniary benefits secured to him by the agreement for a charge over his succession of £25,000. To put it in another form, no one would be justified in asserting that he could not.

It was known to Sir Robert and Mr Jamieson that the pursuer was extremely averse to consent to the disentail. I do not pause to examine the evidence on this point. The fact is abundantly established both by the parole proof and by the correspondence. Indeed, I am using the very phrase which Mr Jamieson in his letter of 26th August 1885 employs to describe the feelings with which the pursuer regarded the proposal that he should disentail and accept a prospective liferent in lieu of a prospective fee.

I have now to inquire into the circumstances in which the pursuer's consent was given and obtained to the deeds in question. His case is that his consent was obtained by fraudulent misrepresentations, or by misrepresentations which led him into essential error.

It will conduce to clearness if I first determine the condition of the pursuer's mind when he consented to the disentail. In my judgment it is not difficult to do so. He says that he consented because he thought it was the only course to relieve himself of debts for which he was much pressed. I entirely believe him. Nor do I think that this point is open to doubt. Nothing else will explain the fact that his extreme reluctance was overcome. He had made several proposals to Mr Jamieson with a view to the money being raised in another way. These had been all put aside. He had to choose between the surrender of his inheritance and immediate bankruptcy, involving, I suppose, the loss of his position in the army. He chose the former, and consented to the disentail.

I have said that I do not think this point to be attended with doubt. I am aware that the clearness of my opinion does not relieve me of the duty of showing the grounds on which it is based. I do not do so at present. For I shall have occasion to examine the evidence when I come to consider the cause which produced this belief, and this will necessarily include the evidence of its existence. But I may refer to the pursuer's letter to Mr Jamieson, dated 7th August 1886, which to my mind shows very clearly that the state of the pursuer's mind was such as I have represented it to be. This letter was written about three months before the pursuer gave his final consent to the disentail. It was not answered.

We are not left in any doubt as to the representations which were made to the pursuer, and which he asserts produced this belief in his mind. He says that Mr Jamieson told him that the money could be raised in no other way than by consenting to the disentail. His words are—"He also said that he did not see how I could pay my debts without my father's assistance and upon his own terms. I believed him when he told me that." Mr Jamieson makes precisely the same statement. The pursuer was first induced to entertain the proposal at a meeting between him and Mr Jamieson on 25th August 1885. In a letter dated 26th August Mr Jamieson records what passed at this meeting. He says—"We discussed the matter very fully. He had written to me that he proposed that the amount required should be charged on the estate. I told him that this could not be done, and yesterday I had an opportunity of telling him very plainly the reason. He was extremely averse to any resettlement of the estate, and pointed out that he would have the power of dealing with the estate as he chose should he happen to survive you, as things are. This I of course admitted; but I said that that did not alter the matter, because you might, and probably would, live for many years, and during that time he would have no income, and I did not see how he could pay the debts unless with your assistance and upon your terms." In his evidence Mr Jamieson acknowledges that the letter contains an accurate record of what he said. It proceeds—"When he came back after an interval of some hours he said he was prepared to entertain the proposal of a resettlement of the estate, provided a reasonable provision were made for him during your life."

With this evidence before me I do not think that it is necessary to examine the rest of the correspondence or proof, though I may say that in my opinion it is all to the same effect. The pursuer had already been told by Mr Jamieson that his consent to a disentail was the "only way" which occurred to him by which he could be relieved of his difficulties. The letter of 26th August is a reassertion of the same statement, which, so far as I can see, was never qualified or withdrawn. The value of that letter is, that it contains a record of what passed on the day before it was written, and that it is admitted to be accurate. I say, therefore, that we are in no doubt as to the representations which were made. The pursuer was told by Mr Jamieson in the plainest terms that he had no way of extricating himself from

his difficulties except by agreeing to his father's terms. It was after an interval of some hours, and after he had an opportunity of considering his position in the light of this distinct statement, that he first entertained the proposal which had been put before him, and, as I think, he ultimately assented to it by force of that very statement. In making that statement I have no doubt that Mr Jamieson meant to exclude *post obit* bonds as a possible means of raising money. He had done so expressly in previous communications to the pursuer.

It was urged that inasmuch as Mr Jamieson acted for Sir Robert alone, he said and meant no more than that if the pursuer was to raise the money with the aid of Sir Robert, he could have it only on Sir Robert's terms; or, in other words, that he was doing no more than communicating to the pursuer the ultimatum of his father. To my mind there is no foundation whatever for such an argument. The contemporary record contained in the letter of 26th August, which is the best evidence we have, is conclusive against it. Mr Jamieson's words are plain and unambiguous. They admit but of one meaning, and that meaning could not be more clearly expressed by any other form of words. Mr Jamieson said—"I see no way in which you can raise the money without your father's assistance." He was showing the pursuer that he must of necessity accept his father's terms, inasmuch as there was no other course for raising the money. It is his own view—not in any sense that of Sir Robert—which he puts forward to that end. It was a matter which fell entirely within his province.

It must be remembered that when this transaction was pressed on the pursuer he was altogether without professional advice. He was in fact in a much more unfortunate position. He thought that he had an agent and he had none. He thought that Mr Jamieson was acting as his agent and attending to his interests. He was wrong. Mr Jamieson tells us in the most emphatic way that he acted for Sir Robert alone. He says—"He came to me solely in the capacity of his father's agent, and I think I should have been doing what was clearly not my duty if I told the son he could make a *post obit* on his father's life, as he had done before. I conducted the negotiation on the footing that I did not feel myself called upon to consider on his behalf whether there was any other way of getting the money. (Q) In short, you negotiated with him that day as Sir Robert's agent exclusively?—(A) Certainly. I had no other authority." He is asked—"Suppose you had known of an easy unobjectionable mode of his getting money otherwise, would you have considered yourself bound to tell him?—(A) I would not. I was not his agent."

This evidence is startling, but nothing can be plainer. It shows that Mr Jamieson was merely the agent of Sir Robert to procure the deeds under reduction, and that he had no regard for the interests of the pursuer. He did not even consider these interests in the matter most vital to the transaction with which we are concerned. It is difficult to conceive how Mr Jamieson came to assume such an attitude to the pursuer. It certainly goes far to account for the existence of the deeds in question.

It is true that Mr Jamieson says—"I always told him that I was solely Sir Robert's agent. I let him know my position clearly." I wish that he had been more explicit. He might be Sir Robert's agent solely, though he was also charging himself with the interests of the pursuer. For Sir Robert was his sole employer in the sense of being alone responsible for his account. I do not think that he ever told the pursuer that he was paying no regard to his interests, or explained his position, as he defines it, in the passages which I have quoted from his evidence. If he had, it is plain enough that the pursuer's communications with him would have ceased, or at least that he would have seen the necessity of taking independent advice. Nor can I think that Mr Jamieson was acting fairly to the pursuer when he did not inform him that he was looking upon his interests with such unconcern — an unconcern which can only be attributed to his zeal for the interests of Sir Robert.

If the evidence of the pursuer is true, it is clear that he believed Mr Jamieson to be his agent. I think it is true, and that he was justified in his belief. Looking to the letters which he received from Mr Jamieson I cannot see what other inference he could draw. They are full of advice on legal questions more or less connected with the matter of this action, and they seem to me to indicate that Mr Jamieson was doing his best for him. Sir Robert thought Mr Jamieson was acting for the pursuer as well as himself. In a letter to Mr Jamieson, dated June 1886, he says—"I wished Neil to employ Mr Mann, but he preferred remaining with you." When he received that letter Mr Jamieson could have no doubt that he had not let the pursuer "know my position clearly." He received it without explanation or observation. I think that he is mistaken in his recollection when he says that he told the pursuer that he was acting for Sir Robert solely. I am satisfied that he did not reveal to the pursuer his true position. He could not have done so without bringing to an immediate end the negotiation which he was carrying on on behalf of his client Sir Robert, in the success of which Sir Robert was so much interested.

Mr Jamieson states that he believed that the pursuer had "separate advisers, lawyers in London." He ascribes that belief to a letter which he received from the pursuer on 26th October 1885, and another from Sir Robert on 8th December of the same year. I have examined these letters. I cannot find in them any justification for his belief. His recollection must to my mind be at fault. If he knew or thought that the pursuer had an independent agent, it is not doubtful that for his own relief in conducting a negotiation so delicate and

important, it would have been Mr Jamieson's earnest wish to correspond with that agent. There is no effort to gratify what must have been so natural a wish. Further, he could not entertain that belief after Sir Robert's letter of June 1886. From that time forward he could have no doubt that the pursuer believed that he was acting for him as well as for his father, and it may be well to notice that at that date the transaction had not passed beyond negotiation, or at least it had not taken any binding form.

Much was made of the circumstance that in some of his letters the pursuer says that he had been taking advice, and that he told Mr Jamieson that he had been doing so "as a draw." To my mind it is of no moment. It did not alter or affect Mr Jamieson's position. It was, as the pursuer explains, merely a way of trying to get more favourable terms than those which Mr Jamieson, as the agent of his father, was pressing upon him, and of avoiding the necessity of assenting to a proposal to which he was so very averse. It has no bearing that I can see upon the case.

I have digressed from the main argument, though I have touched on matters to which the parties attributed great importance. But in closing my observations on these topics, I may say that in my judgment the material fact is that the pursuer entertained the well-founded belief that Mr Jamieson was acting as his agent. For if he did he could not fail to believe the representations of Mr Jamieson, when he understood them to be made in that capacity.

Let me now turn back to 26th August 1885, when the pursuer was first induced to entertain the proposals which had been made to him. I go back to that date, because we have a written and contemporary record of what passed, and because I think that there was no change in the situation in the future. I have to consider the representation which was made by Mr Jamieson, and the effect which it produced on the pursuer's mind.

If we resort to the direct instead of the indirect form of speech, Mr Jamieson said to the pursuer—"I do not see how you can pay your debts without your father's assistance and upon his terms." I have already said that to my mind the meaning of these words is clear. They mean that so far as Mr Jamieson saw, the pursuer had but one way of paying his debts.

There cannot, I think, be any doubt of the effect of that statement on the pursuer's mind. We must keep in view the position of the gentleman by whom these words were spoken. Mr Jamieson deservedly holds a very high position in his profession, and in making the statement he pledged his professional reputation for the truth of it. It was a statement which reached the pursuer from a very authoritative source. It reached him from one whom he believed to be his agent, and knew to be very capable of advising him. He could not but believe it. He says that he did. I think that he is speaking the truth, and, as I shall immediately show, he acted on it because he believed it.

It has been suggested that as the pursuer had already raised money on a *post obit* bond, and consequently knew that that mode of raising money was open to him, he could not be misled. Mr Jamieson had the same knowledge, but his statement meant, and could only be understood as meaning, that that mode was not available to the pursuer. Of course it was a question of rates, of which the pursuer knew nothing except from one not very fortunate experience, but as to which he could not doubt that Mr Jamieson was well informed. According to his own evidence, Mr Jamieson did entertain the opinion that the rates would be "perfectly ruinous." I am using his own words. This opinion is the justification of the statement which he made to the pursuer. He had already in 1883 told the pursuer that the arrangement by which the Eagle Insurance Company's bond was not discharged but assigned to the trustees—an expedient to which he had recourse in order to protect the pursuer against himself—"would render it more difficult, if not impossible, to raise a further sum on your succession during your father's lifetime." This is not true, and I do not see how Mr Jamieson could think it to be true. For he knew that the assignation was an apparent and not a real difficulty, inasmuch as the trustees were only apparent and not real creditors. But the fact that he made such a statement shows his extreme desire to impress on the pursuer the difficulty or impossibility of raising money by *post obit* bonds, and that he was not scrupulous as to the means he employed to obtain that end. He entirely succeeded. For after the statement made at the meeting in August 1885, the pursuer, averse in the extreme to surrender his birthright, and surrendering it only because he believed that he had no alternative, never proposed to raise money in that way.

Again, it is urged that the pursuer knew that he could sell his reversion. But even in that case he was assured that the terms would be ruinous. I do not think this matter to be of any moment, for I am not prepared to hold that if the money which he needed could only be procured by such a sale the arrangement which was made could have been to the prejudice of the pursuer. The point of his case is that there was an easy and advantageous way open to him, which in consequence of the representations of Mr Jamieson he did not use. I do not think it necessary therefore to notice more particularly what is said about the sale of the reversion. It shows nothing more than the pursuer's extreme reluctance to surrender the prospective fee of the estates.

Next, I am of opinion that the pursuer was induced to sign the deeds under reduction solely by reason of the representations made to him by Mr Jamieson. I have already spoken of his extreme aversion to sign these deeds. As the matter presented itself to his mind, in

consequence of his belief in Mr Jamieson's representation, he was under the necessity of signing them or becoming a bankrupt. As far as he saw there was no alternative. It is certain that if he had known of any other course he would have chosen it. I hold therefore that it was Mr Jamieson's statement which induced the pursuer to consent, for it was the only reason that was ever put forward why he should agree to a proposal to which he was very averse. Mr Jamieson himself says—"I do not know that he would have broken away from the disentail if I had told him of another method, but I suppose he would."

The following passage occurs in Mr Jamieson's evidence—"(Q) For what purpose did you make the representation to him at that meeting that his debts could not be paid unless he would agree to Sir Robert's terms?—(A) I did not see how his debts could be paid while the bond which he had assigned appeared on the register. (Q) Was it for the purpose of inducing him to agree to Sir Robert's terms?—(A) Not at all." I cannot comprehend this passage. I have already said that I cannot see how the bond on the register could present any difficulty to Mr Jamieson's mind. Nor can I see for what other purpose the statement was made than to obtain the consent of the pursuer. Mr Jamieson was anxious to obtain that consent—not of course from any personal interest—but in order to carry into execution the wishes of Sir Robert. He forced the pursuer into the choice of becoming bankrupt or of giving that consent. The instrument which he used to effect that end was the representation that there was no other choice. That representation had no other purpose to serve. I cannot but hold that it was made to serve that purpose.

I have now to consider whether Mr Jamieson was justified in making the representation.

I can see no justification for it. It is not in accordance with fact. He says that he believed it to be true. But he had no right to believe it to be true, for he made it without inquiry or consideration. He says—"I did not apply my mind at all to the question whether there was an easier mode for him to get out of his difficulties than the one I suggested." Again he says—"I conducted the negotiation on the footing that I did not feel myself called upon to consider on his behalf whether there was any other way of getting the money." If so, what right had he to say that there was none? I should have thought that no professional man could honestly say that there was but one course open unless he had applied his mind to the subject on which he was speaking.

Mr Jamieson explains. He is asked—"If you did not apply your mind to that, how do you justify your letters to him making suggestions as to the course which he should adopt?" The answer is—"Because he came to me as his father's agent, and these were the only terms to which his father would agree." Again—"(Q) Was it because you were family agent that you made these suggestions?—(A) Because I could make no other suggestion. I had no authority."

If Mr Jamieson had confined himself to a mere statement of the terms on which Sir Robert would assist his son, his statements would have squared with his theory of his duty. But he did nothing of the kind. In my opinion he pledged his professional reputation to the statement that the pursuer had no means of raising money except by agreeing to his father's proposals.

The fact that Mr Jamieson was acting solely as the agent for Sir Robert can, in my opinion, be no justification for the representations which he made to the pursuer. It might be a good reason why Mr Jamieson should feel that he was not at liberty to suggest that money could be raised on *post obit* bonds. But it could not justify the assertion that money could not be raised in that way. It might be a good reason for reticence. It might justify his failure or refusal to reveal an easier way of raising the money than Sir Robert proposed. But it could never justify him in saying that there was no other unless he had by sufficient inquiry honestly satisfied himself of the fact. It could never justify him in representing to be true a statement on a matter which he had never considered or inquired into.

If he had told the pursuer that he "had never applied his mind to the question at all," it is plain that the pursuer would neither have relied nor acted on his representations. It is the merest mockery to say that he would. Considering the attitude which Mr Jamieson says he assumed towards the pursuer, it is to me inconceivable that the deeds in question could have been fairly obtained.

The result in my opinion is, that the deeds under reduction were obtained from the pursuer under essential error, produced by a false representation made by Mr Jamieson as the agent for Sir Robert Menzies; that that representation was in law a fraudulent misrepresentation, inasmuch as Mr Jamieson made it recklessly, and without applying his mind to the question whether it was true or false, for the purpose of inducing the pursuer to give his consent, and that it was made by Mr Jamieson in order to serve the ends of his client. Consequently, I hold that the pursuer is entitled to the judgment of the Court. I do not enter upon any consideration of the law applicable in such a case. I understood that it was conceded that if the facts be as I have stated them, the deeds could not be defended. But apart from all concession, it is to my mind clear that they must be reduced.

Before I conclude, I wish to say that I believe that Sir Robert and Mr Jamieson were persuaded that the arrangement which was made was the most beneficial for the pursuer. Indeed, I think this persuasion dominated their minds as to the origin and cause of these unfortunate proceedings. But a good motive cannot justify a wrong.

LORD TRAYNER—It is important, I think, to keep in view the circumstances which gave rise to the execution of the agreement in question. The pursuer in 1885 was being pressed by creditors for payment of debts amounting to a considerable sum, which he was unable to meet, and he was being threatened with proceedings at the instance of his creditors which, if followed out, would seriously have affected his position as an officer in the Guards, and would probably have resulted in his enforced retirement from the army. Being so situated the pursuer appealed to his father for pecuniary assistance, proposing that money should be raised on the security of the family estates to an extent at least sufficient to enable him to meet the liabilities which were then pressing so hardly upon him. The defender refused to agree to this proposal, or otherwise to help the pursuer out of his difficulties, except upon condition that the pursuer consented to the disentail and resettlement of the family estates. I cannot regard this refusal on the part of the defender to give the pursuer the assistance he asked as either ungenerous or unwise. The pursuer had previously incurred debts to a large amount in the same way as those due in 1885 had been incurred—by reckless expenditure, gambling, and betting—which the defender had paid; and when asked by the defender to promise that such conduct would be discontinued the pursuer distinctly refused to give any promise of the kind. Indeed, it rather appears that on a former occasion the pursuer had given such a promise which he did not keep. On this, however, there is or may be room for difference of opinion, but there is no doubt possible about this, that when the defender asked and pressed for such a promise, the pursuer repeatedly refused to give it. The defender therefore took up the position from which he never departed, that he would do nothing to help the pursuer out of his difficulties except upon the condition which I have already stated. The pursuer, after long consideration, and after having the advice and assistance of three friends of the family to whom the whole matter was submitted—not merely the question of disentail and re-settling of the estates, but also what the defender should do for his son in the event of such re-settlement taking place—consented to the defender's condition, and the agreement under challenge was accordingly executed. Whether the pursuer had any professional advice (apart from Mr Jamieson's) before he consented to enter into the agreement is not to my mind at all certain, but it is clear from the evidence and the letters of the pursuer that he led both the defenders to believe that he had sought and obtained such advice.

The terms of the agreement thus entered into between the pursuer and the defender Sir Robert Menzies were practically those which had been determined by the three friends already alluded to, and which were approved by the then Dean of Faculty in a submission regarding the same into which the pursuer and defender entered—[*His Lordship summarised the agreement*].

Such being the import of the agreement in question, I come now to consider the grounds on which it is challenged, and of these, first, the alleged essential error. The pursuer's allegations in regard to this ground of challenge are set forth in the condescendence, and shortly stated amount to this—that under the agreement in question and relative trust-disposition the pursuer's interest in the family estates were reduced to a mere alimentary liferent, so restricted as to prevent its being anticipated or used by him as a fund of credit with, what he calls "penal clauses" attached. This restriction the pursuer alleges he did not agree to—that it was no part of the bargain between the parties—that it appeared for the first time in the minute of agreement and trust-disposition, the technical language of which he was unable to understand; that it was not explained to him; and, moreover, that he did not peruse the deeds in which the technical language was used. It seems rather inconsistent to say that the pursuer did not understand the technical language of the deeds, and at the same time to say that he did not peruse them. But this inconsistency in the pursuer's averments is not of much moment; it is much more important to observe that his averments are inconsistent with the facts established. When under examination-in-chief as a witness for himself, the pursuer supported by his deposition the statements made upon record, but in cross-examination he directly contradicted them and himself. There was no other course open to him when confronted with his own letters. I do not wish to say that the pursuer said anything in the witness-box which he knew to be incorrect, and I would be glad to think it was the pursuer's memory only which was at fault. The fact remains, however, that the averments on record and the evidence given by the pursuer in support of them are both wrong, and the pursuer has to admit that this is so. On 2nd September 1886 Mr Jamieson wrote to the pursuer sending him copies of the agreement and trust-deed for perusal, and requesting them to be returned "with any observations which may occur to you upon them." On 19th September the pursuer returned the copy agreement to Mr Jamieson in a letter which commences thus—"I have had time to-day to carefully read through the draft agreement which you sent me the other day;" and he then makes some observations upon its terms which I need not here consider. The matter I am dealing with now is whether he perused the agreement, and this letter proves that he did so carefully. Referred to that letter and his evidence given to the effect that he had not read the agreement, he says—"I wrote stating that I had read the agreement carefully, but I do not think I did so. (Q) Why did you say you had done it when you had not?—(A) I do not know, I suppose I did. If I wrote in the letter that I read it I must have done so. What I wrote in my letter

would be correct. (Q) Therefore you did read the agreement carefully?—(A) Yes." So much for the agreement. The evidence about the trust-deed stands in the same position—[*His Lordship then referred further to the evidence*]. Having read these documents, was there anything in them which he did not understand, and which was not explained to him? It has been seen already that the trust-deed was explained to his satisfaction before he signed it, and it contained the provision which is specially referred to in article 15 of the condescendence as that which the pursuer did not understand and never agreed to—namely, the restriction of his liferent to a purely alimentary provision which he could not anticipate or use as a fund of credit, "with penal clauses attached." But that part of the deed was undoubtedly explained to the pursuer. The pursuer admits in his evidence that it was so. He says—"My impression is that I did ask the meaning of the expression 'in liferent for his liferent alimentary use allenarly,' and I think Mr Jamieson explained it." The evidence of Mr Jamieson on this part of the case is to the effect that with the draft trust-deed in his hand he went over it clause by clause with the pursuer, and explained to him fully both its meaning and effect. It is not necessary, however, to go over the evidence on this subject further. The pursuer admits that he read the deeds, and that they were explained to him, and he does not now pretend that the deeds so read and explained are in any respect different from the deeds as executed and now challenged. The result is that the averments made by the pursuer in support of his ground of action that the challenged deeds were executed by him under essential error as to their contents or effect are not only not supported, but are positively disproved by the pursuer's own evidence. This ground of action therefore fails.

The second ground of challenge is fraud.

Leaving out of view in the meantime the fraud involved in the alleged misrepresentation and concealment, which I shall separately consider, the averments of the pursuer on this part of his case are not very material to the issue, but they require passing notice—[*His Lordship then referred to the condescendence*]. As I have said, these averments do not appear material to the questions here at issue, because it matters nothing to this case whether Sir Robert Menzies had formed the design which he is said to have formed to deprive the pursuer of his succession to the fee of the family estates, if ultimately the agreement under which the pursuer was deprived of or agreed to surrender that fee was entered into by the pursuer voluntarily in the full knowledge of what he was doing, and was not obtained by fraudulent concealment or misrepresentation. But with regard to the pursuer's averments, I notice, in the first place, that the averment that the defenders conspired to induce the pursuer to abstain from seeking independent professional advice, and to entrust the protection of his interests to Mr Jamieson alone is altogether imaginary. The correspondence shows that the pursuer represented himself in the course of the negotiations which led to the agreement now challenged as being advised by some person or persons other than Mr Jamieson, and that he was encouraged to seek such advice and to lay before his adviser the views which Sir Robert and Mr Jamieson held. Nothing could be more plain than this, even were no other evidence of it offered beyond the terms of the pursuer's letter to Mr Jamieson of date 26th October 1885 and Mr Jamieson's reply of 28th October. But there is other evidence to the same effect abundantly afforded by the pursuer's correspondence, and the pursuer cannot deny (whatever the fact may be) that he represented to his father and Mr Jamieson that he was obtaining for himself professional advice. In the second place, the delay which took place in the negotiations arose from this, that the pursuer would not consent to take his father's assistance which he had sought, on his father's terms, and Sir Robert would not listen to the counter proposals of the pursuer. I think Sir Robert was very obstinate, and disinclined to accept the views which the three friends of the family had expressed, and delay was undoubtedly thereby occasioned. But that such delay was the result of any scheme entered into between the two defenders, or arose from any intention or desire on their part to prolong the negotiations and so accentuate the pursuer's difficulties, is negatived by the letters written by Mr Jamieson to Sir Robert, from which it appears that Mr Jamieson was urging Sir Robert to give up his own views, and to come at once to a settlement with the pursuer on the terms proposed by the three friends. And, lastly, the reference to the three friends of the family (suggested by Sir Robert to bring about an arrangement with the pursuer, and not to hinder or delay such an arrangement), so far from being a pretence intended to give "an appearance of *bona fides*" to Sir Robert's proposals, was so genuine that it resulted in advantage to the pursuer which Sir Robert was unwilling to concede, but of which the pursuer is now reaping the benefit.

The Lord Ordinary has expressed his opinion that the pursuer's "averments in regard to a fraudulent scheme and fraudulent dealings are not established," and that "if the pursuer is entitled to set aside the agreement which he made, it must be upon some other ground than that of fraud and deceit." In that opinion I entirely concur. But I go a step further. Not only are the pursuer's averments of fraudulent scheme and fraudulent dealings not established, but in my view there is nothing to suggest that such a scheme ever existed, or that such dealings were ever practised. The pursuer has charged his father with trickery and deceit practised on him for the purpose of depriving him of his succes-

sion, and charged his father's law-agent with participation in this dishonourable proceeding. Such statements should not have been made without reasonable ground for at least believing them to be true. Such ground for belief in his own averments the pursuer had not, and I cannot refrain from saying that it is discreditable to the pursuer that such averments were made.

I now come to consider the only remaining grounds of challenge, namely, concealment and misrepresentation, which I take together. The Lord Ordinary is against the pursuer in so far as the alleged concealment is concerned, because he thinks that has already been decided against him by the Court. But on the matter of misrepresentation the judgment of the Lord Ordinary is favourable to the pursuer, and there I am unable to concur with the Lord Ordinary. The pursuer's averments on the matter may be stated in a sentence. He says that every benefit he obtained under the challenged agreement could have been obtained through an insurance office on terms far less burdensome and greatly more advantageous to him than those imposed upon him by the agreement; that the defenders knew this, and fraudulently represented that there was no other way open to him to obtain what he desired and required to get than by entering into the agreement in the terms which they proposed.

The averments that the concealment was fraudulent, and that the representations made were false and fraudulent, need not be further noticed. The Lord Ordinary thinks that the misrepresentation made (as he regards it) was innocent and undesigned, and I do not understand that there is any difference of opinion upon that subject.

As regards the alleged concealment, I can only repeat what I said in the former case between these parties. Sir Robert was under no duty to disclose to the pursuer (assuming it to be the fact) that he could make a better bargain with an insurance company than that which Sir Robert proposed to him. Upon that matter Sir Robert had no knowledge or information which was not equally open to the pursuer. Concealment or non-disclosure of a fact which one of the contracting parties is not bound to disclose to the other is no ground for annulling a bargain. Nor was Mr Jamieson, as Sir Robert's agent, bound to make the disclosure which his client was not bound to make. If, on the other hand, Mr Jamieson was acting as the pursuer's agent in the transaction, and failed in his duty to disclose what he was bound to know and tell his client, that might give rise to an action of damages against him for failure in his professional duty, but would not afford any ground for setting aside a transaction which but for such failure would not have been entered into. I think, therefore, that the alleged concealment cannot avail the pursuer any more than his allegations of essential error and fraud. Then, was there any misrepresentation on the part of either defender, inducing the pursuer to enter into the agreement under challenge. None certainly was made by Sir Robert, but he will be responsible and must take the consequences if any such misrepresentation was made by Mr Jamieson as his agent.

The Lord Ordinary has, in his opinion, made a very full reference to the letters in which the alleged misrepresentation was made, or from the terms of which the misrepresentation may be gathered. He has also stated the arguments addressed to him *hinc inde* on this part of the case, so that I need not repeat what is thus in sufficient fulness before your Lordships. But in my opinion there was no misrepresentation made to the pursuer, and I shall explain how I reach that conclusion. I think it is essential to a proper understanding of Mr Jamieson's letters, and to get at their fair construction and meaning, that the circumstances should be kept prominently in view which led to these letters being written. The pursuer had more than once before 1885 got seriously into debt, and had applied for advances of money to meet these debts not only to his father but also to money-lenders. The latter had charged the pursuer for the advances they made to him what he himself terms "fabulous interest." It would be termed more correctly "ruinous," for I think it was 60 per cent. Among other borrowing transactions entered into by the pursuer, there was one entered into by him in 1882 with the Eagle Insurance Company, under which he borrowed £5500 on a *post obit* bond. This debt was ultimately paid, like others, by Sir Robert, who raised money for the purpose on the security of the family estates; but the bond to the Eagle Insurance Company when paid was not discharged. It was assigned to trustees, with consent of the pursuer, and thus kept up as a charge against him for the avowed purpose, communicated to him, of making it "more difficult if not impossible," for him to pledge his life-interest to other money-lenders for future advances during his father's lifetime. When the pursuer again became in pressing need of money in 1885, he applied through Mr Jamieson to his father, and his desire then was to borrow more money on the family estates to enable him to pay his debts. Obviously the reason why he applied to his father rather than to the money-lenders was this, that money could be borrowed on security of the Menzies estates at a very small rate of interest, and thus the ruinous rates of the money-lenders would be avoided. The interest, besides, of this further loan to be raised on the estates would have come out of Sir Robert's pocket so long as he lived, although it is right to say the pursuer proposed to pay the half of this interest out of his allowance. No money, however, could be borrowed on the family estates without the consent of Sir Robert, and this consent he declined to give except on conditions. The position of matters therefore was this —The pursuer wanted money at a cheap rate, and he could only raise it at that rate on the family estates and with his father's

consent. The whole correspondence which followed had this in view—how can money be raised to meet the pursuer's necessities on the family estates, and on what conditions? It was quite true, as Mr Jamieson said, and as the pursuer knew, that if money was not procured to meet the demands of the creditor (a Mr Engel) then pressing the pursuer for payment, there was "nothing for it but ruin" to the pursuer. That was really the pursuer's position. But notwithstanding that such was the pursuer's position, Sir Robert refused his consent to raise the money except on the conditions he had stated, and in communicating this to the pursuer, Mr Jamieson in his letter of 28th October used these words—"If you come to him (Sir Robert), as unfortunately you are obliged to do, and ask him for money to pay your debts and to give you a stated annual allowance, he is entitled to say, as he does say, that he will only agree to do so on certain terms." It is maintained that the meaning of the words "as unfortunately you are obliged to do," and the representation made by them—taken in connection with the fact communicated previously that the existence of the Eagle Company's *post obit* bond would make it "difficult, if not impossible," for the pursuer to borrow on his expected life interest—was really this—You have no alternative but to take money on your father's terms, for you can get it nowhere else, or face impending ruin. Such a construction of Mr Jamieson's words appears to me not only unwarranted, but altogether unreasonable. Taken with their context, what Mr Jamieson said (and I think the pursuer so understood him) was this—You are unfortunately obliged to apply to some one for money, and you have applied to your father; if you are to get money from him, you must take it on his terms. But it does not mean and does not say that money could not be got on any terms elsewhere than from Sir Robert. In short, the opinion I have formed is, as I have stated, that Mr Jamieson was regarding the matter in the view of how money could be got on the security of the estates and with Sir Robert's consent, and that when he told the pursuer that he could not get money except on Sir Robert's terms, he was speaking relatively to these conditions and not absolutely. It would have been absurd for Mr Jamieson to have represented to the pursuer that there was absolutely no way of raising money except through Sir Robert and on his terms. The pursuer knew better. He had always, as he knew, the money-lenders to resort to, although no doubt on extravagant terms; he had raised money before on a *post obit*, and he knew, I suppose, that he could do so again, although it might now be more difficult or more expensive than formerly. And he certainly knew that he could raise money by selling the reversion of his interest in the family estates, for in writing, Mr Jamieson on 7th August 1886, complaining of delay on Sir Robert's part in carrying out the agreement as arranged by the three friends of the family, he said—"Failing a very early settlement of affairs, I see nothing for it but to sell the reversion rather than let Engel do it, as it is imperative that I should have money almost directly;" this letter is dated nearly ten months after the letter of Mr Jamieson, which is said to have represented to the pursuer and led him to the belief that he had no alternative whatever but to take money from Sir Robert on his terms. The result therefore which I reach is this, that the representations made by Mr Jamieson were not of the nature which the pursuer now maintains; that they certainly were not understood at the time by the pursuer as he now represents them, and that they were not calculated to, and in point of fact did not mislead the pursuer. The pursuer certainly knew of at least one alternative way of raising money, namely, by selling the reversion of his interest; and to say now that he entered into the agreement in question under the belief that there was no other way of getting money except by acceding to Sir Robert's terms is just another contradication of himself of which there are too many instances in the proof.

I have said nothing on the question whether the pursuer could have borrowed money, as he avers he could, "from any respectable insurance company" on the terms and conditions set forth by him. There is some evidence to the effect that according to the practice of some offices he could, and that evidence is entitled to considerable weight. But that evidence proceeds upon the view that the title which the pursuer could have given to the insurance company under such a transaction would have been a perfect title, and one which would have availed the lending company in competition with other creditors in the event of the pursuer being rendered bankrupt between the date of the transaction and the date of his succeeding to the estate. I express no opinion whatever as to the effect of such a title, and have referred to this matter only in order to say I am not to be regarded as acquiescing in the view presented by at least one of the pursuer's witnesses, that such a title is attended with "no risk." The question appears to me to be attended with considerable difficulty, and when it arises will deserve more consideration than probably has yet been given to it.

I concur in the opinion which has been expressed, to the effect that nothing has been proved in the present case beyond what was averred in the former case between the parties, which was decided to be irrelevant, and that therefore the case now presented is *res judicata*. But while concurring in that opinion, I have preferred to deal with the case as I have done, and to give judgment on the effect of the proof which the pursuer has adduced in support of his contention.

In closing my observations I feel bound to add, that in my opinion the pursuer has throughout been considerately dealt with by his father; that in imposing on the pursuer the conditions of the agreement challenged, Sir Robert was, as he believed,

and as I think, acting in the interest and not against the interest of the pursuer; that he had no intention or desire to overreach the pursuer, but desired to preserve the family estates for the benefit of the pursuer and his issue, if he had any, and to prevent them going into the hands of money-lenders, which was too likely to be the result if the pursuer did not exercise more self-restraint and acquire more wisdom than he then, unhappily, showed any disposition either to exercise or acquire. The charges against Mr Jamieson are, further, in my opinion, entirely unfounded, and present a very poor return for the trouble he took and anxiety which he invariably evinced to promote the welfare and success of the pursuer.

The Court recalled the Lord Ordinary's interlocutor and assoilzied the defenders.

Counsel for the Pursuer and Respondent —D.-F. Balfour, Q.C.—Asher, Q.C.—H. Johnston—M'Clure. Agents—Smith & Mason, S.S.C.

Counsel for the Defenders and Reclaimers —Sol.-Gen. Graham Murray, Q.C.—Comrie Thomson—Dickson—Salvesen. Agents—Tods, Murray, & Jamieson, W.S.

VALUATION APPEAL COURT.

Tuesday, March 15.

(Before Lord Wellwood and Lord Kyllachy.)

THE STEEL COMPANY OF SCOTLAND (LIMITED) *v.* THE ASSESSOR OF LANARKSHIRE.

Valuation Cases—Case Improperly Stated —Valuation of Lands Amendment (Scotland) Act 1879 (42 *and* 43 *Vict. cap.* 42), *sec.* 7—*Procedure.*

A case stated for the opinion of the Valuation Appeal Court set forth that evidence had been led for the appellants in which they sought to establish certain points, but failed to set forth the facts proved. *Held* that the case was improperly stated, and appeal *dismissed.*

This was a case stated at the instance of the Steel Company of Scotland (Limited), for the opinion of Her Majesty's Judges under the Lands Valuation Acts upon the determination of the County Valuation Committee for the Middle Ward of the County of Lanark.

In the case the Committee set forth the evidence led and the contentions of parties, but failed to set forth the facts they found to be proved.

The respondent objected to the competency of the appeal, in respect the case did not set forth the facts proved, as provided by section 7 of the Valuation of Lands Amendment (Scotland) Act 1879.

The appellants contended that the value was itself a fact, and that an appeal upon value was thus distinguished from an appeal upon questions of law. In the former facts must be found proved. In the latter that was not necessary. This explained the provision in section 9 for the submission to the Court of a certified copy of the evidence.

At advising—

LORD WELLWOOD—The Valuation Act of 1879 requires the commissioners or magistrates to state and sign a case setting forth the facts proved, together with the determination thereupon. I am of opinion that this case is not properly stated. The Valuation Committee have given us at great length the contentions of parties as they were bound to do under the 9th section of that statute. They also inform us that proof was led for the appellants in which they sought to establish certain points. But they do not tell us whether in their opinion those points were or were not established, and they do not state any facts which they hold to be proved. Moreover, they do not even tell us whether their determination proceeds on the footing contended for by the Assessor, or on that contended for by the appellants, although perhaps we may infer from the amount of the valuation that the Committee have practically adopted the Assessor's views.

This being so, I think the case is not properly stated. I am not disposed to criticise such cases too strictly, or to insist upon a full statement of facts; because I am aware it is not an easy matter sometimes to state a case well, or to select for statement those facts upon which the question of law or principle really depends. But here we have no facts found at all.

The question is, what is to be done with the case? That is a matter in the discretion of the Court. We may remit it to the Committee with instructions. But there is another course which we may adopt, viz., to dismiss the appeal on the ground that the case is not properly stated. An appellant is bound to see that the case he asks for is properly stated, and it is in the discretion of the Court to dismiss the appeal if this is not done—*Bank of Scotland*, 11 Macph. 991; *Rule* v. *Lord Abinger*, 10 R. 502, *per* Lord Fraser. I may also refer to the practice in regard to appeals under the Registration Statutes, in particular the Scotch Reform Act of 1868, section 22—*Pringle*, 3 Macph. 420; *Cameron*, 5 Macph. 73; *Maitland*, 7 Macph. 288; and *Adamson*, 17 S.L.R. 158.

I think the better course to follow will be to dismiss the appeal, because if we were to remit the case again to the Valuation Committee, it would be necessary before it was ripe for decision, not only that the case should be re-stated, but that the evidence should be corrected and supplemented in various respects. The valuation by the Committee is £1000 less than that of last year, and I do not think that we shall be subjecting the appellants to much hardship if we allow the valuation of £11,000 to stand for this year.