course have competently enough declared that if one of the sons failed his share should go to the other—in other words, that if one of the sons failed, then he apportioned the whole estate (less the £10 given to Mrs Donaldson) to the surviving son. This, however, he did not do, and I can see no ground for the contention that the surviving son took by accretion the "equal share" apportioned to the son who failed. I cannot read the provision which gave James only "a share," as in any circumstances having the effect, or expressing the intention, of giving him the whole. In my opinion, the share allotted to Robert never vested in him because he predeceased the period of payment; in consequence thereof the apportionment to him of a share equal to that apportioned to James became inoperative, and not having been otherwise apportioned in the event (which has happened) of Robert's failure, it remained unapportioned. In these circumstances the right to the share so unapportioned is governed by the provision in the marriage-contract which provides for equal division in the event of there being no apportionment. The result, in my opinion, is that Mrs Donaldson takes the £10 allotted to her, and James one-half of the remainder as allotted to him. With regard to the balance, being the share which would have fallen to Robert had he survived, I think it belongs in equal shares to the survivors James and Mrs Donaldson, under the destination in the marriage-contract.

Lord Moncreiff—On the questions put to us I am of opinion, first, that vesting was postponed till the death of Mrs Euphemia Scougal or Stirling, and accordingly that nothing vested in Robert Stirling.

Secondly, the apportionment of the provisions in favour of the children of the first marriage is effectual so far as it goes, that is, Mrs Donaldson is clearly entitled to £10, and James Stirling to one-half of the balance of the fund.

The third question, viz., how is the share destined to Robert Stirling to be disposed of, is more difficult. Does it go by accretion to James, or does it fall to be divided as unappointed between James Stirling and Mrs Donaldson, the survivors of the first family, in terms of the antenuptial marriage-contract?

The law is settled that, where a legacy is given to a plurality of persons named or sufficiently described for identification, "equally among them" or "share and share alike," there is (in the absence of expressions by the testator importing a contrary intention) no room for accretion. Now, here, although James and Robert are not named in the deed of appointment, they are sufficiently described for identification as the children of the first marriage, excepting Mrs Donaldson, as there were only three children of that marriage and could be no more. Therefore it is just as if the provision had run "to my sons Robert and James Stirling equally among them, share and share alike."

The doubt which I have felt is whether the deed does not contain expressions of intention by the testator that there should be accretion. I think it is not improbable that he intended that in any event Mrs Donaldson should not get more than £10. But he has not said so. The gift is not to Robert and James "and the survivor," which would have put the matter beyond doubt; and it is not certain that if he had contemplated the possibility of Robert predeceasing he would not have made a larger provision for Mrs Donaldson.

In this state of matters, although the question is very narrow, I think that Mrs Donaldson is entitled to the benefit of the doubt, and that the usual rule of construction should be applied. Even in that case, James, the second party, will get nearly three-fourths out of the fund—£700 out of £942.

The Court pronounced the following interlocutor:—

> "Find, in answer to the first question therein stated, that the provisions there referred to vested at the death of Mrs Euphemia Stirling: Find, in answer to the second question, that the deed of apportionment was effectual when executed, in so far as it apportioned the estate among the objects of the power, and did not lapse on the death of Robert Stirling: And find, in answer to the third question, that the fund in question which would have been taken under the deed of apportionment by Robert Stirling had he survived falls to be divided equally between the second and third parties: Find and declare accordingly, and decern."

Counsel for the First Parties—Kinloch. Agents—Donaldson & Nisbet, Solicitors.

Counsel for the Second Party—R. S. Horne. Agent—Irvine R. Stirling, S.S.C.

Counsel for the Third Party—Wilton. Agents—Donaldson & Nisbet, Solicitors.

Counsel for the Fourth Party—A. M. Anderson. Agents—Donaldson & Nisbet, Solicitors.

Tuesday, December 13.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

WEIR *v.* GRACE.

Agent and Client—Will in Favour of Law-Agent—Undue Influence.

Circumstances in which *held* that a law-agent had discharged the *onus* resting on him to show that a will made in his favour by his client expressed the true and deliberate intention of the testatrix, and had not been impetrated from her by his undue influence.

Alexander Weir, Melbourne, Australia, and Mrs Ann Weir or Key, St Andrews,

heir in heritage and next-of-kin of the deceased Miss Margaret Brown, who resided at New Grange House, St Andrews, raised an action of reduction against Stuart Grace, banker and solicitor, St Andrews, C. S. Grace, W.S., St Andrews, son of Stuart Grace, and certain other persons, legatees under the will, which was one of the documents sought to be reduced.

The summons sought for reduction in so far as regards any right which the defender Stuart Grace or the defender C. S. Grace could claim under them, of (1) a letter dated 5th March 1881 purporting to embody the testamentary directions of the said Miss Margaret Brown and her sister Miss Ann Brown, in the following terms:—"*New Grange, 5th March* 1881.—Dear Mr Grace,—My sister and myself thinks we should now make our will, and as you have been our kindest friend in giving us your good advice at all times, we both think we cannot do better than leave you at our deaths, New Grange, Mountville, the two cottages and gardens at East Grange, and the house No. 62 in South Street, St Andrews, and all that is in our possession at the time of our demise. We leave it solely to you, also all the furniture in our house, silver plate, jewellery, books, pictures, napery, crockery, and wearing apparel, &c. &c. We leave you sole executor with the exception of a few legacy's for you to pay out of the fund.—MARGARET BROWN." Then followed legacies amounting in all to £5000. (2) A deed of settlement by Miss Margaret Brown dated 1st April 1881, with relative codicils dated respectively 15th June 1886 and 5th April 1893, whereby she conveyed all her property, heritable and moveable, to her sister Miss Ann Brown, and in case of her predecease (which happened) to the defender Stuart Grace and his heirs, under burden of the legacies, and appointed Miss Ann Brown, whom failing the defender Stuart Grace, whom also failing the defender C. S. Grace to be her executrix or executor; and (3) a testament-testamentar by the Sheriff of Fife and Kinross in favour of the defender Stuart Grace as executor-nominate of Miss Margaret Brown following upon the deed of settlement second sought to be reduced. Reduction was not sought of the letter or settlement in so far as the special legacies were concerned.

The pursuers pleaded—"(1) The said letter and the said deed of settlement by Miss Margaret Brown and the said confirmation ought to be reduced to the extent concluded for, with all that has followed thereon, in respect that the defender Stuart Grace being the confidential law-agent of Miss Margaret Brown at the dates thereof, and down at least to August 1895, took advantage wrongfully and improperly, and in violation of his duty as a law-agent and of his position and influence as such, to induce Miss Margaret Brown to grant the same to his, the defender's, advantage, and to the lesion of Miss Margaret Brown and the pursuers. (2) In respect said letter and provisions were procured from Miss Brown by said defender by undue influence, the same, with all that has followed thereon, ought to be reduced as concluded for. (3) The execution of said letter and provisions having been procured by the defender Stuart Grace in favour of himself and his son while acting as the law-agent for Miss Brown, without the deceased having the benefit of disinterested counsel and advice, the said defenders cannot be permitted to hold the benefit so obtained. (4) The said letter and provisions not being the deliberate, voluntary, and uninfluenced acts and deeds of the deceased, ought to be reduced with all that has followed thereon. (5) In the circumstances of the preparation of the said deed of settlement as condescended on, the *onus* of showing the provisions challenged to have been the deliberate and uninfluenced act of the deceased lies on the defenders."

The defenders pleaded—"(2) The whole material averments of the pursuers being untrue, the defender is entitled to absolvitor."

Proof was led before Lord Kincairney, which disclosed the following facts:—Miss Margaret Brown was born in 1813, her sister Miss Ann in 1818. For many years they lived together in a house called New Grange, about a mile from St Andrews. They were in easy though not in affluent circumstanees, the estate of the survivor Miss Margaret Brown at her death in 1897 exceeding £20,000. They lived very simply; their life was uneventful but not secluded, and though of homely manners they were sensible and intelligent. There were several neighbours who called on them, and some friends who visited them. They had a brother, Robert Gibson Brown, who lived at Newport, and whom they occasionally visited down to his death in 1886. They had next to no intercourse with the pursuer Mrs Key or her family. Their most intimate friends and most frequent visitors were Mr Grace and his family. Mr Grace was born in 1823; his firm of Grace & Yule had been agents for the Misses Brown's father, and for many years he had been the most intimate friend of the ladies, and their adviser and the transacter for them of any legal business requiring attention. Among other pieces of business which he did for them was the preparation in 1869 of a mutual will in favour of the survivor, and the conduct of certain legal proceedings about the teinds of their property.

Mr Grace's account of the circumstances leading to the preparation of the will were as follows:—In March 1881 he called at New Grange and the Misses Brown handed him the letter dated 5th March above quoted, and requested him to make a will for them giving effect to the letter. He deponed that he told them that he could not make a will in his own favour, and recommended them to leave the money among their own relations, but that the ladies adhered to their determination, and Miss Ann suggested that if Mr Grace would not make the will, Hugh Lyon, S.S.C., Edinburgh, might be employed to do so. Mr Lyon was Mr Grace's Edinburgh correspondent, and had acted for the Misses Brown in their legal matters about the teinds of

their property already mentioned. Mr Grace further deponed that at the request of the Misses Brown he agreed to see Mr Lyon on the subject, and in accordance with his promise he shortly afterwards called on Mr Lyon and mentioned the wish of the Misses Brown.

As a result of this interview two draft wills were prepared in Mr Lyon's office, the names of the legatees being left blank, and James Robertson, a clerk in the office, went down to New Grange, saw the Misses Brown, and filled up the blanks according to their instructions. When the deeds were extended and ready for execution, Mr Alexander C. Logan, W.S., another of Mr Lyon's clerks, went down to New Grange, read over the deeds to the Misses Brown and got them signed, the witnesses being himself and Jane Smith, a domestic servant at New Grange. Mr Robertson took back the wills to Edinburgh, and they were left in the custody of Mr Lyon.

Among the legacies left by the will was one to George Brown, the ladies' brother; whom failing to his wife. George Brown died in 1886, and it occurred to the ladies that they did not desire the legacy to him to pass to his widow. Mr C. S. Grace thereafter procured the wills from Mr Lyon, the legacy to Mrs Brown was revoked, and the wills were returned to Mr Lyon.

Miss Ann Brown died in 1888, and her will, which carried her estates to her sister, was recorded in the Sheriff Court Books of Cupar. Mr Lyon died in 1891, and on 19th November 1892 Messrs J. & C. S. Grace wrote Mr K. R. Maitland, W.S., who had succeeded to the business, intimating Miss Margaret Brown's wish to have her will sent to herself. This was done, and thereafter the will remained in her possession. On 6th April 1893 she revoked another legacy, having paid the amount of the legacy to the legatee.

Miss Margaret Brown died on 15th April 1897, and after her death the letter of instruction and the will were found in her repositories. On 7th July Stewart Grace was confirmed her executor. The present action was raised on 6th December.

On 13th July 1898 the Lord Ordinary pronounced the following interlocutor:—"Finds that the pursuers have not established any sufficient ground in law for reducing the documents sought to be set aside: Repels the reasons of reduction; sustains the defences; and assoilzies the defenders from the conclusions of the libel, and decerns."

Note.—"The pursuers of this action of reduction of the settlement of Miss Margaret Brown are her cousins-german and sole next-of-kin, or at least are among her next-of-kin. The defender Mr Stuart Grace has for many years carried on business as a solicitor in St Andrews, and has acted as the law-agent and legal adviser of Miss Brown, and, when she was alive, of her sister Miss Ann Brown, for more than thirty years. Miss Brown died at the age of eighty-four on 15th April 1897. The settlement sought to be reduced was executed on 1st April 1881, and it appears from its testing clause to have been prepared in the office of Hugh Lyon, S.S.C., Edinburgh. It is a general settlement of Miss Brown's estate in favour of Mr Grace, under burden of payment of certain legacies. Reduction is asked only so far as regards the right conferred on Mr Grace or his son Charles Stuart Grace. It is, I think, very important to notice that the action concludes for reduction also of a letter dated 5th March 1881, addressed by Miss Brown, for herself and her sister Ann, to Mr Stuart Grace, which, so far as he is concerned, is in substantially the same terms as the settlement; so that the pursuers had to guard against the contingency of this letter being held to be testamentary, even if the settlement were reduced.

"No doubt has been suggested that Mr Stuart Grace, at the date of the will, stood in the relation of confidential legal adviser to Miss Brown, and the action therefore regards the validity of a settlement by a client in favour of her law-agent.

"I think it may not be inconvenient to refer at the outset to the law applicable to such a deed, which I think has been fairly well settled. There is no doubt that the law regards such a deed with extreme suspicion, and, when it is prepared by the law-agent and beneficiary, with much disfavour. I understood the pursuers to contend that such a will is null, irrespective of the circumstances in which it was granted. They referred to *Anstruther* v. *Wilkie*, January 31, 1856, 18 D. 405, in which an agreement by a client to make a gift of £1000 to a law-agent for his services was reduced. Lords Wood and Cowan appear to have held it null, apart from the circumstances. The Lord Justice-Clerk held that it was extortionate. The judgment declared it to be null 'in the circumstances.' In *Logan's Trustees* v. *Reid*, June 13, 1885, 12 R. 1094, it was held, for the first time in this country. that a donation by a client to his agent, in circumstances which were not suspicious, was revocable even after the donor's death. From that judgment the Lord Justice-Clerk dissented. I think that if these cases apply, reduction in this case could not be resisted.

"But I think it settled that these cases do not apply, and that wills in favour of a law-agent are not in the position of donations during life; and that such a will is not null by our law, but only liable to rigorous scrutiny. See *Huguenin* v. *Baseley*, 1807, 1 Whyte & Tudor, 7th ed. p. 284. It seems, therefore, unnecessary to refer to the English cases about deeds *inter vivos*. I do not suppose that there is much difference between our law and the law of England on this point. We approach the matter somewhat differently. In England the rules seem to be—*First*, 'That the *onus probandi* lies in every case upon the party propounding a will, and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator;' and *second*, 'that if a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion

of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased'—*Fulton* v. *Andrew*, 1875, L.R., 7 H.L. 448, *per* Lord Cairns (quoting B. Parke), p. 461. In Scotland a probative will must be attacked in an action of reduction, in which there is a primary or apparent *onus probandi* on the pursuer; but that appears to be a result from the mere form of procedure, and, at least in regard to wills of clients in favour of law-agents, there seems to be no substantial difference between the laws of Scotland and of England, either as to the *onus probandi* or the amount of the *onus*.

"In the case of *Park* v. *Olatt* Sir John Nicholl states the law as to a will propounded by an agent in his own favour as follows:—'The presumption and *onus probandi* are against the instrument, but the law does not render such an act invalid; the Court has only to require strict proof, and the *onus* of proof may be increased by circumstances, such as unbounded confidence in the drawer of the will, extreme debility of the testator, clandestinity, and other circumstances which may increase the presumption, even so much as to be conclusive against the instrument. In the absence, however, of any circumstances of this sort the demands of the law may be more easily satisfied.'

"In a very recent case of this kind in the Probate Court, Lord Davey lays down the principle thus—'Whenever a will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator, the Court ought not to pronounce in favour of it unless that suspicion is removed'—*Tyrell* v. *Painter* [1894], Pro. Div. 151.

"So far as I am aware there is only one case in our books of much importance on this precise point—*Grieve* v. *Cunninghame*, December 17, 1869, 8 Macph. 317. In that case the will was sustained, and the rule was stated by the Lord President, quoting and adopting the note to Lord Barcaple's interlocutor—'It will always be upon the agent to show that the making of the settlement in his favour was the free and uninfluenced act of the testatrix, deliberately entertained and carried through with an entire knowledge of its effect'—*Munro* v. *Strain*, June 18, 1874, 1 R. 1039, is really a case of facility and circumvention.

"Turning now to the facts, what is most noticeable is that there are very few facts to be considered. The testatrix and her sister Ann, who died in 1888, were two maiden ladies who had lived together for many years in a house called the New Grange, about a mile from St Andrews. If not in affluent, they were at least in easy circumstances, and Miss Brown's estate at her death exceeded £20,000. They had, however, been brought up in a homely way, and apparently they always lived very simply, and I think it proved somewhat penuriously, at least it is impossible to say that they were liberal.

"It is said on record that they did not know how wealthy they were, and that they were kept in ignorance of their means. But of that I find no proof. Their life was quiet and uneventful, but, as I think, not solitary or secluded. There were several neighbours who were in the habit of calling on them, and they had some friends who visited them. They had a brother, Robert Gibson Brown, who lived at Newport, and whom they occasionally visited. He died in 1886. The Misses Brown had next to no intercourse with their cousin Mrs Key, who lived in St Andrews, or with her family. There is some evidence that the testatrix entertained a dislike to some of them, particularly to William Key. Apparently the Keys had gone rather down in position and Miss Brown had improved, and that may have been the reason, although a very bad one. There is no doubt that their most intimate friends and most frequent visitors were Mr Grace and his family. Mr Grace's acquaintance with them had apparently begun at Duloch, near Inverkeithing, a property belonging to a Mr Gibson, who had married another Miss Brown, and was a man of wealth, and for many years Mr Grace had been their most intimate friend, the transactor for them of any legal business requiring attention, and their adviser when they required advice, and he and his wife and son called on them very frequently. Among other pieces of business which he did for them was the preparation in 1869 of a mutual will in favour of the survivor, and the conduct of certain legal proceedings about the teinds of their property.

"Miss Ann Brown was by a couple of years the younger of the two sisters. She died in 1880 at the age of seventy. The pursuers seem to endeavour to prove, I hardly know why, that Miss Brown, the testatrix, had the stronger will, and exercised some ascendancy over her sister. I think that is not proved, and it certainly would not aid the pursuers' case if it were. It is quite clearly proved that both the ladies, if of somewhat homely manners, were sensible and intelligent and in no way eccentric. The means of forming an opinion about Miss Ann Brown are not complete, because none of her letters are produced, but the letters of Miss Brown to the witness Mrs Auld (who seems to be in the habit of preserving her letters), and also Mr Grace's letters to her and her to him, have been produced, and I have certainly been impressed with Miss Brown's letters, and those of Mr Grace to her. Her spelling is defective, but her letters are well written and well composed, and are those of a sensible clear-headed woman, and Mr Grace's letters are such as a man of business would address to a woman whom he knew to be capable of understanding business matters. I should certainly lean to the opinion that in point of intelligence Miss Brown was above the average. The correspondence produces the impression that she was not a woman who

would be easily hoodwinked or subjugated to the will of another.

"The circumstances leading to the preparation of the will are told by Mr Grace. There is no other evidence, and no reason for doubting his. His account may be thus summarised. In March 1881 he called at New Grange, and the ladies then handed to him the letter dated 5th March, which is printed on record. It expresses the intention of the ladies to leave their estate to Mr Grace subject to the legacies. Perhaps it is itself testamentary, but that need not be considered. The ladies requested Mr Grace to make a will for them giving effect to the letter. He depones that he told them that he could not make a will in his own favour, and that he recommended them to leave their money among their own relations. He says the ladies adhered to their determination, and that Miss Ann suggested that if Mr Grace would not make the will, Mr Lyon, S.S.C., might be employed to do so, and Mr Grace says that he at their request agreed to see Mr Lyon on the subject. Mr Lyon was on very intimate terms with Mr Grace. He was related to Mr Grace's first wife, and was his regular Edinburgh correspondent. He had acted for the Misses Brown in their legal matters about the teinds of their property which have been mentioned.

"This letter is of great importance in this case in every aspect of it. The pursuers aver 'That it is not the spontaneous production of Miss Margaret Brown. She was unlearned and unskilled in her expressions, engaged in written composition seldom and with difficulty, and was utterly ignorant of legal phraseology. The said letter was written to the dictation of or after a model furnished by defender Stuart Grace.' The pursuers have not attempted te prove this averment. My own impression is that (apart from certain legal terms) the lady who wrote the letters which have been produced was fully competent to write this particular letter without any assistance, or at least with her sister's assistance. The word 'demise' and the term 'sole executor' perhaps attract attention, but it is not likely that the word 'demise' was dictated or suggested by a Scotch lawyer, and there is no reason for supposing that Miss Brown did not understand the meaning of 'sole executor.'

"In accordance with the request of the Misses Brown and his promise to them, Mr Grace shortly afterwards called on Mr Lyon and mentioned the wish of the Misses Brown, and the two wills were accordingly prepared and executed. There is a good deal of evidence, and a good deal was said in the debate about the way in which these deeds were executed, and no doubt there may be discussion on these matters if the case goes further. My conclusions on the evidence as to this point are—(*First*) That neither Mr Robertson, who saw the Misses Brown and received their instructions, nor Mr Logan, who attended to the execution of the deeds, asked or received from Mr Grace any instructions at all. The evidence on this point may impress different people differently, but that is my impression; (*secondly*) I think that the Misses Brown neither asked nor received any advice, legal or otherwise, about their settlement, unless it was from Mr Grace. It may be that they did not ask advice from anyone. Neither Mr Robertson nor Mr Logan advised them at all.

"I cannot but think that it might have been better had Mr Grace not called on Mr Lyon about the wills. The ladies were quite competent to instruct Mr Lyon themselves. Further, it would have been better that the wills had been prepared by some agent less closely allied with Mr Grace than Mr Lyon was; and, lastly, it would have been much better had Mr Lyon (the matter being so delicate) taken the instructions of the ladies himself. At the same time, I think I am entitled to consider that the business could not have been entrusted to a more capable or honourable agent.

"Mr Grace says that he resolved that he would thereafter have nothing to do with the wills, and would remain ignorant of all that took place about them; and I think he acted as far as possible on that resolution.

"The wills were then left in the custody of Mr Lyon. The letter, as I understand, remained in the possession of the Misses Brown.

"Among the legacies left by the wills was one to George Brown, the ladies' brother. The legacy was to him, whom failing, to his wife. The letter mentions George Brown only. George Brown died in 1886, and it occurred to the ladies that they did not desire the legacy to him to pass to his widow; but it seems that they were not sure whether that would be the effect of the will or not. The result was that the wills were procured from Mr Lyon, the legacy to Mrs Brown was revoked, and the wills were returned to Mr Lyon.

"It may be noticed in passing that the Misses Brown had in contemplation the reduction of their brother's will, and that Mr Grace recommended them, if they thought of raising an action, to consult Mr Lyon, he himself being precluded from his connection with the will from acting or advising in that matter.

"Miss Ann died in 1888, and apparently her will, which carried her estate to her sister, was recorded in the Sheriff Court Books at Cupar.

"In March 1892 the wills were sent from the office of Maitland & Lyon, and thereafter remained in the possession of Miss Brown; and on 6th April 1893 she revoked another legacy—that to Miss Bogie—which had, I understand, been paid.

"Miss Brown continued in good health until some weeks before her death, and, so far as appears, she continued in the possession of her faculties. Her last letter to Mrs Auld, dated 3rd January 1897, is written in her usual style, and the writing is fairly good considering her very advanced years. I observe that she says 'I have had a great many Christmas cards and kind wishes,

which does not point to a life so secluded as the pursuers describe.

"I think that these are the material circumstances which require consideration in determining this question. There are a number of other circumstances and details of more or less consequence, but it would extend this opinion unduly to mention and discuss them. There is a conflict of evidence as to some things which occurred after Miss Brown's death which I shall notice very shortly afterwards, but I do not think they require consideration just at present.

"The first question is whether the will in question is to be regarded as prepared by the defender Mr Grace or not. On the face of it, and also in fact, it was not, but was prepared by an agent of repute in Edinburgh. Even taking it so, and supposing that the ladies had applied to Mr Lyon without saying anything to Mr Grace, I think there would still remain a strong presumption adverse to the will, and it would still be necessary to establish that the deed expressed Miss Brown's free and deliberate intention. But, considering Mr Grace's call on Mr Lyon, the intimate relations which subsisted between them, the fact that Mr Lyon did not himself see the ladies, and particularly the fact that the ladies received no advice from Mr Lyon's clerks, I have some difficulty in seeing that much difference is made in the law of the case by the intervention of Mr Lyon. No doubt the ladies had his protection, which was quite proper, but I am hardly prepared to dissent from the pursuers' contention that the deed must be taken as if it had been prepared by Mr Grace. I by no means say that Mr Lyon was put forward as a cloak or blind to conceal the fact that the deed was truly the deed of Mr Grace. There is no direct proof of that, and I do not think it was the case.

"But, conceding the view of the pursuers that this will must be taken as having been executed by Mr Grace as agent, is it not proved that it expresses the free and deliberate will of Miss Brown? In considering this question, the first thing to be considered is the letter of 5th March 1881. Did it express the free and deliberate will of the ladies? There is not a syllable of proof to the contrary. There is nothing to the contrary except suspicion. Suspicion of what? Is it suspicion that he influenced Miss Brown against her relations? That idea was repudiated at the debate, and there is no proof of it. There is no proof that Mr Grace dictated the letter or persuaded the ladies to write it. It is impossible to hold on mere grounds of suspicion that he did so.

"Then the suggestion remains that he so insinuated himself into their good graces, and dominated their wills, and unduly, although indirectly, persuaded them contrary to his duty as their professional adviser. He advised and assisted them very frequently. It may not be going too far to say that he put them under obligation for many acts of attention and kindness, and that he obtained their friendship and their favour there is of course no doubt, but I find no proof that he did so by the exercise of arts or practices which the law prohibits. The law has not defined the degree of intimacy or friendship which may subsist between an agent and his client, only it is very jealous of that relation, and takes care that the client is not induced to act contrary to what might be otherwise supposed to be his natural inclination.

"Now, in this case, it is true that the two ladies had relations who were not very distant. They had their brother, to whom a legacy of £1000 was left. It is explained that he was a man about their own age, without a family, and in no need of their money. There were the pursuers, their cousins, one resident abroad, the other in St Andrews, but, as has been explained, it is clear they had no favour for them. Mr Grace and his family were certainly their most intimate friends, and if they passed over these relations, it was natural enough that they should prefer Mr Grace.

"I think that the letter was written without the intervention of Mr Grace. If so, it seems hard to say that the wills, which were the mere echo of the letter, were not. I am treating the letter just now, not as in itself testamentary, but as expressing in a manner not open to much suspicion the will of the testatrix. I do not see that there is or can be any doubt that the ladies fully understood the wills, or that the witnesses Robertson and Logan were satisfied. The wills are simple. They give effect to the letter, and the ladies were subject to no infirmity of body or of mind which could disable them from understanding them.

"Another great peculiarity of this case is that the will was prepared sixteen years before the testatrix died, and it remained as the expression of her will during all that time. It was not in her possession until 1892, but she had occasion to reconsider it thrice,—(1) In June 1886, when she and her sister recalled the legacy to Mrs George Brown; (2) on the death of her sister; and (3) in 1893, when she revoked the legacy to Mrs Bogie. It cannot be suggested that she forgot her will, or that she thought she was not entitled to revoke it. On these two occasions in 1886 and 1893 she may be said to have confirmed it. It may be true that, if the will was originally impetrated by undue and illegal influence, the same influence which created it might preserve it. At the same time it does appear to me to be very difficult to say that if a testatrix remain of the same state of mind and will for sixteen years, that is not to be regarded as her free and deliberate will, but as a state of mind brought about by the undue influence of some-one else. I think it must be her own will, however it originated. It is impossible to hold the contrary, and I am satisfied that the letter and settlement under reduction are expressive of Miss Brown's free and deliberate will.

"If they are expressive of her free and deliberate will, has the Court any right to say that her will shall not receive effect, and that her money shall go to persons whom she did not desire to benefit, because

the legatee whom she selected to benefit was her law-agent? Apart from the right of the legatee, the testamentary rights of the testatrix have to be considered.

"I do not go into the details of the case of *Grieve* v. *Cunninghame*. I think it bears a close resemblance to the present case, but I consider the case of Mr Cunninghame was very much weaker than that of the defender in this case, and in my opinion I could not grant decree of reduction consistently with the judgment in *Grieve* v. *Cunninghame*.

"I regret the extreme length of the evidence in this case, and I think that the defender might safely have restricted his proof, although I must recognise that on account of the fulness of the disclosure expected from the defender, a proof in such a case cannot be short. There is also some conflict of evidence, which necessarily adds greatly to the length of a proof.

"There is one somewhat curious point which I ought probably to notice. I do not see that it can directly affect the case although it bears on Mr Grace's good faith. I allude to an alleged conversation with Mr William Key at the gate of the cemetery after the funeral of Miss Brown, when Mr Key says that Mr Grace told him that there was no will. On that point I am satisfied that Mr William Key was mistaken. He seems to have been in a state of excitement, as appears from an intemperate letter which he wrote to Mr Grace, and he may have confused what was said by Mr Grace junior with what he supposed to have been said by Mr Grace senior. But it is a point about which Mr Grace could not have been mistaken, and I have no doubt that his account of the matter is correct."

The pursuer reclaimed, and argued—The defender had not discharged the *onus* upon him of showing that the making of the will was the uninfluenced act of the testator, and that she had not been prejudiced by the fact that he was her law-agent and confidential adviser. The law was clear that wherever an agent received a substantial benefit from a client, whether by gift or will, a *sine qua non* to his enjoying that benefit was that he must show that the client had the benefit of independent advice, or at least had been placed in as good a position as if she had received independent advice. According to the authorities the Court must arrive at the conclusion that undue influence had been used, unless the giver or testator had been put into the same position as if she had been in the hands of an independent agent. It was not necessary that there should be moral blame on the part of the person benefited, the fact that there had been no independent advice was all sufficient. The agent was bound to see that his client was properly advised as to the consequence of her intended act—*M'Pherson's Trustees* v. *Watt*, December 3, 1877, 5 R. (H.L.) 9; *Gray* v. *Binny*, December 5, 1879, 7 R. 332; *Huguenin* v. *Baseley*, 1807, 14 Vesey 273, 1 W. and T. Equity Cases, 247; *Allcar* v. *Skinner*, 1887, L.R., 36 Ch. D. 145; *Parker* v. *Duncan*, 1890, 62 L.T. 642. That being the law, it was clear from the circumstances of the present case that Miss Brown had had no independent advice. The ladies had been influenced by Mr Grace at the time of the letter—indeed, the letter itself was expressed in such terms as showed that the ladies must have had legal aid in concocting it. Then again, Mr Lyon was Mr Grace's Edinburgh correspondent, and had taken his instructions as to the preparation of the will from Mr Grace. Mr Lyon had never himself seen the ladies, and the clerk who went down to see them took down in his pocket a draft will with only the names of the legatees left blank, and had not given the ladies any advice on the subject. In these circumstances the matter was in the same position as if Mr Grace himself had written the will. The Lord Ordinary admitted as much, and in doing so had arrived at a right conclusion. But he had gone wrong on the law. This was a strong case of its class. The ladies were in an extreme state of dependence on Mr Grace; they were old and he was their chief friend and their business adviser. The legal presumption must therefore be strongly enforced against him, and he had totally failed to show that the ladies when they made their wills had been placed in the same position as if they had been guided by neutrals.

Argued for defenders—If the Court was of opinion that the legacy was the result of the free exercise of the testator's will they would not set it aside — *Allcar*, *supra*, opinion of Cotton, L.J., L.R., 36 Ch. 171; *Parker*, *supra*, close of Sir James Hannen's Charge to Jury, 62 L.J. 643. The evidence here clearly showed that Mr Grace had exercised no undue influence over the Misses Brown in the preparation of their wills, and that the wills were drawn up at their own desire and expressed their unbiassed intentions. It was not the case of a solitary testator. The ladies were intelligent, and would no doubt talk over the matter together. Mr Grace had no hand in the preparation of the letter of instructions, never having seen it till it was handed to him, and this was plain from the wording of the letter itself. Mr Lyon was not the tool of Mr Grace; he accepted employment as an independent agent, and acted as such in the preparation of the wills. Clerks had been sent down from his office both for the purpose of ascertaining the wishes of the ladies before the deed was prepared, and for the purpose of having the deed executed, and on both occasions it had been apparent that the ladies thoroughly understood and approved of what they were doing, This being the case the wills must be given effect to—*Grieve* v. *Cunningham*, December 17, 1869, 8 R. 317; *Purfitt* v. *Lawless*, 1872, L.R. 2 P. & D. 462.

At advising—

Lord Justice-Clerk — Where a law agent of a testator receives a substantial benefit by his client's will "it lies upon him to show that the making of the settlement

in his favour was the free and uninfluenced act of the testator, deliberately entertained and carried through with an entire knowledge of its effect." I take these words from the opinion of Lord Barcaple, which was adopted as a correct expression on the question of *onus* of proof in such a case by the late Lord President. The *onus* upon the favoured agent is a serious one, and the bequest cannot stand if he is unable to discharge it. On the other hand, if he does discharge it to the judicial satisfaction of a court of justice, there is no law which prevents such an unbiassed and voluntary gift from receiving effect. It may receive effect even in a case where the law-agent has himself given aid in the actual business of the making of the will, although of course, in such a case, the difficulties of discharging the *onus* are necessarily much increased. In a case where there is no opportunity for mutual advice suspicion will much more strongly attach to the transaction. That element does not present itself here.

In this case there is the specialty that the will is not the will of one person, but practically the will of two acting together. The two Misses Brown mutually gave a gift the one to the other, and acted in concert as to the final disposal of their means. They were persons who had the full management of their own affairs, capable of attending to any business that these affairs might make necessary. They had full knowledge as to their means, and were attentive to their management. It is proved satisfactorily that before Mr Grace knew anything about their intentions they had drawn up a statement of them in writing in the form of a letter to Mr Grace himself, which the elder sister had signed. The case is further peculiar in this, that the will was not made when death was supposed to be imminent, or when extreme age made it always imminent. What was done was done a good many years before death in the case of one of the ladies, and a great many years in the case of the other. It was in form a mutual making of wills by the two sisters, with evident consideration given to the claims of others, and there was no obstacle interposed to their jointly, or either of them after the death of the other, making any alteration upon the testament that had been signed. Indeed, after intervals of years, from change of circumstances, what had been done was brought prominently to notice, and practical alterations were made.

In all these particulars the case is unlike former cases in which similar questions have arisen. It is practically impossible to come to any other conclusion than that the ladies were in full knowledge of what they had done, and were in that knowledge for many years, during which now and again their testamentary acts were brought forcibly back to recollection. That they did deliberately what was done, or deliberately adhered to it, cannot, I think, admit of doubt. The surviving sister, with her own hand, made alterations of the will by codicil—an act quite inconsistent with her not being conscious of and adhering to what was not altered by the codicil.

The next question is, how did it come to be done? Did the agent who was favoured by any action of his bring it about. Of that I can find no trace. As was pointed out already, the skeleton of their will was put down in writing by themselves, and there is no reason to doubt the truth of Mr Grace's statement that their presenting the document to him was the first hint he had of any such intention as it expressed being entertained. He did not take the letter addressed to him but left it with the ladies, which was not what a man would have done who was eager to bring about a bequest in his favour.

Then, did Mr Grace take any part in carrying out of the business of making up and completing the deed? I think it is satisfactorily made out that he did not. Mr Lyon, of Maitland & Lyon, who had done business for the ladies before, was communicated with at their request by Mr Grace. Here let me say that Mr Grace, in communicating with Mr Lyon, may not have acted so prudently as he might have done. It would have been wiser had he left it to the ladies to make their own communications to another agent without his intervention at all. But the employment of Mr Lyon was the suggestion of the ladies themselves, and therefore it was in no way a selection by Mr Grace of an agent for them. And as regards Mr Lyon himself, there cannot be a doubt that he was the last person that anyone who knew him would have selected to assist in any transaction to which a suspicion of unfair dealing might attach. He was the last person that a man who knew him would select to get any improper transaction carried through. I do not doubt that in bringing the ladies in contact with Mr Lyon Mr Grace did what he thought was certain to ensure that they would be dealt with in the most upright manner, and that any business done would be absolutely free from taint. Mr Lyon, it appears, was at that time leaving home in ill-health, but he had an experienced managing clerk in his office, who took then a general charge of his business, and who had a very long experience. This clerk personally visited the ladies. They named to him the beneficiaries they desired to favour, having a jotting of their own before them of what they wished to be done, and he was satisfied that they understood what they were doing, and that it was their true will and intention. Thereafter the two deeds were extended, and Mr Logan, a Writer to the Signet, who had been ten years in business with Maitland & Lyon, went with the deeds and attended to their execution, which was done with reading of the deeds before signing in the ordinary way. The deeds thereafter remained in Mr Lyon's custody until they were again required in consequence of the testators desiring to make certain modifications by codicil. And latterly the operative will remained in the surviving testator's custody for nine years before her death, and was found in her repositories, the original letter expressing her own and her sister's intention

being found tied up with it. These facts also tend to give this case a complexion very different from that ordinarily found in similar cases.

It was said in argument that there was no neutral advice, but it is not clear in what sense that word is used when counsel employ it in this case. If it means that there was not a neutral adviser to take the ladies' instructions and to see that what they really desired to do was what was in fact done, then I think it is not a just criticism. Assuming that they were capable of forming their own intention without assistance, and giving intelligent and definite expression to it, then I think they did have that neutral advice which enabled them to carry out that intention effectively. A person of sound mind and capable of deliberate intention does not require advice in any other sense than that a lawyer can advise how effectually to do that which is desired so as to prevent any miscarriage by misuse of terms or omission of necessary words, or anything of that kind. But if the pursuer meant advice in the sense of suggestion or persuasion as to what it was right to do, I do not think that this was a case to which any such idea was applicable. Cases do occur where persons, from natural slowness of intellectual grasp, or from being debilitated by sickness or old age so that their mental powers are not so efficient as in health or less advanced years, may properly be aided by a confidential lawyer to consider and turn over their affairs, and the claims of those who are related to them, and so be protected in the making of their testamentary dispositions from being the victims of the importunity or fraud of interested persons, or from doing things under erroneous ideas. But this is not a case of that kind. No one can suppose that if these ladies had at their own hand selected a lawyer and given him instructions, that he would have had any cause to suppose that they needed guiding advice to help them, or that their powers were enfeebled so that they needed guidance to enable them to form a sound judgment and make a rational disposition of their property. He would have seen that they were quite able to form their own sound unbiassed judgment. He would naturally have taken their instructions without hesitation as from persons in full vigour of mind. Therefore I do not consider that in any proper sense they were without neutral advice. The course of proceeding was entirely above board, and there was nothing unusual in it except that the expressed desire was to leave the residue to their old friend, who was their agent. My opinion is that the defender has discharged any burden of proof which that exceptional circumstance lays upon him. I have no doubt that what was done was the free and uninfluenced act of the party, in full knowledge of its effect, and that Mr Grace is not only free from the imputation of having influenced what was done, but is in the position of not even having attempted to do so. I therefore would move your Lordship to adhere to the Lord Ordinary's interlocutor.

Lord Young—We have to deal with an action of reduction of a will dated in 1881, and of a letter signed by the testator by that will dated on 15th March preceding. The will gives the residue of the testator's estate to Mr Stuart Grace, a man of business in St Andrews, and who acted as man of business for the testator. The letter, I may say even now, is a holograph letter of the testator whose will is under reduction, containing instructions for the preparation of a will, and it is addressed to Mr Stuart Grace, in whose favour, as I have said, it is to a large extent—an extent of something at least approaching £10,000 out of the estate, which was represented to be of the value of about £15,000. Now, the ground of reduction is stated in the first plea-in-law for the pursuers, who are some of the next-of-kin of the testator. That plea-in-law is to the effect that Mr Stuart Grace, being the confidential law-agent of Miss Margaret Brown at the date of the will, and down at least to August 1895, "took advantage, wrongfully and improperly and in violation of his duty as a law-agent, of his position and influence as such to induce Miss Margaret Brown to grant the same, and to procure the same to his, the said defender's, advantage, and to the lesion of Miss Margaret Brown and the pursuers," that is, of the testatrix and her next-of-kin. And the second plea-in-law sets forth this as the ground of reduction—"In respect said letter and provisions were procured from Miss Brown by said defender by undue influence, the same, with all that has followed thereon, ought to be reduced as concluded for"—that is, it ought to be reduced as obtained by a law-agent from his client by undue influence.

Now, the will, which is in very distinct terms, appears to have been prepared, so far as wills bear by whom they are prepared, not by Mr Stuart Grace, but the testing clause, which usually gives the information as to who prepared the will, bears that it was written by Charles Macfarlane, clerk to Hugh Lyon, S.S.C., Edinburgh, and was subscribed by the testator before Alexander Christopher Logan, W.S., and Jane Smith, domestic servant at New Grange House—that is, the domestic servant of the testator. Upon the face of the will, therefore, which is produced under the call in the reduction, there is no objection to it, and nothing to suggest that it was prepared by or executed under the supervision of any beneficiary under the will. It appears on the face of it to have been prepared by an Edinburgh firm of law-agents and conveyancers, and to have been witnessed by a Writer to the Signet, who appears from the evidence to have been a clerk in the employment of the Edinburgh firm, and by the domestic servant of the testator. But Mr Stuart Grace may nevertheless have been the law-agent of the testator, and acted improperly as such in exercising an undue influence—that is, unduly using his influence as a law-agent on the ladies to procure the letter and the will, and as your Lordship has said, it is averred in the condescendence that he did so. We have heard a great deal in the course of the case, and read a

good deal in the Lord Ordinary's judgment, about the suspicions arising, and of a legal presumption where a law-agent has transactions with a client which benefit himself, or even when he prepares and has executed under his supervision a will by a client in his own favour. It does not appear to me that we are very much concerned with any suspicions or legal presumptions in this case. They are very important, and are acted on in cases where the facts are not known to the Court, where the Court has no information, but where the facts are known to the Court—that is to say, where the Court has information respecting them in the only way in which a court of law can have information as to the facts of the case, namely, by evidence, there seems to me to be no room for suspicion or any presumption other than may have, as the Court thinks, a foundation on the facts as disclosed in the evidence. But if it should appear on those facts, contrary to my impression, that there is any room for a suspicion or presumption on the rule of law, of course we shall have to give effect to it.

In a case where evidence has been taken, the first thing to determine is, what is the conclusion in point of fact which we reach. I do not mean at all to go through the evidence, or even to refer to it in any detail, but in the first place, with reference to the letter, I think the facts may be taken from the evidence of Mr Stuart Grace himself. Mr Grace gives this account in the proof—"In March 1891—I don't recollect the date exactly, but it was a few days subsequently to the 5th"—the letter is dated 5th—"I was calling at the house, Miss Brown told me in presence of her sister that they had resolved to make their will, and that their intention was to bequeath some legacies, and to leave me the residue of their estate." In what I have said hitherto I have only referred to the one sister whose will alone is under reduction in this matter—Miss Margaret Brown—but it is nevertheless very proper in considering the case to take account of the fact that there were two sisters, Ann being the younger—a few years younger than the other—and who made a will in similar terms, but whose will is not under reduction, the only effect of it being that she having predeceased, it increased the property of her surviving sister Margaret, whose will is under reduction. They both lived together until the younger died, I think in 1888. Mr Stuart Grace proceeds to say—"I was calling at the house. Miss Brown told me in presence of her sister that they had resolved to make their will, and that their intention was to bequeath some legacies and to leave me the residue of their estate, and at the same time they handed me the letter dated 5th March 1881. I read it. (Q) Before reading that had you any idea of any such intention being in the mind of these ladies?—(A) Not the smallest. (Q) Had you ever spoken to them on the subject?—(A) Never. After I read the letter I gave it back to them almost immediately, and I told the ladies how much I appreciated their kind proposal, but that I could not agree to it. I also disclaimed having done anything to merit it. I recommended they should leave the residue of their property among their own friends and relations. I told them that it would be always a pleasure to me to aid them with my advice when they wanted it, and I reminded them that I had made charges against them for all the business I had done." I am not going to read, I think, almost any more of his evidence, but he goes on to state that they both informed him subsequently that they had made up their minds to have their will arranged in the terms expressed in the letter. Then what did he do? He told them that if they did adhere to the notion of making a will in these terms, it would be proper that it should be made and executed under the supervision of another man of business. He also says that upon his saying that, one or both of them mentioned Mr Lyon's name. They both knew that Mr Lyon was his Edinburgh correspondent, and that he had as such done business for them. I think it was contended in argument that we must take it as the fact that he himself suggested Mr Lyon. I do not think it material, and am not unwilling with reference to the opinion which I entertain and am going to express, to take it that he suggested Mr Lyon, and that they agreed to it. He then went to Mr Lyon and informed him of the position of matters—that these two ladies, who were known to him, Mr Lyon, as Mr Grace's clients, had made up their minds, and had instructed him to make out a will in the terms expressed in their letter—that is to say, making him residuary legatee, each sister giving her property to her sister in case of the sister's predecease, and then to Mr Stuart Grace. Now, I should have expected, I confess, Mr Grace to have retained the letter of instructions and taken it to Mr Lyon. I think that if he had retained it that would have been the course which would have occurred to most people for him to take, but he says that when he repudiated the idea of their making a will in his favour at the meeting in March when the letter was handed to him he gave it them back. He said, "No; you should make a will in favour of your own relations;" and he gave them the letter to "consider it carefully and fully whether it was not the most proper course, which I tell you it is, that you should leave your property to your own relations;" and the fact that he had not the letter with him to take to Mr Lyon, but that it remained in the possession of the two ladies, Miss Margaret, whose will is under reduction and her sister Ann, who lived with her, is confirmatory of his statement of what passed at the meeting on 5th March or a few days after. I see no reason whatever to doubt that the fact is as he states it. A suggestion was made, I think, in the course of the argument which certainly did not command my approbation of itself, that it would have been better if he had declined to tell Mr Lyon anything, and just said—"Go to the old ladies, or send some responsible or trustworthy clerk

who manages your business or aids you in managing it in these matters, to the old ladies, and find out for yourself what they wish to be done." I think Mr Lyon would have elevated his eyebrows if Mr Stuart Grace had refused to tell him that he came to him because the old ladies had intimated to him their intention and desire of making a will in his favour, and that that was his reason for coming. It would have been very remarkable conduct on his part in my view, and would have caused very deserved and intelligible surprise in Mr Lyon's mind if he had been secret in the matter and not told him frankly and openly "My reason for coming to you is that they have intimated to me verbally and in writing that they wished to make me their residuary legatee and I thought it would be better that the preparation of the settlement and the execution of the settlement should be done by you and under your supervision." Then two draft deeds were prepared of the wills exactly as they stand except only that the name of the residuary legatee, Mr Stuart Grace, and the names of the other legatees, were left blank in order that it might not be filled in until the ladies had been communicated with, and that the name should be filled in on their instructions. Then these drafts with these blanks are taken to the ladies by Mr Robertson, who was for over twenty years a managing clerk in Mr Lyon's business. He had not been so long at that date, but he had been a long time in the office and was a very experienced man and trusted by Mr Lyon in the management of exactly such business as this. His account —and this is almost the only other thing which I shall read from the evidence—I find in the proof for the pursuers. He gives an account of the preparation of these drafts. He is not examined until after sixteen or seventeen years after the event, and he is not able to say whether he prepared the drafts or whether Mr Macfarlane, another clerk in the office, did. He, however, says this—"I went over to St Andrews one Saturday, in terms of our letter to Mr Grace of 23rd March, which was written by Mr Lyon. Mr Grace's letter of the 19th has not been able to be got. When I went to St Andrews I went first to Mr Grace's house. I found him at home." He, of course, knew what he had come about; it would have been very singular if he had not. He goes on—"I had sent no communication to the Misses Brown themselves. Up to this point any correspondence there had been to which Maitland & Lyon were parties was entirely with Mr Grace. When I got out to New Grange I found both ladies in. I had never met them before. (Q) Did you explain to them who you were? (A) I assume so, but I cannot remember." I repeat that his examination is something like sixteen or seventeen years after the event. "We set to to the drafts, and they had a jotting ready for me, and from it and the talk we managed to get the two drafts completed. I don't know what that jotting was. I always called it a jotting and list of legacies. I had it in my hand. I did not know the handwriting. On the first page of the draft, at the first blank, the words 'and his heirs' had been put in by Macfarlane. (Q) And you knew who 'his' was? (A) I did not suppose Mr Grace had been joking, or that the ladies had altered their minds. When I went to St Andrews I did not know anything about who the special legatees were to be, unless Mr Grace had mentioned them in that missing letter of the 19th which I would get to read. When I went there I expected Mr Grace to be the residuary legatee, and that was carried out. (Q) Were you there to advise the ladies in any way as to their settlement or just to fill in the blanks? (A) I was there to take from their own lips what they wanted. I was there altogether about a couple of hours. It took about an hour for the work and another hour chatting about all sorts of things." Then he is asked—"(Q) When you get instructions to frame a draft, and do frame it, is that not an important thing?"—a ridiculous enough question no doubt. The answer is—"Yes, but it was tentative to seeing for certain that it was by themselves;" and I think he states in the most distinct manner that the ladies quite understood what he was there for, and quite understood the draft which he read over to them, and the conversation in which they intimated to him distinctly that they meant Mr Stuart Grace to be the residuary legatee and named the individual legatees and the legacies to him. Well, I take that to be the fact with nothing to the contrary, and no reason suggested why we should disbelieve a word of it.

Then the next fact in the case is that Mr Logan was sent to have the wills executed, and his evidence is in the print. Mr Logan was quite an independent man. Although he was in Mr Lyon's employment he was a Writer to the Signet, and he went with the deeds made out and read them over to the ladies. Interrogated by the Court, he says—"When I called on the ladies I said I had come from Maitland & Lyon. I have no recollection whether I mentioned Mr Grace's name. I would likely say that I had seen him. They had made up their mind as to their settlement before I came. (Q) And they did not consult you at all? (A) They took me along with them in explaining why they were doing what they did; they gave a reason for the faith that was in them." That is too figurative language. That means, I suppose, that they gave a reason for their desire to make the will as expressed. "(Q) Did they consult you in any way about the settlement? (A) No, not to alter it in any substantial way. I can hardly say I advised them to any extent. I did not see any room for advising except on practical matters. I said I had come to get the drafts of their deeds adjusted. They were very intelligent and took up the thing quite well." Then there again we have the wills prepared by and executed under the supervision of the Edinburgh firm of Maitland & Lyon, or by the trustworthy employees of that firm who were employed by them to do such business.

Now, taking these to be the facts, I think I may refer to Mr Grace's relation to the ladies, and I shall do that almost in a sentence. I think he says in his evidence that he is now seventy-five, that he was acquainted with the father of the ladies the two Misses Brown from his boyhood, and had acted as his man of business after he got into manhood and became a man of business, that he was frequently at the Grange farm, where the father lived with his family, including these two old ladies, who are the testators. He was a frequent visitor there both during the father's life and after his death, and he says he was specially intimately acquainted with the youngest daughter—I think she became a Mrs Gibson—and very intimate with her and her husband. She died, and his intimacy with her seems to have been one of their many reasons for these old ladies having a great respect and regard and something approaching to affection for Mr Grace. He had been their father's friend and their younger and deceased sister's friend, and had been their friend, for a very long period of years. And he managed their business to this extent, that he procured moderate but apparently safe and reasonable investments for their money, but taking their instructions with respect to everything, and fully kept them acquainted with the exact position of their affairs at all times, and put into their hands the investment documents for their money. That was his relation to them; he was not only their man of business. Their business was of a very small amount and very easy kind. It was the investment of their funds; and there was a little bit of heritable property of inconsiderable amount. And he was a frequent visitor at their house, continuing his private personal intimacy with them which had existed with their deceased sister and had existed also in the time of their deceased father. He was more than their man of business—he was their personal friend.

Well, then, another fact which I may take as established on the evidence—no suspicion or presumption in the matter—is that the ladies were of sound disposing mind, quite of capacity to manage their own affairs. During their long lives they did manage them with his aid as man of business as to the investments in the manner I have mentioned. They kept house, lived we may say modestly, frugally, or some may think of applying the word parsimoniously. But they knew what they were spending, and they knew what they had to spend, and they knew what they were saving—they had a thorough knowledge of their affairs—there was no suggestion made to the contrary.

Now, upon these facts, is there any room at all for the use of the word "suspicion" or for any presumption against the validity of the testament which they made? I cannot regard this will as made or executed under the supervision of Mr Grace? I think it was not. A good deal was said about advice—whether Mr Lyon or Mr Robertson or Mr Logan gave any advice in the matter—about the importance of a man of business and the duty of a man of business in the discharge of duty. But his duty is not to give advice to people who are capable of making wills and of arriving at a conclusion as to how they ought to dispose of their property by will; it is to see what is their will, however they arrived at it, and to see that they thoroughly understand the deed or document which is prepared as giving expression to it, and to find out that such deed is giving an expression to their will. The duty of a man of business is confined to that. I do not think there was any duty on Mr Grace as a man of business, but I think it was entirely becoming as a personal friend of the old ladies and of their family that he should advise them—as he says he did—not to leave their property to him, at least without serious and deliberate consideration, and to consider carefully the advice which he gave them—that they had better leave it among their own relations. They knew their relations—knew them well; although there was not much intercourse with them, yet there was no avoidance by them of their few relations nor by their few relations of them. But it is not suggested, and it would be contrary to the evidence, that they had relations of whose existence or of whose circumstances they were ignorant. The ladies, knowing the state of the family, what relations they had and their circumstances, and knowing their own circumstances and being perfectly intelligent, I do not think it was incumbent at all on Mr Grace to give them any advice at all—certainly not as a man of business, and I should have said nothing in the way of censure of his conduct if he had not even remonstrated but simply expressed himself—"I am really very grateful to you for your kind intentions which you are expressing to me; they come on me by some surprise, for I had no thought of such a thing, but I really appreciate your goodness and kindness, and have no objection, if after careful consideration you adhere to their being carried out." I could see no impropriety in that conduct, nor can I see the slightest impropriety—any room for reflection on Mr Grace either as a private gentleman or as a man of business, in what he did in the matter, according to the conclusion your Lordship arrived at on the evidence in point of fact. As to Mr Lyon or Mr Robertson or Mr Logan offering any advice to the ladies, it would have been a piece of gross impertinence, and I think if they had done so the ladies would have treated it as such and said—"We are quite capable of forming our own will and expressing, it and we have done so, and what we want is that you shall carry it out." Now, I think it was seen to by them that Mr Robertson when he took the draft to them wrote down their intentions with respect to Mr Grace and with respect to the other legatees. It was the duty of Mr Logan when he went with the deeds, to see that they thoroughly understood them, and that they carried out the will which they had

formed. We heard a great deal in the course of the discussion of such words as "uninfluenced" and "unbiassed." I suppose a testator is influenced by his own will, and is biassed in favour of those in whose favour he has formed an opinion and resolution to make a will. There can be no will made without the influence of the man's own views and opinions and his bias in favour of one and not in favour of another, or more in favour of one than another. No bias on the part of a testator—if that language had any meaning—would mean, "I do not care a farthing what will is made for me; I have no bias at all in favour of anybody." Now, that is to talk nonsense. These ladies were influenced by their respect and esteem for their own and their dead sister's and dead father's friend of many long years, and that they should be influenced by that was, I think, altogether legitimate.

I do not agree with the Lord Ordinary when he says that he thinks the case should be dealt with in the same way as if Mr Stuart Grace had prepared the wills, and they had been executed under his supervision. I do not take that view. But I may say that if I had taken the view that he had prepared it in accordance with the holograph letter of instructions, and it had been executed in his own presence and witnessed by clerks of his own, I should have arrived at the same conclusion, that upon the facts of the case there was no room for any suspicion, or no room for any presumption of misconduct on his part, because the evidence, beginning with the holograph letter of instructions, which records the will of these ladies exactly as it was expressed in their wills, and the whole evidence in the case, is that they were of sound disposing mind, knowing the state of the family and their relations, knowing the state of their own affairs, and thoroughly understanding what they had done.

I also think great weight is due—though the case would, in my opinion, have been conclusive without it—to the fact that these ladies knew of these wills—Miss Ann for seven or eight years, and Miss Margaret down to her death in 1897—that is, for sixteen years—and that during nine years of that time, that is, from Ann's death, Margaret had her will as well as Ann's, which gave her Ann's property, in her own possession. During all that time of perfectly intelligent existence, according to the evidence, it was in her power to destroy the will, or to cancel it or alter it in any respect, and we have no reason to suppose that she did otherwise than adhere to her favourable opinion of Mr Grace, which led her to make the will in his favour, for the whole sixteen years which intervened between the giving of the instructions and the execution of them in 1881 and her death in 1897.

I am therefore of opinion, and, I confess, without any doubt, that this is an unfounded action.

Lord Trayner—The rule or principle on which this case must be decided is not open to controversy, and it has been set forth with equal clearness and force by the Lord President in the case of *Grieve* v. *Cunninghame*, and Sir James Hannen in the case of *Parker* v. *Duncan*. A deed of gift by a client in favour of his or her law-agent is always open to suspicion in this sense, that there is a legal presumption against its being the free and unbiassed expression of the client's will. That presumption the law-agent must rebut, not merely by his own evidence, but by independent testimony. If he can do that—if he can, by testimony independent of and apart from his own, establish to the satisfaction of the Court that the deed expresses the real purpose and intention of the granter, and is not in fact the result of influence on his part exercised directly or indirectly on the client—then the deed will be as valid as if granted in favour of a stranger, that is, one not standing in any confidential relation to the granter. Now, applying this principle in its shortest aspect to the case before us, I think the defender has fully satisfied the *onus* which it lays upon him, and that accordingly the pursuer's case must fail. There are various considerations which have led up to this result which I shall very shortly state.

1. By letter dated 5th March 1881 Miss Brown communicated to the defender that she and her sister intended to leave the bulk of their estate to him. There is nothing in that letter, or proved concerning it, which suggests that it was other than the expression of the deliberate and unbiassed determination of the two ladies themselves, reached without any communication with the defender. That letter was returned immediately by the defender to the writer of it, who retained it in her own possession. It was found in her repository after her death, sixteen years after the date of the letter.

2. The formal wills which embodied the wishes of the Misses Brown (for they each executed a separate will) were not prepared by the defender. In this respect the present case is (favourably to the defender) distinguished from the case of *Grieve*. The wills were prepared by the late Mr Hugh Lyon, as honourable and scrupulous a man as could be found in his profession. The instructions for the preparation of the wills were given by the Misses Brown to Mr Lyon's principal clerk Mr Robertson, who visited them for the purpose of obtaining such instructions. That he took with him a skeleton form of will is nothing to the purpose. It was a convenient form in which to bring before him and the Misses Brown the different questions on which instructions were to be taken, such as who were to be the legatees, who the residuary legatee, who the executor, and so on. It had no names inserted under any of these heads. The information to enable these blanks to be filled up was obtained by Mr Robertson direct from the Misses Brown. They had then an opportunity of freely expressing their wishes apart from the defender altogether, and an opportunity of obtaining from Mr Robertson aid in giving full effect to their wishes in formal expression.

3. When the draft wills were ready for

execution they were taken direct to the Misses Brown by Mr Logan, another of Mr Lyon's clerks. He read over the deeds (or one of them, for, *mutatis mutandis*, they were transcript one of the other) and in his presence they were executed. The deeds were then taken back to Mr Lyon's office, who retained them on behalf of the granters, who directly paid Mr Lyon's charges for the preparation and execution of the deeds. The Misses Brown had thus another opportunity of expressing their real wishes apart from the defender.

4. In each of the two wills the person first named as residuary legatee was the sister of the granter, and the defender was only substituted for such residuary legatee in the event of her predeceasing the granter. In this respect also the present case is distinguishable from the case of *Grieve*. This circumstance does not go the length, certainly, of rebutting the presumption against the deed, but it tends in that direction. It raises a counter presumption; for if the defender was, as is presumed, exercising an influence on the makers of the deeds in favour of himself, he would not, probably, have interposed another residuary legatee between himself and the succession.

5. The deeds executed by the Misses Brown never were in the custody of the defender. They were held by Mr Lyon until his death, and sent by his representative direct to Miss Brown in the month of March 1892, and remained with her till her own death in 1897. During that period of five years Miss Brown had every opportunity of destroying or cancelling her will in favour of the defender had she so desired without his knowledge that anything of the kind had been done. Nor during that period of five years was her will a matter which Miss Brown had forgotten, nor with which she took no concern; for she twice executed codicils to her will, written in her own hand, but drafted for her in Mr Lyon's office. Her attention, too, must have been sharply drawn to the disposition of her property made by herself when in 1888, on the death of her sister, their joint estate became vested in her.

These considerations all go to rebut the presumption which the law makes against the free and uninfluenced character of the will. But when the independent testimony of Mr Robertson and Mr Logan are added, it would be absurd to say that there is no evidence but the defender's own to support the view that Miss Brown's will was the free and uninfluenced expression of her own desire—influenced no doubt by feelings of friendship and affection, but not influenced, as the law in the absence of contrary evidence will presume, illegitimately by the defender.

A good deal was said in the argument for the pursuer as to the necessity on the part of the defender of showing that Miss Brown had had the benefit of independent advice. It was also pointed out that neither Mr Lyon, Mr Robertson, nor Mr Logan had advised Miss Brown. Now that, in the circumstances, Miss Brown should have had advice independent of the defender is a proposition which I need not dispute. Even assume that such advice was necessary to the validity of the will. What then? Miss Brown had it. It is true that neither Mr Lyon, Mr Robertson, nor Mr Logan advised Miss Brown or her sister what they should do with her money. That was no part of their duty. But Miss Brown had their aid and advice as to how her own wishes were to be formally expressed so that they might have effect. I do not understand that the "independent advice" to which the decisions in this branch of the law refer, means ultroneous (and it might be impertinent) suggestions and advice to a testator as to who or what should be the objects of his bounty. It is the aid and advice which professional or non-professional persons can afford in order to make certain what are the testator's wishes, and enables those wishes to be clearly and formally expressed. This kind of independent aid and advice Miss Brown, in my opinion, undoubtedly had.

I think it is established as matter of fact (1) that Miss Brown was, up to the time of her death, quite capable of managing her own affairs; (2) that she fully comprehended the meaning and effect of the deed sought to be reduced; (3) that it expressed her own wishes as to the distribution of her property, deliberately formed by her; and (4) that it was executed by Miss Brown as her own free and uninfluenced act.

I think, therefore, that the judgment reclaimed against should be affirmed.

Lord Moncreiff—The broad question which we have to decide is, whether the will under reduction expresses the deliberate and unbiassed testamentary intentions of Miss Margaret Brown, or whether, on the other hand, it must be held, as regards the bequests to the defender Mr Stuart Grace, to have been impetrated through undue influence on his part. The Lord Ordinary has decided in favour of the defenders, and I think rightly. I am far from saying or thinking that this is not a case in which full inquiry and explanation on the part of Mr Stuart Grace was necessary. At the date of the will, 1st April 1881, and for many years before and after that date, the defender Stuart Grace acted as sole agent and legal adviser of the two Misses Brown, and was on terms of the closest intimacy and confidence with them. He did not prepare the will, but he was connected with its preparation and execution to the extent that he was aware that the ladies desired to make their wills, and that it was their intention to leave him the bulk of their property, and he put them in communication with Mr Lyon, W.S., his own Edinburgh correspondent, in order that such a will might be prepared and executed. Lastly, under Miss Margaret Brown's will Mr Stuart Grace receives nearly three-fourths of the whole estate of the two sisters, amounting to a considerable sum.

In these circumstances it was only right that the burden should be laid on Mr Stuart Grace of satisfying the Court that this large bequest made to him, the legal adviser

of the testatrix, was her spontaneous and unbiassed act, and was not due to the abuse of the confidential position in which he stood to her.

The burden, such as it was, has, I think, been satisfactorily discharged. Apart from the explicit disavowal by Mr Stuart Grace, which, looking to his high personal and professional character, is entitled to consideration, the circumstances connected with the execution of the will (some of which were exceptional) are of themselves almost sufficient to rebut the charge of undue influence.

There is here no question of facility or failing mental or physical powers. In 1881 the ladies were shrewd intelligent women in good health with several years of life before them. No doubt undue influence may exist and prevail where there is no facility, but the mental and physical health of the person said to have been influenced is a material matter in such cases.

There is also this peculiarity that as far as the evidence discloses, the letter, memorandum, or jotting dated 5th March 1881, which contains all the essentials of the will, was prepared by the ladies themselves without any communication with Mr Stuart Grace. All that the will did was to give formal effect to the intentions disclosed in that writing. If it is the case that the ladies came to the determination expressed in that letter of their own free will, and uninfluenced by Mr Stuart Grace, this is almost conclusive of the case.

Again, there is this unique feature in the present case, that the will which the pursuers seek to reduce was executed sixteen years before the death of Miss Margaret Brown. At any time during that period it might have been revoked. It was repeatedly brought under the notice of Miss Margaret Brown, who added two codicils to it with her own hand at different dates; she therefore knew that she could revoke or alter it at pleasure. It was in her own possession for some years before her death. The fact that she let it remain unaltered as regards the provision to Mr Stuart Grace and his family is strong evidence of her deliberate and fixed intention that the money should go to them.

Further, there is no evidence that Mr Stuart Grace made any attempt to isolate the ladies, or to prevent any of their friends and relatives from having access to them. They evidently had likes and dislikes. They liked some of their friends and relatives, and gave them presents or left them legacies. But they do not seem to have liked the pursuers of this action, although Mr Stuart Grace succeeded in obtaining a present of £300 for Mrs Key in 1893.

But it is said that the testatrix had no independent legal advice. It cannot be laid down as an abstract proposition that in all such cases there must be independent advice. The absence of it may be fatal, and in most cases it will be a material point against the validity of the gift or bequest. For instance, where a substantial gift is made *inter vivos* by the client to the agent, by which the client is impoverished, the absence of independent advice may be conclusive. But in the present case there was no gift *inter vivos*, the ladies remained and intended to remain during their lives in full possession and control of their property. In these circumstances I think that a legal adviser would discharge his duty to his client if he satisfied himself that the directions he received for the preparation of a will represented their deliberate wishes and intention, and therefore, assuming that here there was need of separate legal advice, I think it was given. The will was not prepared by Mr Stuart Grace, and I think that the Misses Brown had as much legal advice as the occasion called for. Mr Lyon was a man of scrupulous integrity in his profession, and although he did not himself discuss the terms of the wills with the ladies, he sent an experienced confidential clerk, Mr Robertson, with the draft, and he tells us that he was quite satisfied that the ladies thoroughly understood what they were doing, and that they had quite made up their minds as to the terms of the settlement. Again, when the will was executed, Mr Logan, W.S., read over the extended deeds to them before they signed.

Unless it was incumbent on Mr Lyon to remonstrate and endeavour to dissuade them from making such a will, I do not see what more could have been done. My impression, after reading the whole of the evidence, is that both of the ladies were determined to dispose of their money in that way, and that no legal adviser, however independent, would have succeeded in altering their determination. I am satisfied on the evidence that the defenders are entitled to our judgment.

The Court adhered.

Counsel for the Pursuers—Sol.-Gen. Dickson, Q.C.—Dundas, Q.C.—Christie. Agents Simpson & Marwick, W.S.

Counsel for the Defender—The Dean of Faculty — H. Johnston, Q.C. — Kincaid Mackenzie. Agents — Mackenzie & Kermack, W.S.

Wednesday, December 14.

SECOND DIVISION.

[Sheriff of Lanarkshire.

MILLAR *v.* BELLVALE CHEMICAL COMPANY.

Contract—Breach of Contract—Damages—Measure of Damages—Loss of Prospective Profits—Loss of Business Reputation.

The A company, manufacturers, contracted to supply B, a wholesale dealer, with golf balls, which were to be of two kinds, one a medium-priced ball to take the place of re-made balls, and the other a higher class of ball fit to be sold at the same price as the ordinary first-class ball. Both classes of balls were to be manufactured for