Saturday, June 19.

FIRST DIVISION.

[Lord Guthrie, Ordinary

AITKEN *v.* CAMPBELL'S TRUSTEES AND OTHERS.

Agent and Client—Law Agent—Bargains between Law Agent and Client not Relating to Ordinary Law Business—Building Speculations—Fairness of Bargains.

The relationship of law agent and client does not cease when the business transaction between them ceases to be ordinary law business. Contracts, therefore, of any sort—*e.g.*, a building speculation—between a law agent and his client are to be regarded with the strictest scrutiny.

Circumstances in which *held* that bargains between a law agent and his client relating to (1) the purchase and sale of feu-duties, and (2) certain building speculations, were fair and reasonable transactions, while other transactions of the nature of gifts or involving fraud could not stand.

Gillespie & Sons v. *Gardner*, May 20, 1909, 46 S.L.R. 771, *followed.*

On 14th February 1907 W. R. Aitken, builder, Shawlands, Glasgow, brought an action of count, reckoning, and payment against the Rev. T. M. Campbell, Crosshill, Glasgow, and others, trustees of the late John Campbell, writer, Pollokshaws, and the then dissolved firm of Campbells & Prentice, writers there, and Hugh Campbell and Thomas Prentice, the surviving partners thereof. In it he called for an account of the intromissions of the late Mr Campbell and of the said firm (of which Mr Campbell was for some time a partner) with his (the pursuer's) estate. A petitory conclusion for £21,546, alleged to be the balance due, or, in the event of the defenders failing to account, for £25,000 in name of loss and damage, followed. Reduction of four agreements, dated 26th September 1894, 11th November 1895, 19th January 1899, and 23rd November 1901, between the late Mr Campbell and the pursuer, was, in so far as that might be necessary, also concluded for.

The defenders, John Campbell's trustees, lodged defences and pleaded, *inter alia*—"(4) The pursuer and the deceased having been joint-adventurers in the various transactions condescended on, these transactions are subject to the rules of joint-adventure and not to those of agent and client. (5) The deceased having duly accounted to the pursuer for all sums due to him in respect of the transactions condescended on, these defenders are entitled to absolvitor."

The transactions in question were numerous. (1) The pursuer, who alleged that he had appointed John Campbell his law agent in 1885, in cond. 4 narrated that in 1893, having had his attention drawn to a piece of land at Coustonhill in the burgh of Pollokshaws, he arranged to acquire it for building purposes. Campbell carried through the arrangements, and in their course two of the agreements sought, if necessary, to be reduced—namely, those dated 26th September 1894 and 11th November 1895—were made between him and the pursuer. The ground was feued to Campbell, subject to a feu-duty of £170, and to the condition that buildings to a certain amount should be erected thereon; and Campbell sub-feued to the pursuer in several steadings, sub-feu-duties being created to the amount of £225, one-half of which were to belong to Campbell and one-half to the pursuer, but the second half could be acquired by Campbell at 26 years' purchase. (2) In cond. 5 the pursuer narrated his sale to Campbell, nominally for a client, Mrs Pollock, of four tenements in Reid Street, Maryhill, his subsequent payment of a sum of money as decrease in the rents of the property, and his eventual repurchase and substitution of different property, his discovery after Campbell's death that Mrs Pollock was Campbell's mistress, maintained by him, and that he, Campbell, had really acted in his own behoof. (3) In cond. 6 the pursuer narrated his sale to Campbell of a feu-duty of £55, secured on buildings called Station Buildings, which he (the pursuer) had erected at Cathcart, at 28 years' purchase, whereas, as he now maintained, 32 years' purchase was the fair price. In cond. 9 he narrated a similar sale of feu-duties for £78 over property at Newlands Terrace, Cathcart, at 29 years' purchase instead of 33; and in cond. 11 he narrated a building speculation with regard to ground in Albert Road, Langside, in connection with which the fourth agreement sought, if necessary, to be reduced was made, and in which Campbell was to become security for £10,000, and was to receive 1-5th of the price of the feu-duties or ground-annuals created over the property. (4) In cond. 7 the pursuer narrated that he purchased a piece of ground in Reid Street, Maryhill, in 1898, the title, however, being taken by Campbell in his own name, and that after building had ceased there remained over a free portion of the ground, which, however, Campbell had not restored to him. In cond. 9 he narrated that there was a portion of ground over from his building operations in Newlands Terrace, Cathcart, which was in the same position. (5) In cond. 8 the pursuer narrated the acquisition of building ground in Townhead, Glasgow, in connection with which the third agreement sought, if necessary, to be reduced, was made, whereby it was agreed Campbell should give financial assistance limited to £5000, and should receive the sub-feu-duties at 26 years' purchase instead of, as he now maintained, 32 years' purchase, their fair value. He further stated that he only received 21 years' purchase, and denied a subsidiary minute of agreement dated 16th May 1900, whereby 21 years was substituted for 26 years. (6) In cond. 10 the pursuer narrated his purchase of four villas at Shawlands,

his taking down the villas and the building there by an independent syndicate of tenements, Campbell's loan to the syndicate of £5000 over the ground when some of the tenements had been erected, and his receiving from the pursuer the surplus land which he induced the pursuer to exchange for a feu-duty of £16, and the payment of the price of this feu-duty to Campbell's trustees, the defenders. (7) In cond. 12 the pursuer narrated his sale to Hugh Campbell, John Campbell's eldest son, of two tenements at Port-Dundas, that he was induced by Campbell to agree to sell for £2300, but that the real price as shown by the conveyance was £2650.

[For the nature of the various transactions see also, *infra*, the opinions of the Lord Ordinary and the Lord President.]

On 6th November 1908 the Lord Ordinary (GUTHRIE), after a proof, pronounced this interlocutor:—"Finds, *First* (1), that in or about October 1893 the pursuer and the late John Campbell, in connection with the feuing of the vacant ground at Coustonhill referred to in article 4 of the condescendence, entered into the first of a series of building speculations in which the pursuer and the said John Campbell were jointly interested, conform to the feu-charter produced, and in accordance with a feuing-plan prepared on the joint instructions of the pursuer and John Campbell, and in terms of an agreement, dated 28th September 1894, and a supplementary agreement, dated 11th November 1895; (2) that John Campbell did not act as the pursuer's agent in settling the terms of the said agreements in which the said John Campbell was personally interested; and further, supposing that the said John Campbell did so act, the said terms were in the circumstances fair and reasonable as between agent and client: *Second* (1), that in or about 1898 John Campbell professed to purchase from the pursuer for a client Mrs Pollock, a widow, the four tenements in Reid Street, Maryhill, referred to in cond. 5; that on 14th July 1899 John Campbell obtained from the pursuer the sum of £130, 9s. 11d. as decrease of rents on the said property, which he professed had been suffered by the said Mrs Pollock, and that in 1900 John Campbell induced the pursuer to repurchase the said properties from the said Mrs Pollock, and to convey to her three large tenements belonging to him at Port Dundas on the representation that the person interested in the said repurchase and conveyance was Mrs Pollock, and that the said repurchase and conveyance would be for her benefit; (2) that the said whole representations were known to John Campbell to be false, and that he and not the woman called by him Mrs Pollock, a widow, but whose real name and designation was Miss Annie Mossie, was the principal in these transactions; (3) that the pursuer sustained loss through the said transactions, and is entitled to damages therefor; assesses the same at the sum of £1000, together with the said £130, 9s. 11d., with interest thereon from 11th November 1900 and 14th July 1899 respectively: *Third*, finds that in connection with the building speculations referred to in conds. 6, 9, and 11, John Campbell did not act as the pursuer's agent in settling the terms of the said speculations in which John Campbell was personally interested; and further, supposing that the said John Campbell did so act, the said terms were in the circumstances fair and reasonable as between agent and client: *Fourth*, that the piece of ground referred to in cond. 7, and the triangular piece of ground, part of Newlands Terrace, referred to in cond. 9, are the properties of the pursuer, and that the defenders are bound to convey the same to the pursuer, and to account for any revenue received therefrom: *Fifth* (1), that, in connection with the agreement dated 19th January 1899, referred to in cond. 8, John Campbell did not act as the pursuer's agent in settling the terms of the building speculation therein agreed upon, in which John Campbell was personally interested; and further, supposing that John Campbell did so act, the said terms were in the circumstances fair and reasonable as between agent and client; (2) that while John Campbell was acting as agent for the pursuer in carrying out the said agreement, a supplementary agreement, dated 16th May 1900, also referred to in cond. 8, was entered into between them, under which certain ground-annuals, which had been valued under the agreement of 19th January 1899 at twenty-six years' purchase, were valued, as between the pursuer, their seller, and John Campbell, their purchaser, at twenty-one years' purchase; (3) that the provisions of the said supplementary agreement constituted a gift by the pursuer to John Campbell, his agent, and that the defenders are bound to account to the pursuer for the difference between the value of the said ground-annuals at twenty-six years' purchase and their value at twenty-one years' purchase, with interest from the dates when said ground-annuals were created: *Sixth*, that in or about 1903 the pursuer agreed to give John Campbell the price of a £16 feu-duty while Campbell was acting as agent for the pursuer in connection with the transactions referred to in cond. 10, and that on 25th April 1904 the defenders Campbells & Prentice deducted from moneys due to the pursuer £432, being the price obtained from said feu-duty, and paid it to the defenders John Campbell's trustees; (2) that this was a gift agreed to be given by the pursuer to John Campbell while the relationship of agent and client subsisted between them; (3) that the defenders are bound to repay the same, with interest from 25th April 1904: *Seventh* (1), that on 10th May 1901 the pursuer sold, through John Campbell, the tenement referred to in cond. 12; (2) that the disposition of said tenement to the purchaser thereof bears that the price was £2650, and that John Campbell only accounted to the pursuer for £2340; (3) that the defenders have not proved that the said £2340 was the true price for said subjects, and that they are bound to account to the pursuer for the difference between the said price, with interest from the date of settlement: Appoints the defenders to lodge in process

within one month an account giving effect to the foregoing findings: *Eighth*, finds that the pursuer is not entitled to an accounting as concluded for in the first conclusion of the summons, and dismisses the same, and decerns: *Ninth*, finds that the pursuer is entitled to have the whole law and business accounts incurred by him to John Campbell, or his firm of Campbells & Prentice, since 1st January 1885, taxed, and that the defenders are entitled to restate the same; remits the said law and business accounts, charges for commissions, and other charges, upon restatement, to the Auditor of the Court of Session to tax and report, reserving the question of the pursuer's liability therefor: Reserves the question of expenses: Continues the cause, and grants leave to reclaim."

Opinion.—"In this case the pursuer treats the late Mr Campbell, whose trustees are the defenders, as having acted for him in the matters complained of as an ordinary law agent dealing with ordinary transactions, informed and skilled in the matters on which he is said to have overreached him, as he, the pursuer, was not, and on whose advice he therefore relied. On the general questions involved in the case he quoted *Macpherson's Trustees* v. *Watt*, 4 R. 602, reversed 5 R. (H.L.) 9; *Edwards* v. *Meyrick*, 1842, 12 L.J. Ch. 49, 2 Hare 60, 62 R.R. 23; *Rigg* v. *Urquhart*, 1903, 10 S.L.T. 503; *Cheese* v. *Keene*, L.R., 1908, 1 Ch. 245; Begg on Law Agents, 295; and the defenders referred to Vice-Chancellor Wigram's judgment in *Edwards* v. *Meyrick*, *ut supra*, on which they chiefly relied; *Welsh & Forbes*, 8 F. 453; *Shilson, Coode, & Company*, 1904, 1 Ch. 837; *Gradwell* v. *Aitchison*, 1893, 10 T.L.R. 20; Cordey on Solicitors, 1899, 186; *Pisani*, 1873, L.R., 5 P.C. 516; *Cane* v. *Lord Allen*, 1814, 2 Dow's Appeals 289; *Montesquieu* v. *Sandys*, 1811, 18 Vesey 302, 11 Rev. Reports 197; *Gibson* v. *Jeyes*, 5 R.R. 295, 6 Vesey 266; *Spencer* v. *Topham*, 1855, 22 Beavan 573; *Gillespie*] v. *Gardner*, *per* Lord Dundas, 46 S.L.R. 771; *Mackay* v. *Macarthur*, 1899, 36 S.L.R. 662.

"By way of remedy the pursuer craves, not restitution with interest nor the profit the agent has made, but damages, on the footing of what the pursuer might have made had he retained the subjects which Mr Campbell acquired, and had he realised these subjects at the time when Mr Campbell acquired them, or otherwise subsequently, when they stood at their highest.

"The pursuer's case depends on the assumptions before mentioned, which, in my opinion, are unfounded. Mr Campbell did not act as an ordinary law agent; he had no more knowledge or skill on the questions which form the subject of inquiry in this case than the pursuer had, and the pursuer had no occasion to rely on his advice, and I do not think did so. Nor were the transactions ordinary; they were speculative, involving uncertain and possibly serious financial responsibility, of a kind to exclude the co-operation of the ordinary lender, or of any money-lender, on ordinary terms. As to the remedy craved, it is only exigible in the case of fraud. But except in regard to one matter, that connected with Mrs Pollock, there was no fraud; therefore except under that head there is no room for the application of that remedy.

"Shortly after the transactions in question began, namely, in 1898, Mr Campbell assumed Mr Prentice, and afterwards his son Mr Hugh Campbell, under the firm of Campbells & Prentice. But, throughout, the pursuer's whole business was transacted with Mr Campbell himself, and I shall speak of him only. . . . . .

"No complaint is made of the manner in which as a law agent Campbell carried into effect the agreements between him and the pursuer.

"If Mr Campbell was advising the pursuer as an ordinary agent in the transactions complained of, and if these transactions had only involved ordinary risks, then the defenders admit that certain of them could not stand; while, on the other hand, the pursuer admits that on every matter except that connected with Mrs Pollock his complaint would have been unavailing but for the character of agency with which Mr Campbell was clothed.

"The origin as well as the nature of the relationship between the pursuer and Mr Campbell requires attention. The pursuer's complaint, now confined to the ten years beginning with 1893, when the transactions in connection with the lands of Coustonhill on which the Grantly Gardens houses were built, referred to in Cond. 4, began, covers the whole subsequent ten years down to 1903, the date of Mr Campbell's death. In 1893 the pursuer was 33 years of age (Campbell being 50), and had been engaged for fifteen years, successfully and unsuccessfully, in building on other people's property, as well as in unsuccessful speculations with his father at Seaton Avenue, and between 1885 and 1890 with a partner named Meiklejohn, at Langside. His experience, including the investigation connected with his bankruptcy for some £500 in 1883, must have taught him not merely all the details of the building trade, but, as far as necessary, the nature and effect of feus, sub-feus, and ground-annuals, and the different methods of financing building ventures, just the information necessary for him to possess in order to enter intelligently into the contracts with Campbell now complained of. I put aside as irrelevant three questions which bulk largely in the proof—first, whether Mr Campbell knew that throughout the whole transactions Aitken was an undischarged bankrupt; second, whether the pursuer inserted his middle name of Robertson to prevent his identification as a bankrupt; and third, the nature of the relations between Campbell and Mrs Pollock, because my judgment would have been the same even if Campbell knew of the bankruptcy, as I think he probably did, and even if the reason for Aitken's change of name was the sinister one alleged, which I think it probably was, and even if Mrs Pollock instead of Campbell's mistress had been his wife. And I do

not need to decide between the contending views of the accountants (working only on Mr Campbell's accurately kept books and punctually rendered accounts, for Mr Aitken kept no books) as to the actual results to the pursuer and Campbell respectively of the different speculations; whether, for instance, as the defenders allege in regard to the feu-duties acquired by Mr Campbell he or his estate made an ultimate loss in all cases, except in the case of those purchased at twenty-one years, and the Coustonhill feu-duties, or whether, as the pursuer alleges, large sums were made on other transactions, apart from the sums that might have been made had the feu-duties been realised by Mr Campbell when the market was at the highest. I have to consider risks, not results.

"The pursuer in connection with his building speculations needed somebody to finance him, and somebody to do the ordinary work of a law agent. Mr Campbell, who had never been employed by him as an ordinary agent, and who had no monetary or other hold over him, and who did not suggest any of the speculations, nor urge him to agree to the terms of the agreements, was asked by him and agreed to finance him, and also to act as his law agent. In ordinary circumstances, financing would have been done through Mr Campbell arranging for the necessary loans on ordinary terms from private lenders, banks, or reversionary companies. But in this case it is established to my satisfaction that in the pursuer's circumstances even if private lenders or public companies would have financed him, they would not have done so on ordinary terms. In 1893, when the transaction chiefly attacked, that of Coustonhill, was entered on, the pursuer had no means, and it was his first very large venture.

"In these circumstances it was arranged, at whose instance does not clearly appear, that Mr Campbell should finance the pursuer. That arrangement having been made, without any pretence on Mr Campbell's part that he was truly acting not for himself but for somebody else, and in regard to matters about which the pursuer had at least equal knowledge with Campbell, it appears to me that it was impossible for Mr Campbell thereafter *in hac re* to act as the pursuer's ordinary advising agent so far as the terms of the financing were concerned. In relation to these, about which we are alone concerned, the position of the pursuer and Campbell was that of joint adventurers, not of principal and agent, nor of borrower and lender. An ordinary agent has no double interest; a lender is only responsible for the money lent: Mr Campbell was standing in as a partner with the pursuer. It is true that the carrying out of the financial arrangements in proper form was in Mr Campbell's hands as the pursuer's administrative or executorial agent; for any blunder in the execution of the necessary deeds he would have been liable. But in regard to the terms on which the funds were to be provided by Mr Campbell, the parties were necessarily at arm's length. Nor, being at arm's length, had Mr Campbell any advantage over the pursuer. Not only were the considerations *hinc inde* as capable of being calculated and considered by the pursuer (some of them better) as by Mr Campbell, it is proved that they were considered by the pursuer and his architects, men like the witness Mr Baird, talked over with friends like the witness Mr Hugh Miller, and discussed and arranged between the pursuer and Mr Campbell. The provisions of the several deeds are clearly expressed, and the pursuer does not say that any of them were beyond his unaided comprehension.

"The result was a series of contracts of the nature of joint adventures between the pursuer and Mr Campbell, in which, so far as the burdens to be undertaken and the benefits to be respectively obtained by the pursuer and Mr Campbell were concerned, Mr Campbell was not in a position to advise the pursuer, but the pursuer was in a position to determine for himself; the legal work in connection with the execution of the contracts and their working out being undertaken by Mr Campbell, with the ordinary responsibility of a law agent.

"If I am wrong in this view, I shall assume that Mr Campbell was the pursuer's advising as well as administrative agent *in hac re*, and that the *onus* lies on the defenders to prove that the transactions were fair and reasonable as between agent and client. The question then arises, if, in regard to the financing as well as the framing and carrying out of the contracts, Mr Campbell had the duty of advising, and if the pursuer was entitled to rely and did rely on his advice, were the terms which, in that view, Mr Campbell must be held to have advised the pursuer to give him, his agent, financing the pursuer's building speculations, unfairly and unreasonably favourable to him, Mr Campbell? Did he, in getting these terms, not only use but also abuse his position as pursuer's agent? Did he take or get for himself better terms than he could have got for the pursuer from any other person or persons willing and able to finance him? Did he fail to give him either information or advice which would have affected the pursuer's mind against the terms given to him by Mr Campbell? In my opinion, except where the contracts in question involved or amounted to a gift by the pursuer to Mr Campbell, and except where Mr Campbell, being the person truly interested, represented that the person interested was a third party, and misled the pursuer as to who that third party was (in which latter case, indeed, the element of agency is unnecessary), the pursuer's case, on undue advantage taken by an agent of a client, resulting in contracts unfair and unreasonable for the client, fails on the facts. On the assumption of ordinary agency the defenders would be bound to prove that Mr Campbell, using his best endeavours, could not have got better terms outside than he gave to the pursuer. I think they have done so. They have shown that the ordi-

nary lenders, taking into consideration the state of each property at the time, would not have gone into these speculative transactions on any terms; and the pursuer has not produced a witness who would have given better terms, or who knows any quarter where better terms might have been got, taking into consideration again the state of the properties at the time when the different agreements were entered into. This crucial point does not seem to me to be met by the admission of the defenders' witnesses that they never knew a similar bargain between a client and his law agent. The pursuer does not suggest that Mr Campbell intended to overreach him, or was aware that he was getting greater benefits than would have been insisted on by any outsider. He cannot specify any information known to Mr Campbell, or which Mr Campbell should have obtained for him, which he should have communicated to the pursuer, or any skilled advice which he should have given to him, which would have affected the pursuer's judgment adversely to the terms arranged with Mr Campbell. In regard to the number of years' purchase of feu-duties, the pursuer, contradicting, as he frequently does, in his evidence, the case made for him on record, admits that he knew that other people, in different circumstances, were getting higher rates. The varying rates of feu-duties is one of the subjects of daily talk among builders, and between them and their architects discussing proposed ventures. The suggestion is that Mr Campbell probably did not realise how advantageously for him the bargains would work out, a view consistent with his having honestly overestimated the extent of the probable risks, a matter on which there is obviously room for wide difference of honest opinion. Mr Campbell used no pressure to induce the pursuer to go on with transactions which could only be carried out by giving Campbell a share in the profits; and the precise share, even if originally proposed by Campbell, was discussed with the pursuer, who was in a position to calculate whether the profits to be reasonably expected would, after deduction of Campbell's interest, make the transaction one worth the pursuer's while to enter upon. In each case the arrangement might, in certain circumstances, have involved Campbell in serious responsibilities, and the risk he ran could not have been fairly met merely by the restricted legal charges agreed on, or even by full fees for legal work, and by an ordinary rate of interest. The risk required either a high rate of interest or a direct share of profits, or an indirect benefit through an arrangement, either absolute or optional, for the sale of feu-duties to Campbell at a number of years' purchase below the current rate. Giving a share of profits and feu-duties at a small number of years' purchase were the methods adopted, and I think it proved that, had the financing been done by a third party, the same or a similar method would have been followed, and I see no reason to doubt that as large a share of profits would have been demanded and got. There were the certain risks, under the feu-charters, for feu-duty and other obligations, and under the agreements, for money to be lent, if the pursuer desired it. There was also the contingent risk of Aitken's death, or second bankruptcy through loss on other transactions, over which Mr Campbell had no control, or through the general collapse in the building trade, which comes periodically, and there was the risk of further involvements which the working out of the contracts might render necessary to save disaster, risks which all enter into the calculations of a lender. These risks have had many illustrations in Glasgow and elsewhere in recent years, both in the case of individuals and of investment companies honestly managed and substantially backed; and they were illustrated in this case by the guarantee of £10,000, granted under the third head of the agreement of 23rd November 1901 by Mr Campbell in favour of the pursuer, which still stands against Mr Campbell's estate. It is significant that it was the defender's enforcement in 1906 of that obligation, by action against the pursuer, that led to the present action of 1907, which action might, however, not have reached the Courts but for the pursuer's agent's discovery of the Pollock scandal and the Reid Street fraud. The pursuer says—'The Maryhill business was a startler to me.' If in 1893 he was ignorant of the selling rates of feu-duties, he was thoroughly familiar with them long before Mr Campbell's death; yet he never suggested unfairness in any of the transactions till his agent's discovery of Mrs Pollock's identity. It must also be observed that the alleged excessive benefits obtained by Mr Campbell, for instance, in the Coustonhill transaction, arise from an increase in the value of feu-duties subsequent to the dates of the agreements. This fortuitous rise is as irrelevant a consideration as the recent fortuitous drop, except in so far as both show the speculative nature of such transactions. I think Mr Wilson for the defenders was entitled to maintain, as he did, that the case is within the rule which may be gathered from *Edwards* v. *Meyrick*, that where there is good faith on both sides in regard to a speculative matter in which two parties are interested, the Court will not interfere, even although one of the parties has the duty of an agent to put the transaction into shape and carry it out, and even if the transaction has eventuated in apparently excessive benefits to the person so acting.

"All that I have said is on the assumption that the pursuer, when the several bargains were entered into, was not willing to realise his investments and utilise the money in connection with these building speculations. Such a plan, which would have changed the whole situation, was never proposed, and the pursuer does not say he would have entertained it if it had been suggested by Mr Campbell.

"There remain the cases of alleged gift and the case of alleged misrepresentation.

"The cases of alleged gifts, whether gifts in form, or in effect like the reduction from 26 to 21 years in the supplementary agreement of 16th May 1900, cannot stand, in view of the general relation of agency which subsisted between the parties, even although I am right in holding that in the matter of financing they truly stood to each other, not as agent and client, but as joint-adventurers. The pursuer is not barred by his recognition of these gifts after Mr Campbell's death in 1903 from demanding them back, because at that time he was neither aware that he was entitled to the remedy now craved, nor was he aware of Mr Campbell's misrepresentation and concealment in connection with the Reid Street property conveyed first to Mrs Pollock and afterwards to the pursuer. On the question of gift the defenders referred to *Mitchell* v. *Homfray*, 1881, L.R. 8 Q.B.D. 587; *Champion* v. *Rigby*, Tamlyn's Rep. 1830, 421, 31 R.R. 107; *Gregory*, 1815, G. Cooper, 201, 14 R.R. 244; and *Allcard*, 1887, 36 Ch. D. 145. In No. 2 the case of alleged misrepresentation, I hold it proved that while Mr Campbell represented that the person alone interested was Mrs Pollock, he was himself the interested party, and Mrs Pollock's only interest was derived through him. This seems to me enough for the pursuer's purpose. I do not think his case is affected by his frank admission, in reference to Mr Campbell's false statement that Mrs Pollock was a widow, 'It did not make any difference at all, so far as I was concerned, in the sale of the property.' As between the value of the property in Reid Street repurchased by the pursuer and the value of the Port Dundas subjects conveyed by him to Mrs Pollock, I estimate the difference at £1000; and the defenders must also repay to the pursuer the sum of £130, 9s. 11d. which Mr Campbell induced the pursuer to pay to Mrs Pollock as decrease of rents on the Reid Street property.

"The question of remedy next arises for determination. In the cases of gift the whole transaction was above-board. There was neither concealment nor misrepresentation, and the pursuer is only entitled to restitution, with an account of profits. In the case connected with Mrs Pollock there was fraud, and therefore the pursuer is entitled, in the shape of damages, to the utmost profit he could have made suppose no transaction had taken place. On the question of remedy the defenders quoted *Kimber* v. *Barbour*, L.R. 1872, 2 Ch. App. 56. The separate question raised in cond. 12 is in an unsatisfactory position. I suspect, from the evidence of Mr T. D. Ross, that the true full price was £2300 or £2340, and not £2650 as stated in the disposition, and that all parties concerned, including the pursuer, so understood. But the defenders were bound to clear this matter up by putting Hugh Campbell, the purchaser, Mr Campbell's son, into the box. They have not chosen to do so, and I must take the transaction as I find it on the face of the disposition. The defenders must accordingly pay the pursuer the difference between the amount in the disposition and the amount in the accounts.

"The pursuer asked a general accounting. But, if he has averment, he has no evidence to support the demand. The defenders referred to *Webb*, 1894, 1 Ch. D. 83; *Edwards* v. *Mayrick*, *ut supra*; *Horlock* v. *Smith*, 1837, 2 My. and Cr. 495, 45 R.R. 125; and *Lang*, 1862, 24 D. 1362.

"The pursuer is entitled to have Campbells and Prentice's law and business accounts taxed, they being entitled to restate them. A question will arise as to the defenders' right to debit the pursuer with any portion of these accounts, or otherwise any portion beyond outlay, except where such liability was specially agreed to, looking to the position of Mr Campbell as a joint-adventurer with the pursuer. In the case of the transactions involving fraud and gift, there will also be a question to what extent, if any, the pursuer can be debited with the expenses connected with these. But I think it better to reserve these questions till the re-stated accounts have been taxed.

"So far as my findings are in favour of the pursuer, it does not seem necessary to make any reservation of the defenders' rights under the £10,000 guarantee above mentioned. An action dealing with that matter is in Court, in which decree has been pronounced against Aitken, superseding extract, and operative interlocutors in both cases can be pronounced at the same time. Any security which the defenders now hold in the shape of retained ground referred to in articles 7 and 9 of the condescendence will not be prejudiced."

The pursuer reclaimed, but accepted some of the Lord Ordinary's findings.

Argued for reclaimer — (1) As regards Coustonhill transaction.—The reclaimer was entitled to recover. The transaction was not a fair one, inasmuch as no risk was incurred by Campbell. The *onus* of showing that it was a fair transaction lay on the respondents, and they had failed to discharge it. (2) As regards the sales of feu-duties.—The reclaimer was entitled to recover the full market price at the time. The price he actually received was not justified by any special circumstances. It was not enough to offer, as the respondents now did, to give back the feu-duties at the price paid for them, for an agent was bound to account to his clients for all profit made by him.

Argued for respondents—The question at issue was one of circumstances, viz., Were the transactions complained of fair and reasonable, looking to the position of parties at the time. The evidence showed that they were. Campbell risked far more than the reclaimer did, and it was the reclaimer and not Campbell who first proposed the transactions. The rules governing transactions between agent and client did not apply to the agreements in question, for the parties did not transact as agent and client, but as joint adventurers. It was immaterial that Campbell was at the time the reclaimer's law agent, for the

agreements complained of were not part of his ordinary work as law agent. *Esto*, however, that the rules referred to did apply, then the transactions were in the circumstances fair and reasonable. The reclaimers could not, looking to his circumstances at the time, have got better terms from anyone else. The case therefore fell within the rule laid down in the recent case of *Gillespie* v. *Gardner*, May 20, 1909, 46 S.L.R. 771. (1) As regards Coustonhill — This was a fair transaction, for Campbell incurred large financial obligations which could have been enforced against him, for he could not have got rid of the personal obligation in the feu-contract by disponing the subjects, as the reclaimer suggested, to a man of straw—*Marshall* v. *Callander, &c., Hydropathic Company, Limited*, July 18, 1895, 22 R. 954, 32 S.L.R. 693; *Rankine* v. *Logie Den Land Company*, July 19, 1902, 4 F. 1074, 40 S.L.R. 4. (2) As regards the sales of feu-duties—This was also a fair transaction, for the fair market price at the time was a pure question of fact. The reclaimer was an experienced speculative builder, and in a position to judge of their value. In any event the respondents were willing to restore the feu-duties at the purchase price, and the reclaimer could not ask more.

At advising—

LORD PRESIDENT — This is an action of count, reckoning, and payment by William Robertson Aitken, builder, and it is directed against the executors of the late John Campbell, who acted as law agent for the pursuer and had many transactions with him. The said Mr Campbell died in 1903. The summons in the action was not signeted until 1907, and the transactions which have been inquired into were as old as 1893 and onwards. The averments of the pursuer set forth in detail various transactions which he had had with the deceased John Campbell, all, or nearly all, being of a class arising out of building speculations. The pursuer was a builder and had been engaged in extensive speculations—I do not use the word in any opprobious sense — extensive speculations in the building trade. That is to say, he had been developing ground and putting up tenements and selling them. That, as everyone knows, requires not only building skill but also requires financial arrangements, very often of a somewhat complicated nature, and it was in these financial arrangements that Campbell had been associated with him. There had also been transactions of ordinary sale and purchase between them both, and there had been various other transactions of one sort and another. Now the averments of the pursuer go through these various transactions in detail, and complain—I am using general words on purpose—complain that Campbell, being in the confidential relation of law agent with the pursuer, took advantage of that confidential relationship and obtained for himself arrangements and bargains of a lucrative and unfair character. Also, some of the condescendences complain of transactions which amounted practically to a gift from the pursuer to Campbell; and upon these statements a count and reckoning between them is sought in order that the balance alleged to be due to the pursuer may be recovered. Answers were put in for the trustees, who, complaining that these matters had been left over until the one person who could give an account of the other side, namely, Campbell, was dead, put in averments practically denying the allegations of the pursuer.

The record having been closed the Lord Ordinary allowed proof to both parties of their respective averments on record, reserving meantime all questions of accounting between parties. It has been explained to us, and I think truly, that the meaning of that reservation, according to the practice of the Outer House, is no more than this, that matters of what I may call figure-accounting are not to be admitted to the proof, but that otherwise there is to be a proof as to the actual charges made by the pursuer against the defenders, and the defences thereto proponed. Accordingly that proof was led, at very great length, and upon that proof the Lord Ordinary pronounced a series of nine findings and granted leave to reclaim. That leave was taken advantage of and a reclaiming note was presented by the pursuer, who, before your Lordships, has acquiesced in some, but contested others, of the findings; and the reclaiming note was also in one instance taken advantage of by the defenders, who contest one particular finding of the Lord Ordinary.

With the general result arrived at by the Lord Ordinary I agree, but there is one portion of his interlocutor with which I am not in agreement, and therefore I think it is necessary that I should say so. So far as the transactions in which the Lord Ordinary has found that the pursuer has no cause for complaint are concerned, he has based his judgment upon a double finding. I will take, for instance, as an illustration, the second branch of his finding, which has to do with the speculations at Coustonhill. He finds, in the second branch, that "John Campbell did not act as the pursuer's agent in settling the terms of the said agreements in which the said John Campbell was personally interested; and further, supposing that the said John Campbell did so act, the said terms were in the circumstances fair and reasonable as between agent and client." That class of finding is repeated in more than one part of the interlocutor. Now so far as the Lord Ordinary finds that John Campbell did not act as the pursuer's agent, I cannot agree with him. The Lord Ordinary has explained his view upon that matter, but I am bound to say that I think if the Lord Ordinary's view was right, the rule, which everybody admits to be the rule of law, would really never find application. I am not going to re-state the rules of law which regulate the relations between a person and his law-agent in a matter of contract, because I have nothing to add to what I said in the case of *Gillespie* v.

Gardner (*supra*, p. 771), which was before your Lordships a very short time ago; and I therefore hold here as repeated what I said on the general state of the law in that case. But if one was to hold that the relationship of law agent and client did not exist whenever the business assumed the character of what may be called in one sense not legitimate law business — by which, I suppose, no more is meant than not ordinary law business,—I really do not see what application the rule would have at all. The legitimate, or—as I think is a better phrase—the ordinary business of a law agent with his client, is not to make contracts with his client at all. It is to do things for him. The only contract they have in ordinary cases, is, of course, the contract that the agent is to be paid his ordinary fees; and therefore whenever you come to anything like financing, or purchase and sale, or any bargains of that sort, you are necessarily out of what you may call the ordinary relations of an agent and client. Notwithstanding that, the law as laid down, the general terms of which cannot now be gone back upon, is that a contract of any sort between a client and his agent must be scrutinised in a way that a contract between two third parties would not be. Accordingly, I do not think you can solve the question, as the Lord Ordinary seeks to do, by looking at the nature of the transaction, and then saying, "Because this transaction is not an ordinary transaction between a law agent and his client, therefore the man was not acting as law agent." You have to find out whether the general relationship of law agent and client exists, and then, if you find it does exist, you must apply the strictest scrutiny to the contracts. Well, here I do not think there can be any question for one moment that the general relationship of law agent and client did exist. Campbell was the agent of the pursuer from 1893 up to his death. Every one of the legal pieces of business which this transaction involved was carried through by Campbell, and they were in continual relationship all along. Accordingly, so far as the Lord Ordinary has based his judgment upon that first branch of his finding, I do not agree with him.

But when we come to the second branch of the finding, I do agree; and I wish, therefore, merely to say a word or two upon each of the matters which were made the subject of special argument in the debate before us. Practically what the pursuer and reclaimer objected to in the findings was—first of all, he objected to the third finding, that is, as to the matters referred to in conds. 6, 9, and 11, Now cond. 6 deals with a transaction of purchase and sale of a feu-duty in 1895, which the pursuer had purchased from the Cathcart District Railway Company, of the value of £55. He sold that to the defender at the price of twenty-eight years' purchase. It is now said that at that time thirty-two years' purchase could have been got, and that accordingly defender should account for the difference between twenty-eight years' purchase and thirty-two years' purchase. Cond. 9 deals with an analogous transaction, another feu-duty, the sale being at twenty-nine years' purchase, whereas the proper price is said to be thirty-three years' purchase. I do not think that either of these transactions can be opened up, for this very good reason, that there is no absolute test of the number of years for which a feu-duty may or may not sell. These two feu-duties passed between the parties at the rates of twenty-eight and twenty-nine years' purchase respectively, and the only way in which the pursuer seeks to show that the price which ought to have been got is thirty-two or thirty-three is that he puts gentlemen into the box who say—"We have looked at the reports of sales in the Faculty Hall of Glasgow, and we find that at that date the average price of feu-duties was thirty-two or thirty-three years' purchase." After all, one feu-duty differs from another, just as one star differs from another in glory, and how the value of one particular feu-duty can ever be proved by showing what was the average price obtained for certain other feu-duties I fail to see. The value of one particular feu-duty must always, of course, depend upon the circumstances connected with the security, and with the probability of the future of the property, and a great many other considerations, all applicable to the subjects here in question. You cannot tell the value of a house in a certain street by saying that the average price of the houses in that street sold during a certain period was so and so. Accordingly, I think that here there is nothing against the Lord Ordinary's interlocutor, nor against his finding, because I think the pursuer entirely fails in his proof. Then as regards what is objected to in cond. 11, really the pursuer found little to say. That was a building speculation in Langside, and it necessitated the defender finding ten thousand pounds, and that is what he did. The bank would not advance it unless the defender gave his personal obligation as surety for an overdraft of ten thousand pounds. That is a very large and very great responsibility. If the building speculation had gone wrong, instead of going right, he would have found himself liable for ten thousand pounds, and that being so, I cannot say that it has been proved that the remuneration to the defender was excessive or could not be supported by the criterion which we laid down in the case of *Gillespie* v. *Gardner* (*supra*). That is to say, would another law agent have advised it, or if the proposition had been made by a third party, would this same law agent have advised it to his own client?

Well, then, that leaves the other matter on which most of the discussion really turned, and that is the building speculation at Coustonhill referred to in the *finding of* the Lord Ordinary. Now, the arrangement which was made as regards Coustonhill is contained in a regular agreement between the two. The ground at Coustonhill was feued from a Mr Slater, and the feu contract was taken in the name of

Campbell. The effect of Mr Campbell's taking the feu contract in his own name was that he became liable for a feu-duty of a hundred and seventy pounds. He also became liable, under the conditions of the feu contract, to erect buildings upon the ground in question of such a value that the yearly rent should be at least three times the feu-duty. That having been done, a minute of agreement is entered into between him and the pursuer, in which there is an arrangement made that the ground shall be sub-feued, being divided into twenty-six steadings, and that each subfeu shall be subject to a feu-duty of £17, inclusive of the allocated feu-duty payable to the said Mr Slater. And then the practical conclusion of the agreement is this—the fifth head—"The profit realised from the feuing of said lands under this agreement, after providing for said feuduty of £170 to the said John Pattison Slater, consisting of the surplus feu-duties, shall be divided equally between the first and second parties, but it shall be in the option of the first party to acquire the second party's share of the surplus feuduties at the price of twenty-six years' purchase." Now, the buildings were gone on with. The speculation proved a success, and accordingly Campbell was paid the half of what are called the surplus feuduties, that is to say, half in each steading of the difference between the £17 and the allocated portion of the £170, and over and above that he exercised his option of buying the others at the twenty-six years' purchase, and no doubt in the event it proved a most profitable speculation for Campbell. Now I do not hesitate to say that in this part of the case I have had considerable difficulty, and indeed I may say at first considerable doubt, because the bargain has certainly turned out to be an exceedingly good one for Campbell, a better bargain than one would think a bargain in the ordinary case would be. But after mature consideration of the matter I have come to the conclusion that the Lord Ordinary is right in saying that, viewed as at the time, it was fair and reasonable, and could be supported. I do not repeat what I said in the case of *Gillespie* v. *Gardner* (*supra*) about the point of time at which one must consider such transactions. I think it is quite certain that Campbell in this transaction ran a very considerable risk. It is not only that he became liable for the £170 of feu-duties. Personally I do not put much stress upon that, because it was proved, and I have no doubt it is true, that while he was giving £170 of feuduty, that pretty well represented the value of the bare ground. But he came under an obligation to put up houses upon it, and what was more, he, not by stipulation but by dint of the actual transaction, had practically saddled himself with financing this man through the contract, and we find in the proof that he did finance him to a very large extent; that he, from time to time, had to make large advances to him, and had in every way to interpose his credit so that he should get financed. Now, under all these circumstances I come to the conclusion that the bargain was not a bad one, as at the time, for people without capital, and in the view that although everything did turn out well, things might have turned out badly. Accordingly, I come to the same conclusion as the Lord Ordinary did upon this matter.

There remains, then, only one other question, raised by the pursuer, and that is whether he is entitled to a general account. I do not think he is in a position in which that can be demanded. The case might have been ordered otherwise. The Lord Ordinary might, if he chose, have ordered accounts to be put in and then objections to be put in to these accounts. Instead of that the parties, so to speak, went to proof on these objections, because although these objections were not lodged in the ordinary strict form of objections, yet I think there has been proof upon really every matter of complaint. I think, therefore, the case being developed in that form, it would be out of the question, with no averments to back them, to open up this matter and have a general accounting. It is quite clear that, although there was no formal discharge, there were accounts rendered from time to time as matters went on, by Campbell, and I am equally clear that the whole matters of true contention have been perfectly detailed on record, and have been already investigated in the proof. Accordingly I think the reclaimer fails in all the points which he took.

Then one point was taken by the respondent, and there again I agree with the Lord Ordinary. That was a question of a transaction of sale which had taken place between the two, and the rough fact which we find is that the consideration money in the deed is one sum and the sum admitted to have been paid is a smaller sum. But the explanation made is that the consideration money was falsified by one of Mr Campbell's partners in order that when they came to re-sell they might make a better impression on the next purchaser. That is a very extraordinary and not a very creditable story, and therefore I do not wonder that the gentleman on whose behalf this was said to have been done did not attempt to go into the box and say so. We are left to gather this from the account of a clerk. The gentleman who is said to have done this matter is still alive and might have come if he wished. In that unsatisfactory state of the evidence I think the Lord Ordinary was quite right in holding the persons bound to the consideration money as shown in the deed.

The result, therefore, is that I think that we should affirm the Lord Ordinary's interlocutor, merely with the variation that we should take out that part of the finding which finds that there was not a relationship of law agent and client; and that we should, of course, remit to the Lord Ordinary in order that the case may proceed.

LORD KINNEAR—I agree.

LORD PEARSON — I am of the same opinion.

LORD M'LAREN was absent.

The Court recalled the Lord Ordinary's findings that John Campbell did not in certain specified matters act as the pursuer's agent, found that in said matters he did so act, and with these variations adhered.

Counsel for Pursuer (Reclaimer)—Hunter, K.C.—MacRobert. Agents—Carmichael & Miller, W.S.

Counsel for Defenders (Respondents)—Wilson, K.C.—Cullen, K.C.—Macmillan. Agent—Norman M. Macpherson, S.S.C.

Saturday, June 5.

FIRST DIVISION.

[Sheriff Court at Glasgow.

THE UNIVERSAL CORPORATION, LIMITED *v.* HUGHES.

Company — Calls — Calls from "Time to Time" — Question whether Two Calls of 2s. 6d. each Resolved on at Same Meeting were Separate, or One Call for 5s.

The articles of association of a company, limited by shares, provided, *inter alia*, Art. 9.—"The directors may from time to time make such calls as they may think fit upon the members in respect of all moneys remaining for the time being unpaid on their shares, provided that no call shall exceed two shillings and sixpence per share. . . . A call shall be deemed to have been made when the resolution of the board of directors authorising such call was passed."

At a meeting of directors on 10th December 1907 consecutive resolutions were passed and minuted—"That a call of 2/6 per share . . . be made, payable on the 1st January 1908 . . ." and "that a final call of 2/6 per share . . . be made, payable on the 31st March . . ." Following upon these resolutions two letters were sent out, headed respectively, "Fifth call" and "Sixth (final) call." Each bore the same date, 17th December 1907, and gave notice of the fifth and the final call. In defence to an action for payment of these calls the defender argued that the calls were *ultra vires*, in respect of (i) not being made "from time to time," (ii) being truly not separate calls but one call for 5s.

Held that the calls were separate and valid.

The Universal Corporation, Limited, Broad Street House, London, raised an action in the Sheriff Court at Glasgow, against George Hughes, spirit merchant, Glasgow, "for payment of (*First*) the sum of £50 sterling, 'being the fifth call of 2s. 6d. per share upon 400 shares of £1 each of the pursuers' said company, the Universal Corporation, Limited, in which company the defender is a registered holder of 400 shares,' together with interest thereon . . . and (*Second*) the sum of £50 sterling, 'being the sixth and final call of 2s. 6d. per share upon said 400 shares of £1 each of the pursuers' said company,' together with interest thereon. . . ."

The articles of association of the pursuers, who were a company limited by shares, provided, *inter alia* — "9. The directors may from time to time make such calls as they may think fit upon the members in respect of all moneys for the time being remaining unpaid on their shares, provided that no call shall exceed two shillings and sixpence per share, and every member shall pay the amount of calls so made to the persons and at the times and places appointed by the directors, which said persons, times, and places shall be notified in the notice of call to be sent to the member. A call shall be deemed to have been made when the resolution of the board of directors authorising such call was passed. The joint holders of a share shall be jointly and severally liable to the payment of all calls in respect thereof."

At a meeting of directors duly convened and held on 10th December 1907, the following resolutions were passed and minuted:—"*It was resolved that a call of* 2s. 6d. *per share* on the ordinary shares be made, payable on the 1st January 1908, at the Clydesdale Bank, Ltd.

"*It was resolved that a Final Call of* 2s. 6d. *per share* on the ordinary shares be made, payable on the 31st March 1908, at the Clydesdale Bank, Ltd.

"*A draft of a circular to the shareholders* was submitted and approved, and ordered to be issued with the notice of the above calls."

Following upon these resolutions, notices, as the pursuers averred, were sent out by the secretary of the company to the defender in the following terms:—

"THE UNIVERSAL CORPORATION, LIMITED.
"FIFTH CALL, TWO SHILLINGS AND SIXPENCE PER SHARE.
"Payable 1st January 1908.
"*No.* Broad Street House,
"New Broad Street, London, E.C.
"17*th December* 1907.

"Sir (or Madam) — I beg to give you notice that the directors of the company have made a call of 2s. 6d. per share upon all the members holding ordinary shares upon which only 15s. per share has been paid; and it was determined that such call should be paid on the 1st day of January 1908 to the Clydesdale Bank, Limited, 30 Lombard Street, E.C. . . ."

"THE UNIVERSAL CORPORATION, LIMITED.
"SIXTH (FINAL) CALL, TWO SHILLINGS AND SIXPENCE PER SHARE.
"Payable 31st March 1908.
"*No.* Broad Street House,
"New Broad Street, London, E.C.
"17*th December* 1907.

"Sir (or Madam)—I beg to give you notice that the directors of the company have