[HEARD *25th July*—JUDGMENT *1st and 2nd August*, 1850.]

ELIZABETH IRVINE or DOUGLAS, wife of William Robert Keith Douglas, Esq., commonly called Lord William R. K. Douglas; the said LORD W. R. K. DOUGLAS; and MISS CHRISTIAN C. IRVINE, *Appellants.*

JOHN KIRKPATRICK, Esq., Advocate, *Respondent.*

Process.—Issue.—One issue should never embrace two questions; each question should be put as a separate issue.

Time.—Fraud.—Where a transaction is attempted to be set aside on the ground of misrepresentation and concealment, the lapse of very considerable time, before the challenge is made, is a topic for consideration, and a reason for holding the party to the strictest pleading and evidence.

Fraud.—Misrepresentation.—Statements held not to amount to an averment of misrepresentation.

Ibid.—Concealment.—Concealment, to form ground for a charge of fraud, must be of something which the party using it was bound to disclose.

Ibid.—Ibid.—Facts and information possessed by a party negotiating with another, held not to be such as he was bound to disclose to the other.

IN the yeear 1798, Charles Irvine died while in Scotland, leaving very considerable real and personal estate, situated in the Island of Tobago and in Scotland. He was survived by two brothers, Walter (the eldest, his heir at law,) and Christopher, and by four sisters, Mrs. Burns, Mrs. Kirkpatrick, Mrs. Wardrobe, and Mrs. Glissan; the sisters, together with Christopher, being his next of kin.

At the time of Charles's death, although it was pretty

certain that he had left considerable property, its exact amount was not known, as this depended on the result of accounts between him and the representatives of his deceased partner. But whatever its amount might be, it was known to be subject to two annuities, one of 500*l.* in favour of his widow, and another of 60*l.* in favour of his sister, Mrs. Wardrobe.

Towards the latter end of the year 1798, Walter purchased, first from Mrs. Burns, and afterwards from Christopher, their respective interests in Charles's estate. And after a correspondence with his other sisters, which lasted until the year 1800, he finally purchased all their interests, and received from them, as he had done from Mrs. Burns and Christopher, an assignation and transference, duly executed. The deed from the three sisters contained the following recital :—" And further, " considering that the executory funds of the said Charles Irvine " in this country are very small, and unequal even to the dis- " charge of the funeral expenses and other debts due here; " And that the executory in the West Indies, though it may be " considerable, is extremely precarious, owing to different cir- " cumstances, such as the dangerous state of British settlements " in that quarter, particularly of Tobago, which before the " present war belonged to France, and that the discharge of the " burdens affecting it, and remittance of the clear remainder to " Great Britain, will be attended both with great delay and " danger as well as expense, and for these reasons the said " Walter Irvine, and we, the persons before-named, have come " to an agreement whereby he is to pay to each of us 2,250*l.* " sterling, and we are each of us to assign to him our several " shares and interests in said executory, for the purpose of " enabling him, the said Walter Irvine, to realize the same to " and for his own use and account alone. And seeing that the " said Walter Irvine has made payment to each of us the saids " Margaret, Eleonora, and Isabella Irvine, of the said sum of " 2,250*l.*, as the agreed on value and consideration of our shares

" of the said executory hereinafter conveyed, which belonged to " us severally as executors decerned and confirmed as aforesaid; " of which sums so paid to each of us, the receipt is hereby " acknowledged, renouncing all exceptions to the contrary;" and a clause of warrandice in these terms:—" Which assignation, " above written, we bind and oblige ourselves and our respec- " tive heirs, executors, and successors, to warrant from all facts " and deeds done or to be done by us in prejudice hereof; " declaring that this assignation and the shares of the said " executry or moveable estate hereby conveyed are and shall be " burdened with the due proportion of all the just and onerous " debts and deeds of the said Charles Irvine, and the warrandice " hereof shall not imply that the shares conveyed are equal to " or more than such legal burthens upon the said moveable " estate, but that the same is to be granted and accepted of by the " said Walter Irvine, under the chances of profit or loss which " may in the issue accrue therefrom, no such risk coming under " the said warrandice or affecting in any degree us or our " foresaids."

Either contemporaneously with this arrangement with the sisters, or shortly prior to it, the heir of Leith, who had been in partnership with Charles Irvine in Tobago, disputed an agreement which had been made in regard to the partnership debts and property, and instituted proceedings in the Courts of Tobago and of England, for having it set aside. These proceedings continued from their commencement in the year 1799 or 1800, until the year 1834, when they were terminated by a decision of Lord Brougham, then Lord Chancellor. This decision was followed by an amicable arrangement between the parties in January, 1834, based upon the Master's report in the suit.

In the meanwhile, both Walter Irvine and all his sisters had died off; Mrs. Glissan in 1814, Mrs. Wardrobe in 1821, Mrs. Kirkpatrick in 1823, Mrs. Burns in 1825, and Walter himself in 1824.

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The proceedings in Chancery having, as already mentioned, terminated in the year 1834, the Respondent, in the month of October, 1837, as executor-dative of Mrs. Kirkpatrick, and as residuary legatee of Mrs. Glissan and Mrs. Burns, brought an action against the Appellants, Lady Douglas and Miss Christian C. Irvine, as heirs, portioners, and executrixes of Walter Irvine. By this action he concluded for reduction of the assignation and transference by Mrs. Burns of her interest in Charles Irvine's estate in favour of Walter in 1798, and of the similar conveyance by Mrs. Wardrobe, Mrs. Kirkpatrick, and Mrs. Glissan in 1800. The reasons assigned for this conclusion were, *inter alia*, that the conveyances "were elicited and impetrated by the "said Walter Irvine, through gross fraud and circumvention on "his part, and through facility on the part of the granters, "without any onerous or just cause, and to their and the Pur-"suer's great hurt and lesion." "After allowing Walter Irvine "ample time for investigating and winding up his deceased "brother's affairs, his sisters repeatedly applied to him, the said "Walter Irvine, for the necessary explanation in regard to them, "and for an account of his actings and intromissions therewith; "but the said Walter Irvine not only refused or evaded to give "them a true, full, and accurate account or statement thereof, "but, on the contrary, in so far as he did not withhold expla-"nation altogether, made unfounded, false, and fraudulent repre-"sentations respecting the nature and extent of the said succes-"sion." "While the said Walter Irvine did thus fraudulently "mislead and deceive, and intimidate his sisters by these and "other false statements, as to the nature of the said succession, "its situation and extent, and their right and interest in it, and "withhold from them the full and particular knowledge of the "circumstances which he himself had; he at the same time "repeatedly urged and pressed upon his said sisters the accep-"tance of a liferent annuity and certain slump sums for their "share and interest in the said succession, always falsely stating

" that, in making such offers, he was going a great deal too far, " and was, in truth, sacrificing his own interest to theirs. That " his said sisters, the said Ann, Margaret, and Isabella Irvine, " in consequence of these fraudulent misrepresentations, their " ignorance of the true state of the facts, and of facility on their " part, were at last prevailed upon to accept certain sums in " full of their claims, as stated in the said deeds of assignation " before referred to and recited, and to convey to the said " Walter Irvine, by the said deeds, their right and interest in " the said succession, in consideration of the said sums, although " the said sums were greatly less, and were well known by the " said Walter Irvine to be greatly less, than what they were " entitled to from the said succession;—and which ultimately " yielded, as the said Walter Irvine all along knew it must yield, " a free residue for each of his said sisters, to the extent of not " less than 10,000*l.* sterling. *Quarto*, And independently of the " said fraudulent concealment and misrepresentation on the part " of the said Walter Irvine, it is at least certain that the whole " of the parties, and particularly his said sisters, were in gross " error, and ignorant of the real circumstances: His said " sisters had no means of knowing, except in so far as the said " Walter Irvine chose to give them information, the true extent " and amount of their brother's succession; and the said Walter " Irvine knowing, or having the means of knowing the same, " was responsible for the statements which he made, and on " which he prevailed upon them to act: Further, the said " assignation and others were obtained and granted without " value, or due and proper consideration; and the said Walter " Irvine undertook no obligation or risk corresponding to the " large funds and other advantages which he secured to himself " by virtue of the aforesaid deeds, mis-statements, and other " proceedings."

The Appellants stated several preliminary defences to this action, but without raising any objection to the Respondent's

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title. These defences were disposed of adversely to the Appellants. The Appellants then satisfied the production, and were afterwards ordered to give in defences upon the merits, which was duly done, and thereafter a reecord was made up by condescendence and answers.

In the condescendence put in by the Respondent, he made the following averments:—

Cond. 1. About the year 1766, Charles Irvine, the Pursuer's "maternal uncle, and John Leith, formerly of the island of "Tobago, purchased, on their joint account, certain lots of "ground to be cultivated as sugar plantations; and they after-"wards, in 1768, executed articles of copartnership in respect "of the land so purchased, by which it was agreed, that, after a "certain period, they should divide the lands equally between "them, each being subject to half of the debts and incum-"brances affecting the whole.

"*Cond.* 2. The two co-partners had subsequently occasion to "borrow considerable sums of money, which were secured by "way of mortgage over these planations in favour of the credi-"tors, Messrs. Ruckers, of London.

"*Cond.* 3. In 1778, the partnership between these parties "was dissolved; and, by deed of partition, the lands were "divided between them. The plantations called the Old and "New Grange, were conveyed in property to John Leith and "his heirs, and the plantation called Buccoo was conveyed in "property to Charles Irvine and his heirs. The parties agreed "to take an equal share of the existing debts; and, in respect "that the plantations of Old and New Grange were more "valuable by 10,400*l.* than Buccoo, John Leith became bound "to pay to Charles Irvine one moiety of that sum, or 5,200*l.*, "which was secured by mortgage in Irvine's favour over the "two former plantations.

"*Cond.* 4. John Leith died in 1788, intestate, and leaving

"as his heir-at-law and sole nearest of kin, a lunatic sister, "Elizabeth Leith.

"*Cond.* 5. By reason of the foresaid mortgage of 5,200*l*,. "and also of super-advances made by Charles Irvine to the "company creditors and mortgagees, Messrs. Ruckers, by which "the company debt was liquidated just about the time of "Charles Irvine's death, the said Charles Irvine became a "creditor, by way of mortgage, to the estate of John Leith, "secured over Old and New Grange, to a large amount. The "amount of this debt was settled in 1792 at between 17,000*l*. "and 18,000*l*. It had considerably increased between that "time and 11th April, 1798, when Charles Irvine died.

"*Cond.* 6. The amount of this mortgage debt, as in 1797, "was judicially stated on oath by his brother, Walter Irvine, "on or about 23rd July, 1801, in certain proceedings in the "Court of Chancery, to be 30,000*l*., or thereby; and, by the "final report by the Master of Chancery, it has subsequently "been ascertained that this debt amounted, 'as on the 31st "'day of December, 1797, to the sum of 22,841*l*. 11*s*. 3*d*. "'sterling, with interest at 6 per cent. on 20,157*l*. 15*s*. 3*d*. "'thereof of principal, from the said 31st December, 1797, till "'the death of the said Charles Irvine, on the 11th day of "'April, 1798.'

"*Cond.* 7. The said Walter Irvine, as having or pretending "right to the said mortgage debt, was found by the said Master "to have received payment of the whole of this debt, both "principal and interest, out of the estates of the said John "Leith, being the produce of the Old and New Grange Planta- "tions prior to 1819.

"*Cond.* 8. On the death of Charles Irvine, in April, 1798, "intestate, his heir-at-law was his brother, the late Walter "Irvine; and his nearest of kin were his younger brother, "Christopher William Irvine, and his four sisters, Isobel,

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" Margaret, Anne, and Eleonora. He left a widow, who had " renounced her legal provisions in consideration of an annuity " of 500*l.* per annum stipulated to be paid to her. The said " Charles Irvine died, domiciled in Scotland.

" *Cond.* 9. By the law of Tobago, the said mortgage debt, " amounting to upwards of 23,000*l.*, constituted part of Charles " Irvine's personal estate, which descended to his nearest in kin. " Besides this, the residue of his personal succession (exclusive " of his real estate, which descended to his heir-at-law), was very " large. It was stated by Walter Irvine himself, in a memo- " randum or estimate, which his agent, by his desire, laid before " his sisters, with a view to the transaction after-mentioned, at " between 13,000*l.* and 14,000*l.* But the real amount very " greatly exceeded that sum.

" *Cond.* 10. The said Walter Irvine being desirous of obtain- " ing for himself the whole benefit of this large succession, to " the loss, and in fraud of his sisters after-mentioned, entered " into a negotiation with them, the result of which was, that " he, by fraud and misrepresentation, induced his three sisters, " Isobel (Mrs. Kirkpatrick), Margaret, and Anne (Mrs. Burn), " to give over and assign to him, for a very inadequate consi- " deration, their shares of the personal succession of their " brother Charles.

" *Cond.* 11. In prosecuting this fraudulent scheme, Walter " Irvine first made a secret settlement with his younger brother, " Christopher William, who had been for many years resident " in Tobago, had managed the estates and affairs of Charles " in that island, and was thus cognizant of the extent " and details of his succession. Christopher William was in " Tobago at the time Charles died; but he came to Great " Britain in the course of that summer.

" *Cond.* 12. In the course of the private negotiation between " the two brothers, which terminated in the younger brother " assigning to the elder his share of Charles's personal succes-

" sion, that share was estimated by Christopher William at " 6,000*l.* or 7,000*l.* sterling.

" *Cond.* 13. Christopher William was at that time debtor to " Walter in a large sum, the amount of which the brothers " were not agreed upon, but which must (as appears from what " follows) have been ultimately estimated in the compromise at " near 5,000*l.* or 6,000*l.*

" *Cond.* 14. Christopher William, at first proposed to assign " his share of the personal succession to Walter in security of " his debt; but Walter's object being to obtain an abso- " lute right to the share, it was ultimately arranged that, in " consideration of an absolute assignation being granted by " Christopher William, Walter should grant him a full dis- " charge of his debt, and also pay him over and above 1200*l.* " The transaction was completed by the execution of an assign- " ment and release, dated 1st November, 1798.

" *Cond.* 15. The assignment sets forth, 'and whereas the " ' said Christopher William Irvine stands indebted to the said " ' Walter Irvine,' who is next eldest brother and heir-at-law " ' to the said Charles Irvine, in a considerable sum of money, " ' and the said Walter Irvine has also paid to the said Chris- " ' topher William Irvine the sum of twelve hundred pounds " ' sterling money of Great Britain.' Christopher William " Irvine then proceeds to assign his share of the personal suc- " cession, 'and the said Walter Irvine doth hereby, in consi- " ' deration of this present assignment, acquit, release, and " ' discharge the said Christopher William Irvine, his executors, " ' administrators, and assigns, of and from all debts, sum and " ' sums of money, now due to the said Walter Irvine by the " ' said Christopher William Irvine, in any manner whatsoever, " ' and every part and parcel of the same.'

" *Cond.* 16. At the time when Walter Irvine agreed " to this transaction, he also insisted upon bestowing upon " Christopher William, as a condition of his acceptance, an

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" additional document in the shape of a bond of annuity, to be " executed by Walter in favour of Christopher, of 300*l.* during " his life, to be continued after his death in the proportion of " 100*l.* to his widow, and 200*l.* in equal moieties, to his children " during their lives.

" *Cond.* 17. It was well understood and arranged between " the brothers, that the true nature of this settlement between " them should be concealed from their sisters, and that Chris- " topher William should do all that he could to aid Walter in " his attempts to make a very different settlement with them; " and the two brothers acted upon this arrangement. Chris- " topher William aided his brother in misrepresenting the " nature of the settlement between them, and advised his " sisters to trust themselves in Walter's hands, and to confide " in his generosity.

" *Cond.* 18. Walter Irvine, in negotiating with his sisters, " employed Mr. Charles Steuart, writer in Edinburgh, as his " agent, as being a person in whom these sisters had great con- " fidence; but he concealed even from Mr. Steuart the particulars " of his settlement with his brother Christopher, giving him to " understand that Christopher had acted in the most liberal and " handsome manner, and had offered his share of the personal " succession, at once, upon his (Walter's) own terms.

" *Cond.* 19. The first of his sisters with whom Walter Irvine " effected a settlement was Mrs. Burn, who had married a clergy- " man. These people appear to have placed implicit confidence " in Walter Irvine, and his agent, Mr. Steuart. Mrs. Burn " having applied to Mr. Steuart for information as to the per- " sonal succession, Mr. Steuart, on the 6th of June, 1798, " wrote to her a letter, in which he represented it as uncertain " whether the personal estate would be equal to pay the debts " affecting it. This appears to have been the only information " furnished to these simple-hearted people before they agreed " to assign over their rights to Walter Irvine.

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" *Cond.* 20. Mr. and Mrs. Burn wrote to Walter Irvine " declaring they would do anything he pleased in regard to the " executry of their late brother Charles. Walter proposed that " they should assign their interest in the executry, upon the " condition of his granting them an annuity of 100*l.* upon their " joint lives. This offer was thankfully accepted by Mr. and " Mrs. Burn on the 6th of November, 1798, who seemed to " think this a most generous offer on the part of Walter; and " on these terms an assignation was finally executed by Mr. and " Mrs. Burn on the 25th of December, 1798.

" *Cond.* 21. At the time this transaction took place Mr. and " Mrs. Burn were far advanced in life, and were both of them in " bad health. The annuity, stipulated as the price of their " assignment of their share, was utterly inadequate, and they " never would have agreed to this transaction, had they known " the terms upon which the previous settlement between Walter " and his brother Christopher had been arranged.

" *Cond.* 22. The negotiation between Walter and his two " sisters, Isabella (Mrs. Kirkpatrick) and Margaret for a trans- " ference of their shares of the personal succession, was much " more protracted. He made several unsuccessful attempts " before he at length succeeded in persuading them to make " over their claims to him.

" *Cond.* 23. Previous to 26th April, 1798, Walter Irvine had " received an opinion from Mr. Pigot, an eminent lawyer in " London, whom he had consulted as to his legal interest in his " brother Charles's succession, in which Mr. Pigot advised him " that the personal property descended to the nearest of kin, " brothers and sisters. Miss Margaret Irvine had applied to " Walter for some information as to Charles's succession, in " which she and her sisters thought they must have an interest, " and requested leave to wait on her brother respecting this " business; Walter, on the 27th of April, returned the following " answer:

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"'Mr. Irvine begs leave to acquaint Miss Irvine, that all "'persons who had claims on the estate of the late Charles "'Irvine were, by public advertisement, directed to lodge them "'with Mr. Charles Steuart, W.S., which he deemed sufficient "'notification; but, for her more immediate satisfaction, he "'begs leave to transmit a paragraph of an opinion he only "'received yesterday from an eminent solicitor in London:— "'"The whole of the real estate descends to the heir-at-law, '"who is his next eldest brother, if he died without issue, and '"no will, and the personal estate equally divided amongst his '"brothers."—J. does not vouch for this opinion being the law,— "'those who think themselves aggrieved may have their recourse "'how they may. In the mean time J. does not consider himself "'answerable in any shape, farther than to secure his own "'rights. Mr. Irvine is very sorry to inform Miss Irvine he "'cannot possibly enter into any personal discussion on this "'subject, or indeed any other. Mr. Steuart will, however, be "'ready, as his man of business, to attend to her.'

"The opinion from which the foregoing excerpt was taken "was that of a Mr. Brown, solicitor in London, which had "been transmitted to Walter by his correspondents, Messrs. "Ruckers. The apparent contradiction between it and that of "Mr. Pigot arose from this circumstance, that Mr. Brown did "not know that Charles Irvine had left any sisters. Of this "circumstance Walter was aware, and on 28th April he wrote "to Messrs. Ruckers, mentioning the difference between the "two opinions, and desiring them to inform Mr. Brown of the "existence of the four sisters. Yet, in writing to his sister "Margaret, he quoted the opinion of the solicitor founded upon "imperfect information, and withheld the contrary opinion of "the barrister whom he himself had consulted.

"*Cond.* 24. Of this date, Walter wrote to his agent, Mr. "Steuart, stating, that his sisters were dreadfully in want, and "had become very clamorous in consequence of their expecta-

" tions from their brother's estate. He desired him to advance " them 30*l.* in the meantime: and after disclosing his intention " of giving them a consideration for their shares in the personal " succession, he instructed him to offer them each 500*l.* recom- " mending it as from himself.

" *Cond.* 25. In the month of July following, Walter Irvine, " through his agent, Mr. Steuart, laid before his sisters a " memorial and estimate of their late brother's personal succes- " sion, presenting a very unfavourable view of it, and bringing " out a balance of 4,733*l.* against the executor. This, however, " did not include the mortgage debt, the amount of which he " did not communicate, and on the 31st of July he again " instructed Mr. Steuart to offer them 500*l.* or 600*l.* a-piece for " their claims.

" *Cond.* 26. On the 14th of January, 1799, Walter Irvine " instructed Mr. Steuart to offer to each of his sisters, for their " shares of the personal succession, an annuity of 50*l.* during " their lives, and 500*l.* sterling down.

" *Cond.* 27. Mr. Steuart having reported that his sisters " were disinclined to accept of this offer, and wished to see a " distinct state of the affairs, Walter Irvine on the 30th of " January, instructed him to offer them 1000*l.* paid down, and " he gave him power to increase his offer to the extent of " 200*l.* or 300*l.* more each.

" *Cond.* 28. These offers having not been accepted, Walter " Irvine, on the 29th of January, 1800, wrote a letter to his " sisters, Mrs. Kirkpatrick and Miss Irvine, in which he thus " mentions the settlement he had made with his sister Mrs. " Burn, and his brother Christopher:—' I think it neces- " ' sary to inform you the settlement I made with Mrs. Burn " ' stands thus—100*l.* a-year annuity to be paid on the joint " ' lives of her and her husband, in lieu of her rights. To our " ' brother Christopher I paid 1,200*l.* twelve months after he " ' had made the assignment. As for Mrs. Wardrobe whom

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" ' you suppose I am disposed to befriend, you will be surprised " ' to hear from me I have never paid a farthing, &c. In " ' respect to Christopher accepting of what you may think a " ' small compensation, I can assure you it was his own act and " ' deed. I never made any proposal of the kind to him; on " ' the contrary, I had thought of making over to him all my " ' rights in the personal estate, in order to get rid of the " ' trouble I knew I should have with it, but this he declined, " ' for the same reason, and the impossibility, as heir-at-law, " ' that I should shake myself clear of it whilst so circumstanced " ' with the lunatic's estate. All of which affairs he, from his " ' professional knowledge, was a much better judge of than I " ' could possibly be. We will suppose the Grange debt still " ' to be from 15,000*l.* to 20,000*l.*, call it 18,000*l.*

" *Cond.* 29. In this letter Walter Irvine made a grossly " false and fraudulent statement with regard to the consideration " which he had allowed to his brother Christopher for the " assignment of his share of the personal executry, as also in " regard to the probable amount of the Grange debt. Instead " of 1,200*l.*, he had allowed to his brother 6,000*l.* or 7,000*l.*; " and in regard to the Grange debt, instead of 18,000*l.*, it was " estimated by Walter Irvine himself, judicially on oath, within " eighteen months of the time when he wrote this letter, at " 30,000*l.* His sisters, however, were materially influenced by " these false and fraudulent statements, and, being in great " poverty, they believed that the best course for them was to " accept his offer, which he now had considerably increased.

" *Cond.* 30. In negotiating with his sisters, Isobel (Mrs. " Kirkpatrick) and Margaret, Walter Irvine did not deal with " any legal advisers of these ladies. On the part of these ladies " the negotiation was conducted, and the terms of the compro- " mise with Walter Irvine settled, by a Dr. Mulvey, a person " utterly unacquainted with business, and whose conduct was " guided or approved of by no legal adviser of these ladies " Walter Irvine's views in these transactions were also materially

" forwarded by a Mr. Lindsay, who pretended to the character " of a mutual friend of the parties.

" *Cond.* 31. The final settlement as to these two sisters was " made in London, on or about Wednesday, the 2nd of April, " 1800, at an interview between Walter Irvine on the one hand, " and Dr. Mulvey on the other. No legal adviser was present " on the part of the ladies, but the doctor acted as their sole " and accredited agent. The terms of compromise then settled " were afterwards embodied in the assignations granted by these " two ladies now under reduction.

" *Cond.* 32. By these assignations, Mrs. Kirkpatrick and " Margaret Irvine, in consideration of the sum of 2,250*l.* " sterling, payable to each of them, assigned and transferred to " the said Walter Irvine their shares and interest in the move- " able succession of their brother, the said Charles Irvine."

The plea in law on which the Respondent relied, was as follows:—" In respect of the gross fraud, misrepresentation, " and undue concealment of the said deceased Walter Irvine, " in negotiating with his sisters, and the circumvention which " he practised on them in regard to the compromise of their " rights, the deeds called for in the summons, by which that " compromise was carried into effect, ought to be reduced, and " the Pursuer restored against the effect of them."

The Appellants pleaded in answer,—" 1. The general state- " ments in the libel and condescendence are irrelevant, and " insufficient to support all or any of the reasons of reduction. " 2. At least, the Pursuer's averments being all false and " groundless in themselves, and the deed challenged having been " granted without fraud, misrepresentation, undue concealment, " or circumvention, the action ought to be dismissed."

The Lord Ordinary, after hearing parties on the relevancy of the averments, remitted the case to the issue clerks, by whom the following issue was prepared:—" It being admitted " that the assignation, of which No. 54 of process is an extract, " dated the 25th of December, 1798, was executed by the

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" deceased Mrs. Anne Irvine, with the special advice and " consent of her husband, the late Rev. John Burn, in favour of " her brother, the deceased Walter Irvine:

" It being also admitted that the assignation, of which No. " 55 of process is an extract, dated the 5th and 6th days of " May, and 26th day of June, 1800, was executed by the late " Margaret Irvine, and by the late Mrs. Isabella Irvine, other- " wise Kirkpatrick, in favour of their brother, the said deceased " Walter Irvine:

" I. Whether the said assignation, of which No. 54 of " process is an extract, was procured by fraudulent misrepre- " sentation, or fraudulent concealment on the part of the said " Walter Irvine?

" II. Whether the said assignation, of which No. 55 of " process is an extract, was procured by fraudulent misrepre- " sentation, or fraudulent concealment, on the part of the said " Walter Irvine?"

The Respondents objected both to the form of this issue, and to the proposed mode of trying the case by a jury. But these objections were overruled; leave to appeal the interlocutor overruling the objections was then asked, but refused, and the cause went to trial, when a general verdict was returned for the Respondent. The Court refused a motion to set aside the verdict, and grant a new trial, and on the 21st January, 1848, pronounced the following interlocutor:—" In respect of the verdict of the jury in this " case, decern in terms of the reductive conclusion of the " summons, and remit the cause to the Lord Ordinary, to hear " parties on the conclusion for count and reckoning, and other " conclusions not now disposed of, and to proceed further " as to his Lordship shall seem just."

The appeal was taken against the different interlocutors of the Lord Ordinary and of the Court.

Sir F. Kelly, *Mr. Bethell*, and *Mr. Anderson*, for the Appellants.

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I. The title of the Respondent, stated in his summons, is not such as can entitle him to the prayer of it in any view, for the summons shows he is claiming the interests of women who were all of them married, whose husbands therefore, or their representatives, would be entitled to that which the Respondent asks by the action. Further the summons asks for reduction of the deed to which Mrs. Wardrobe was a party, but no representation is shown by the Respondent to that lady, of one kind or another, not even the faulty representation which he sets up to the other sisters.

[*Lord Brougham.*—Was this objection taken in the Court below?]

No, it was not, but on the authority of Burnes *v.* Pennel, 6 *Bell's Ap. Ca.* 541, and Luke *v.* Magistrates of Edinburgh, 6 *Wils.* and *Sh.* 241, that circumstance will not form an obstacle to its being now urged.

II. Upon the Respondent's own showing, both by his summons and his condescendence, there was no case either of fraudulent representation or of fraudulent concealment. If it be kept in mind that provision had to be made out of Charles's estate for the annuities to his widow, and to Mrs. Wardrobe, it will be evident that after paying the price of the purchase of his brother and sister's interests there could remain very little for Walter himself, unless what he might expect from the issue of the proceedings with the heir of Leith. Walter then had given the parties whom the Respondent represents, more than their share of the available fund, and had, by his purchase, only achieved making himself heir to a Chancery suit, which in the result, did not belie the character of such proceedings, for it lasted during 34 years, and outlived all those persons who are now represented as having been injured by being cajoled into not abiding its result. No doubt that result was favourable, but it might have been otherwise, and the prospect of the long delay and this uncertainty might well make it a

prudent step for the sisters, who were in poverty at the time, to sell the chance of something good for the instant possession of a reasonable price. This is the view which, upon the Respondent's own showing of the nature of the transaction, every prudent mind would take, laying aside for the time any question as to misrepresentation or concealment.

And first, as to misrepresentation, there is no *fact* connected with Charles's estate which Walter in any way misrepresented; every fact now relied on was brought before the sisters, so as either to give them a full knowledge, or put in their power to acquire such a knowledge of it—the only circumstance as to which the Record makes even a suggestion of misrepresentation is the Tobago mortgage debt, but the memorial which accompanied the estimate sent by Walter to his sisters negatives any such suggestion,—that debt was there distinctly mentioned. It is spoken of, certainly, as belonging to *the heir*, a misrepresentation of the law, as innocently made, perhaps, as it was innocently received; but either way that was not such a fact as the parties were entitled to ask from Walter, still less were they entitled to rely upon his statement of it. He was no agent or adviser of theirs. On the contrary, by the Respondent's own showing, he was dealing with them at arm's length, and in his letters distinctly put them upon enquiring for themselves.

Second, as to concealment, there is nothing in the Record to which this charge has the semblance of application but the purchase of Christopher's interest. In the letter of the 20th January, 1800, Walter says he had paid Christopher 1200*l.*, and now the Respondent alleges that he also paid him the release of an old debt, stated to have been between 6000*l.* and 7000*l.*, and that he also "insisted upon bestowing upon" him an annuity for himself, his widow, and children. Assuming these statements to be true, the sisters had no right to a knowledge of them. It was *jus tertii* to them what arrange-

ment was come to by Walter and Christopher with each other. If they had no right to a knowledge of these facts, then they could not complain of their concealment.

The averments in the condescendence are not only that there was misrepresentation and concealment, but that the representation and the concealment were *fraudulent*, and fraud is the designation given to everything that was done. It is not sufficient, however, to justify an issue of fraud or no fraud that the party uses that term.

In strict pleading, the party must show, not only that the representations made to him were false, and that the maker knew them to be false, but that he was induced, through the falsehood, to enter into the transaction which the falsehood was intended to draw after it. He must not only *aver* fraud, but something that *shows* fraud, although that term had not been used to characterize it. He must prove it, as averred Wilde *v.* Gibson, 1 *Ho. of Lords, Ca.* 625.

On this Record there is no averment of substantive fraud, or anything to which, by the utmost ingenuity, that character can be ascribed. But not only should fraud have been shown by the averments, but fraud going to the substance of the transaction sought to be disturbed. Fraud may have influenced the inducing motive, but that won't avail; it must enter into the very substance of the act done, *Stair* I. 17, 2.

There was nothing, then, upon the Record, which entitled the Respondent to the issues which he obtained, and the interlocutor approving of them ought now to be reversed.

III. But further, the claim set up by the Respondent is that which is known in English law language as "a stale "demand," and is equally discountenanced by the law of Scotland as it is by the law of England. The parties whom the Respondent represents, stood by, so long as they lived, and he has done so since their death, enjoying all the benefits of the arrangement made with Walter, slumbering upon their

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supposed objections, not in ignorance of them, but in attendance on the result of the proceedings in Chancery, until it should be seen whether there would be advantage in bringing the objections forward, and then doing so after a lapse of nearly 40 years. Such conduct has always been viewed by the Courts of both countries, as disentitling the party to their aid in recovering rights, which he has shown himself so negligent of. Smith *v.* Clay, *Amb.* 645; Cholmondeley *v.* Clinton, 2 *Jac. & W.* 1; Champion *v.* Rigby, 1 *Russ. & My.* 539; Roberts *v.* Tunstall, 4 *Hare*, 257; 2 *Bell's Prin.* 115; Monkland Coy. *v.* Dickson, 5 *Wil. & Sh.* 447. The mere lapse of time, therefore, formed such a personal exception against the Respondent as should have barred his being heard.

The Lord Advocate and *Mr. J. Parker* for Respondent. I. and III. It is too late now for the Appellants to raise any objection as to title or lapse of time; every question of that nature was open to them before satisfying the production. The deeds once produced, all that remains is to examine the grounds of the challenge, and the door is closed against all objections to title, or of other preliminary nature. By the provisions of the 6th Geo. IV, c. 120, s. 5, preliminary or dilatory defences, as they are called, are to be pleaded and disposed of before defences on the merits are to be ordered. This assumes that, after the defences on the merits, dilatory defences are not to be entertained. At all events the 10th section of the same statute, after providing for the final adjustment of the Record, "enacts that "no amendment of the libel, or *new ground of* "*defence* shall be allowed after the Record shall have been "thus completed." If, therefore, the Appellants wished to found on these objections of want of title, or lapse of time, they should have pleaded them before satisfying the production.

[*Lord Brougham.*—Do you hold the defence as to time to be barred if not reserved?]

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Decidedly.

[*Lord Brougham.*—That is if pleaded as a bar, not as showing a stale demand.]

Both, certainly.

[*Lord Brougham.*—It is not so in England.]

The heads of acquiescence and homologation give the doctrine of stale demand, though that term is not known in the law language of Scotland. They are constantly pleaded, and an issue on the subject of acquiescence would have been granted had it been asked.

[*Lord Brougham.*—My question did not go the length of homologation or acquiescence, but regarded time as a mere topic.]

Our argument goes that length too; for it comes to this, that if time had been pleaded, it would have precluded the necessity of going into the grounds of reduction, but it must be pleaded as a preliminary defence in some shape, otherwise it is barred. In Monkland Coy. *v.* Dickson, homologation and acquiescence had been both pleaded, and the plea had been sustained. Here, from the course taken by the Appellants, there was nothing to induce the Court or the Respondent to suppose that anything was to be gone into but the grounds of reduction; accordingly the issues were so framed as to meet these alone, and the evidence took the same course.

II. The cause having been tried by a jury, it is not competent to complain of that mode of enquiry having been adopted; the remit for trial by jury cannot be appealed against; 59 Geo. III. cap. 35, sec. 15. If then the case has been duly tried, the Appellants cannot have it re-tried here; the charge of fraud may be very absurd, but a jury have decided otherwise, and so has the Court below when asked to disturb the verdict by ordering a new trial. All that can be argued here, is the relevancy of the averments, without regard to the evidence by which they may be supported. The averments of the summons are suff-

ciently broad to support the case set up by the Respondent, and the statements of the condescendence are equally so. They show that, after having been made aware, by the opinion of Mr. Pigot, that the personalty of Charles descended to his sisters as well as his brothers, and that the West India mortgage formed part of his personalty, Walter concealed this information, and dealt with his sisters on the representation that the personalty went to the brothers alone, and the mortgage formed part of the realty, and went to himself alone, as Charles's heir, and that the effect of this was at once to wipe off 31,000*l.* from the executry. These averments might be false, but assuming them to be true, they were undoubtedly relevant to support the charge of fraud. They show the case of a trustee dealing with his *cestui que* trusts, without communicating to them all the knowledge which he himself possessed, for as Walter was not entitled to the mortgage debts or the other personalty, his interference with either placed him in the position of an executor *de son tort*, and made him, as such, liable to all the obligations thrown upon a trustee for the protection of his *cestui que* trusts. His acts, therefore, are to be looked upon with a jealousy, and in a manner different from that in which the acts of an ordinary person would be viewed.

LORD BROUGHAM.—This case brings before your Lordships for decision the merits of an interlocutor of the Court of Session in Scotland reducing two Deeds of Assignment, or, as it is called in Scotland, Assignation, one made in 1798 and the other in 1800, between two parties, one of whom is Walter Irvine, the father of the present Appellant Lady William Douglas, and the others of whom are the four sisters of Walter Irvine, Mrs. Burn, Miss Irvine, Mrs. Wardrobe, and Mrs. Kirkpatrick, formerly the Misses Irvine, and their representatives; and it is painful in the very outset of my observation to remark, that we are here deciding upon the validity of two

deeds made by and in favour of parties, none of whom are now alive, their interests being only represented by their heirs and representatives, for the parties themselves have long since gone to their graves. The last of them died in 1829, others of them in 1824, 1825, or 1826, I think, and the first observation which I have to make to your Lordships will rest upon that circumstance.

My Lords, the deeds were sought to be reduced by proceedings commenced at periods of 37 and 39 years respectively from the dates of those instruments. Those two Assignations consisted of a family arrangement (upon which I shall say a word presently), between Walter Irvine the brother, he and Christopher being the survivors of three brothers, Charles being dead, and his four sisters, (three of whom were then unmarried, the Misses Irvine), of whom Mrs. Burn was one, Miss Irvine another, Mrs. Wardrobe the third, and Mrs. Kirkpatrick the fourth. My Lords, a large estate in Tobago had belonged to one of the brothers, Charles Irvine, who died long before the commencement of the suit, a considerable time before the execution of the second and a little while before the execution of the first of these deeds. He died in 1798, and questions of a complicated nature arose immediately after his decease respecting the succession to his property, for there were mortgages upon it to a considerable amount, with other claims. There was a lunatic, a Miss Leith, who had interests, or a claim, as it is called, on the estate, and there was Walter Irvine, the heir-at-law to the real estate, and who by the law of Tobago, if Charles was understood to be there domiciled, had a claim also to a share of the personalty. There was likewise Christopher, who had a claim past all doubt to his share, being the agent of the estate, living in the island, and I believe domiciled there, though this is immaterial. Charles Irvine, the deceased, to whom Walter succeeded as heir-at-law, was domiciled, as it appears, though that is not admitted, but he rather appears to

have been for six years, namely, from 1792 to 1798, resident in Scotland, being a native of that country, whither he had returned from Tobago, and where, without ever returning to Tobago, he died.

At the late period to which I have alluded, namely, 37 years after the last of the deeds, and 39 years after the first had been executed, proceedings were commenced in the Courts of Scotland; and out of these the judgment arose which is the subject of our present consideration. An action of reduction was brought of these two deeds, upon the ground of misrepresentation by Walter to his sisters, the Misses Irvine, or of fraudulent concealment of facts within his knowledge from their knowledge, or of both fraudulent misrepresentation and fraudulent concealment, which past all doubt, if sufficiently averred on the pleadings, and if sufficiently proved in evidence, would have sufficiently called upon the Court to reduce or set aside the deeds.

The object of this arrangement was, on the part of Walter, to obtain from his sisters the surrender of all right to their share of the personalty of Charles their deceased brother; and the question, and the only question raised by the action was, whether, in order to obtain this benefit for himself, he fraudulently misrepresented or fraudulently concealed matters to induce his sisters to enter into that arrangement, and whether such misrepresentation or concealment, or both, operating upon them, induced them to execute the deeds in question? And here I must stop to remove out of the cause that which has not been dwelt upon except as a topic in argument occasionally, but which I consider in the circumstances of the case to have little or no place, namely, that this is in the nature of a family arrangement, for I conceive that a family arrangement between parties who were treating really at arm's length, who were not upon good terms with each other (at least two of the sisters, as they state, were not upon good terms with their brother

Walter), has little or no place, and above all where fraud is alleged. That matter, therefore, I at once throw out of the cause.

But my Lords, I now come to a consideration of the manner in which the Court dealt with the case upon the pleadings. It appeared to their Lordships after argument, that there was sufficient ground for directing an issue and sending the question of fraud to be tried by a jury. From that decision no appeal lies, any more than from the decision on the motion for a new trial which was subsequently made and refused. Therefore we have nothing judicially to do with that. Nevertheless it is difficult for me in considering this case, and casting my eye back upon the course of the discussion on either side at the bar; it is difficult for me, so regarding what has passed here, and regarding the evidence, the mass of which I now have under my hand, to avoid saying one word to express my regret that such a course was taken, for here are between nine and ten hundred closely printed quarto pages of correspondence submitted to a jury, who, through that maze, were to grope their way, who, by examining the pieces whereof that mass consisted, were to make up their minds, and who, as the result of that painful and hardly practicable examination, that laborious and hardly possible enquiry, were to give their opinion upon the matter of fact submitted to their consideration by the issues sent them to try. I had much rather that the opinion of the Court itself had been taken upon the subject than that it should have been sent to be tried by a Jury. It is, however, now too late to wish for that which did not take place. Nor is that which we are now considering, how the Court thought fit to deal with the case, first in ordering the trial, and next on the motion for a new trial. With neither of these questions have your Lordships now anything to do; we are confined to the judgment finally pronounced setting the deeds aside.

And first I must advert to the time which has elapsed. It may, however, be more convenient that I should commence

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with what I have to offer upon the frame of the issues and upon the form of the record. There were two deeds, numbered 54 and 55, in the process, or as I see they are called Nos. 57 and 58 in my copy of the pleadings, Mrs. Burn's deed, and Miss Irvine's, Mrs. Wardrobe's, and Mrs. Kirkpatrick's deed respectively. These deeds were the subject-matter of the two issues which are conceived in the same terms, the question sent to the jury being whether Walter Irvine did obtain (it is not even said "did or did not," so as to make it grammatical), the deeds in question, by fraudulent misrepresentation or fraudulent concealment from his sisters? Beyond all manner of doubt this is an improper form of issue. It is improper for more reasons than one, each of which would be enough to support its condemnation. It is improper to couple together two not necessarily connected or even dependent issues. It is highly improper, illogical, and in every respect mischievous to put a question on two separate matters, to one of which an affirmative answer might be returned, and to the other a negative. It is asking a jury to answer a double question, to one parcel of which they might say "yea," and to another "nay," contrary to every rule either of examining a witness, or of interrogating a jury. But it is improper on another account, and most essentially, and for paramount reasons improper, when you consider that you are not asking the question, as in the case of a witness, of one individual, but of twelve, six of whom might say that the deed was obtained by fraudulent misrepresentation, and the other six that it was obtained by fraudulent concealment. They all together, the whole twelve, might join in giving that verdict, which alone they gave for the Pursuer, making no distinction, effecting no separation, referring to no diversity between the two matters, but a general verdict against the deed, not even answering the question put, not even saying that it was fraudulently obtained, and without saying in what way, but a general verdict for the Pursuer, leaving the Court to gather, (and I believe this

is not inconsistent with the loose and slovenly practice of that Court), that it was meant to answer the question put to the jury in the affirmative generally. How then can we say that we have a verdict at all upon such an issue sent to a jury, and such a general verdict returned! I have no security. I cannot tell. I do not mean to say that the fault of the issue might not have been cured by the verdict of the jury. I do not mean to say that if the jury had returned a verdict in answer to the compound question separating it into its parts, they might not have got rid of the evil of its duplicity, for they might have said if they had chosen, "we specially find" so and so. Then it must have been unanimous, and that would have taken away all the risk of there being no verdict at all; which exists in the present case. They might have said "we find that there was frau-
"dulent misrepresentation, and that the deed was obtained by
"that, but we do not find that there was fraudulent concealment,"
or they might have said, "there was fraudulent concealment,
"but we do not say there was fraudulent misrepresentation,"
or they might have said, "there was both fraudulent misrepre-
"sentation and fraudulent concealment," or they might have said "there was neither." Therefore they might, by a special finding, have cured the radical defect of the question put to them. And why, let me ask, did the most able and learned Judge who tried the cause, not give his direction to the jury so to find? If he had done so, I am far from meaning to say that he would have taken away all difficulty in the present case, but at least he would have taken away from the Court below, and from your Lordships' dealing with what was done in the Court below, the first of the great difficulties which meets us and obstructs our progress in endeavouring to see our way through this case. He did not so think fit to do, and a general verdict was thus returned. A motion for a new trial was made, it was refused, and that could not be appealed from. Judgment was then passed for the Pursuer according to the verdict, as the Court

deemed it and construed it; that judgment was to reduce the deeds, and that is the judgment now under appeal. It is a judgment proceeding upon the supposition that the jury were all agreed in their finding; whereas from the form of the issue compared with the nature of the verdict, it is quite probable that half the jury might have found one thing and half another; and that they agreed in nothing at all.

My Lords, the next observation which I have to make is perhaps yet more material with a view to the ultimate decision of the cause. The verdict being general, not finding whether it was misrepresentation or concealment, or both, but only negativing that it was neither (we are left only with the information that it was for one or other of those reasons, or both, but we cannot tell which, that the jury found for the Pursuer), then what position do we now find ourselves in, and what position were the Court below in, though they do not seem to have been aware of it? Notwithstanding the trial ordered; notwithstanding the trial had; notwithstanding the verdict pronounced; and notwithstanding the refusal to have a new investigation—no valid judgment could pass upon this record, unless there was in the record enough to support the judgment. The verdict is only auxiliary to the working out, as it were, of the purpose of the record. Then we are referred to the summons, and the condescendence, and whatever else, on the part of the Pursuer, is said to be his recorded statement of his own case. Well, but suppose this, which is possible; which might have happened in this case, and may happen in any other case of the same sort, where the double and confused mode of framing issues is adopted; suppose one of the two matters were well and validly alleged upon the record, so that if the finding had been upon this matter there would have been no doubt of the judgment to be passed upon it; suppose the other matter were so set forth upon the record, that if a verdict had passed upon it, no judgment could validly have been supported by that finding.

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Here is the position we are in. I will suppose misrepresentation to have been duly alleged, and with sufficient specification; I will suppose concealment to have been not duly alleged, and without sufficient specification—or, which comes to the same thing, that it was concealment of that which the party had no obligation of any sort, either in law or in equity, to reveal—and suppose the jury had found upon the misrepresentation in the affirmative,—judgment, beyond all doubt, would have passed upon that finding. But then suppose they had found only upon the second, which was ill set forth, it is equally clear that no judgment could have passed validly upon it. Well, then where are we? We have a general verdict; and we cannot say whether it was upon the misrepresentation, which, if the finding had been upon that, would have supported the judgment, or was only upon the concealment, which, by the hypothesis I am making, would not have supported the judgment. Then how is the Court validly or safely to pronounce a judgment on such an equivocal and inept verdict? It is contended by the Appellants that in that case the only competent judgment would be an absolvitor—a judgment to assoilzie from the conclusions of the summons the Defenders called into Court upon such a record, and charged only upon such a verdict.

I have considered this point with great attention, and I have been referred to a number of cases to show that this is the common mode of pleading in Scotland. But upon looking into these cases, which I have attentively considered, one difficulty occurred to me in all of them. For aught I know, the difficulty was cured in the mode which I have described as that which might have been adopted here, namely, by the jury finding specially. I cannot tell, and I have asked in vain for a copy of any book in which any of those cases could be traced. Mr. Lefevre was kind enough to look this morning, at my desire, after I had read the cases sent to me yesterday morning, and he can find no book whatever in which we see the result of the

trials. At all events, those cases, (putting that circumstance entirely aside,) were given to me with another view—not with a view to their ultimate effect, but to show that here the ordinary course of pleading had been pursued; and this, I think, is sufficiently proved. I think, however, it is *mala praxis*. I hope and trust that it is a course which will be no longer followed; and I take leave most respectfully but most earnestly to press upon the attention of their Lordships in the Court below the propriety of turning over a new leaf, and adopting a more sensible, rational, and logical practice. That must be a bad course of proceeding which cannot be prevented from working confusion and begetting error, by the accident of a jury finding specially when no power exists of preventing them from finding a general verdict.

I should have been in great difficulty indeed upon this subject, if I had been of opinion that misrepresentation was validly set forth, and concealment not competently set forth; or that misrepresentation was incompetently set forth, and that concealment was validly set forth. I should have been, upon the shape of this record, in a painful predicament. I should then have had to go into the learning of those cases which were so much discussed here some six years ago; I mean that of the Irish Writ of Error, in which your Lordships decided contrary to my opinion, contrary to the opinion of the great majority of the Judges, contrary to the opinion of my noble and learned friend Lord Lyndhurst (with whom, by the way, I have consulted upon the similar points in the present case, and who entirely agrees with me in opinion upon them). We were clearly of opinion that the case was wrongly decided, but we bowed, as was our duty, to the majority of your Lordships, who decided for the Plaintiff in Error; and, indeed, that decision was only disputed by me on the ground of precedent and practice. Your Lordships, admitting the precedent and practice, held it to be *mala praxis*, and that it was fit to be reformed.

But the rule to be collected in that case is, that in criminal cases, contrary to the opinion of Lord Mansfield,—*obiter*, certainly, but a *dictum* deserving of the greatest consideration, and entitled to the most profound respect,—that the rule is the same in criminal as in civil cases. I never doubted, Lord Lyndhurst never doubted, the majority of the Judges never doubted, that it was so in a civil suit. If there are two counts, one of which is bad and the other good, and there is a general finding for the whole, you cannot apportion the damages between the two; you cannot say how much applies to the good, and how much to the bad; and therefore the whole is bad, and there is jndgment *non obstante veredicto;* or, if judgment has been given for the Plaintiff, it must be corrected. But now that rule is applied to criminal cases as well as civil. The law, therefore, is general, that there can be no judgment upon a verdict so taken, either in a civil case or in a criminal; and for the very reason which applies to the case at bar. I have, however, said that it gives me great satisfaction, after the anxious attention which I have given to this cause in all its parts, that I am not reduced to the necessity of deciding it upon the ground I have adverted to, though that probably might be enough to support the judgment of reversal which I shall move your Lordships to pronounce. But there are, in my opinion, other grounds on which that judgment may be supported. To the consideration of these I now proceed.

And first, my Lords, I will again advert to the time which has here elapsed. Thirty-seven years after the one deed was made, and thirty-nine years after the other, an impeachment by this action, upon the allegation of fraud, is brought against those instruments, and that fraud is imputed to a gentleman hitherto always supposed, as is said (but it is immaterial, though I must assume it to be so), of fair and respectable character; and his nearest relations are now to defend his memory, and defend their own rights against that foul imputation of fraud, and fraud of

the worst description; for it was taking an unfair advantage of his nearest relations, whom he was rather bound to protect than entitled to deceive.

My Lords, no time will run as a common law limitation against fraud. That must be on all hands admitted. No time, say the Scotch lawyers, can be taken as a bar to an action of reduction like this, unless time and acquiescence be specially pleaded. A party meaning, say they, to avail himself of the topic of time, must do it by a plea, and must either succeed altogether, or (I suppose they mean to add) fail altogether. I cannot go so far as that. I too say that no time will run to protect and screen fraud. I too say that a Court of Equity will overleap the barrier of time to get at the fraudulent parties and their deeds, and to undo those deeds, and to prevent any one, whether accomplice or innocent, from profiting by the fruits of fraud. I too say, therefore, that the length of time which has elapsed is not a bar to the suit. But that it should not enter into our consideration—that it is to be wholly dismissed from our minds—that, as a suggestion, it is to have no effect upon us in moulding our opinion, as it were, and influencing the frame of mind in which we shall be when we are to consider the rest of the case either as a jury upon the facts, or as judges upon the law, to that proposition I cannot assent. The parties are all dead long and long ago. The party accused, Walter Irvine, died nine years before the action was commenced. Of the other parties who survived, the latest died four years before the action was commenced; and all their agents and men of business are in their graves. Every one who by parole testimony could have shed any light upon this transaction is gone. The suit is brought thirty-seven and thirty-nine years after the fraud is alleged to have been committed. Forty-six years and forty-eight years after that fraud is alleged to have been committed, the first trial by a jury takes place, and the matter of fact of the fraud is to be submitted to that jury after the lapse of nearly half a century.

Am I not to take into account this grievous injury to the party charged? I do not mean to the memory of Walter Irvine and the feelings of his surviving family, but to the parties charged and sought to be deprived of their property under those deeds. Am I to dismiss that entirely from my consideration, and to deal drily with all the facts and all the law of this case exactly as if it had happened three or four years before the action was brought, or perhaps as many months? I cannot go this length. On the contrary, I hold that the consideration of time is most material; and I fearlessly lay down this to be the law of Scotland, as well as of England, that in such circumstances, lying bye is most material to be considered, and that it must tell against the party, if there be no explanation, or rather if there be no satisfactory excuse for it. And that the party here and his advisers are well aware of this topic is clear, for their summons sets forth a reason to excuse the lying bye; but it is no reason at all. They say, that until the chancery suit was decided, which I did not dispose of finally till 1833, they could not bring the action. Why could they not? They did not choose, because they did not know exactly whether it would be worth their while or not; but that, though it may explain, is not a reason to excuse the delay. It is not even a topic of argument. I say, then, I lay it down fearlessly as the law of this country, and of Scotland, and of every country having an enlightened and rational, I may say a civilized system of jurisprudence, that in such a case as the one before us, the party must be held to the very strictest proof in regard to the facts; but that is not all. I go further; and I hold that also, in regard to the pleading, to the shaping of the action, which is his own choice, though he cannot choose the facts, he shall be held most rigorously to the principles of strict logical pleading. It is a case in which I would hold him as tight as if it were a question of an indictment for perjury and assignments of perjury were required that A. B. did falsely swear so and so; whereas in truth, and in fact it was so and so. It is

a case in which, as Lord Mansfield once said when similarly circumstanced, though not in respect of time or of fraud, I would hold the party to the ticking of a *t* and the dotting of an *i* in his pleadings.

Unfortunately, my Lords, this does not appear to have been the view taken of it by the learned Judges in the Court below. The Lord President, who entirely disapproved of the verdict, and who alone of the four learned Judges pronounced a very positive, clear, and unhesitating opinion one way, relies very much and largely upon the point of time. Lord Mackenzie alone, of the other three, makes any allusion to it; and he says, "Delay is less material in this cause, because the evidence is "documentary, and *litera ripta manet*, and therefore this "objection is of no great force." It should have occurred to his Lordship, as it does to me, that it might have been not so wholly documentary if the action had been brought three or four years after the alleged fraud was committed. Lord Fullerton says nothing of time at all, though the Lord President seems to have thought it nearly decisive; and though Lord Mackenzie thinks it a matter necessary to deal with. Then upon the case itself, Lord Jeffrey says there is great hardship. But of what kind? On account of the magnitude of the sums and the reputation and character involved; but he does not make the least mention of the greatest hardship of all, namely, the lapse of seven or eight and thirty years. These learned Judges, exceptthe Lord President, give no clear and decided opinion; and though the merits of the verdict be not now before us, yet considering the conclusion at which I have arrived, and which I wish your Lordships to adopt, I feel this a comfortable circumstance. One of them, Lord Mackenzie, says, "Looking at "it altogether, I cannot say the verdict is grossly wrong. I do "not say if I had been on the Jury, I would have given the same "verdict, but I cannot say they are grossly wrong." Lord Fullerton says, "There is no doubt that the case in evidence is much

" weaker than the case averred upon the record." And he goes chiefly on the concealment, making little reference to the misrepresentation. Lord Jeffrey says, "On all grounds there is " great room for diversity of opinion. The Court might differ " from the Jury, but that is not enough." Then he sums up: " I rather think that the impression on my mind is that the " arrangements were not fairly obtained." These things go entirely to the merits of the case. In point of fact we are only upon the record. At the same time I feel great satisfaction in looking over this mass of evidence, and examining these opinions of the learned Judges, in feeling perfectly assured that if I had been in the Court below, I should have agreed with the clear opinion of the Lord President, differing, I will not say from the very clear opinion, but from the very hesitating and not even perfectly formed opinion of the other three Judges who dissent, and only dissent so far as to say that they do not think the Jury were what they call so "grossly "wrong," as would justify sending the case again for trial.

We now therefore come, my Lords, to the frame of the record, upon which everything turns; and as your Lordships sit upon important business at five o'clock, by which time I shall not be able to finish what I have to state in addition to my argument upou the law of the case, I think that the more convenient course will be, that I should finish my observations to-morrow rather than to-day. Therefore, if it is your Lordships' pleasure, we will conclude the consideration of this case to-morrow. The case is one of great anxiety, and it is very fitting therefore that I should now state the conclusion at which I have arrived for a reversal. If I should not to-morrow be able to move the judgment I have, in case of any accident, announced the conclusion to which I have come, as I did in that very case of Leith *v.* Irvine. The inquiry having lasted twenty-five days before me, I would not expose the parties to the expense and delay of a re-hearing when it had arrived at the

last stage, and I therefore give the judgment during the sittings. I shall therefore hope to conclude my observations to-morrow, either at the sitting of the Court or at the close of the Court, whichever is most convenient to the parties, taking a course of which we have many examples, as that pursued by Lord Eldon in the Roxburgh case and others.

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LORD BROUGHAM.—My Lords, I had yesterday gone through the two important points of the lapse of time and the state of the pleadings, and it remains for me to apply the principles which I then laid down to the particular case of this record. When I stated my opinion with respect to the double question involved in the issue, and the single finding for the Pursuer upon the whole matter, I might have illustrated it, as one or two Special Pleaders with whom I have had communication upon the subject have done, by reverting to the rules of pleading in England. Suppose an action is brought upon a bond, and the Defendant, in order to escape from his obligation, specially pleads thus, that it was obtained from him by the obligee, the [Plaintiff, by means of fraudulent misrepresentation or fraudulent concealment—suppose fraudulent misrepresentation is the ground of one special plea, and fraudulent concealment of another; and suppose the fraudulent misrepresentation is stated validly and unobjectionably, as thus—inasmuch as so and so was represented by the obligee, contrary to the truth, and contrary to his knowledge of what the truth was. If the verdict were upon that count, no question it would stand for the Defendant. But suppose there were another count, setting forth, as an excuse for the non-payment, fraudulent concealment, inasmuch as so and so, which amounted to no fraudulent concealment, either because there was no duty to disclose it, or because the statement was *felo de se*, showing

in itself that there was no fraudulent concealment; past all doubt, no verdict could stand upon that count. Then suppose a verdict were given upon both counts without distinction, and the judgment were entered up on both counts generally, without distinguishing on which of the two, and without saying it was upon both, but only negativing that it was upon neither, that would be this case. Well then, past all doubt, upon a writ of error, that judgment could not stand. Then the question would be, whether to give judgment for the Plaintiff, in consequence of the badness of the verdict and the judgment, or to award a repleader, or to award a *venire de novo?* A repleader could not be awarded, because it would be in favour of the party who had made the first fault in the pleading. A *venire de novo* could not be awarded, because it must be upon the same record and the same issue, and *non constat* that the jury would not return the same verdict, for you have no means of compelling the jury to separate the one from the other of the issues, and to return a special verdict. Consequently there must be in that case judgment for the Plaintiff—that is to say, judgment against the plea—that is to say, judgment against the defence, resting upon the ground of fraudulent misrepresentation or fraudulent concealment. Now that is just the case here, except that here it is Defendant who is claiming the benefit of the rule, there it would be the Plaintiff claiming its benefit against the plea in justification of non-payment.

However I have stated already my satisfaction at finding that it is unnecessary to decide the cause upon this point. I have also stated enough with respect to the time, laying down the principles, of which there is no question, that mere lapse of time is no bar in the case of fraud; that possibly time, may, according to the Scotch rules, have been necessary to be pleaded, and yet it is not pleaded—there being no plea of acquiescence or homologation. But although no bar, either here or in Scotland, although it may, by the Scotch rules, be

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necessary for the party to plead it specially, in order to make it an answer to the action, it is still most material, not only upon the evidence for the jury, and upon the question of a new trial for the Judges (with which we have nothing to do) but it is most material upon the question of pleading also; and that after such a lying bye as has here happened, in scanning the averments on this record, we must, in Lord Mansfield's phrase, hold the party to the ticking of a *t*, and the dotting of an *i*, if need be, for deciding the question.

I must now, however, say that it does not, upon the best consideration which I have been able to give the whole matter, appear to be at all necessary that the party should be held to that rigorous closeness. It does not appear at all necessary in support of the judgment which I am about to move, that we should rest it on the length of time which has elapsed, the decease of all the parties, the decease of all their agents, and of all persons connected with the transaction, for I think even *de recenti facto*, this record would not have been sufficient, according to the closeness and strictnesss of procedure to which the party must be held in ordinary circumstances.

What I have now to state ranges itself under five heads: *First*, the general allegations contained in the 5th, 6th, and 7th articles of the condescendence, but into which I need not enter so much at large, because I shall afterwards have to deal with the same-subject matter under the other heads. *Secondly*, with respect to the mortgage debt on this estate. *Thirdly*, with respect to the misrepresentation (and hitherto I am only upon fraudulent misrepresentation) the charge that Walter Irvine represented himself as having given 1,200*l.* to Christopher, whereas he also released a debt; but this suppression of what passed with Christopher is also stated as a concealment. *Fourthly*, the correspondence which took place with one of his sisters with respect to the opinion of Sir Arthur Pigot, then Mr. Pigot, and of Mr. Brown, an attorney; a correspondence

showing a misrepresentation partly, and partly a concealment. *Lastly*, the deed of assignation to Mrs. Burn, which stands upon a separate ground. When I have gone through these different heads, I shall have exhausted the case.

1. Now, with respect to the statements in the 5th, 6th, and 7th articles of the condescendence, if you take the memorial which is given in page 41 of the Appellant's case, it is found that the statement in article 5 of the condescendence is not contrary to the fact when coupled with what the memorial discloses. That memorial is to be taken as a communication made by Walter Irvine, and not only as a communication in point of fact made, but as a communication set forth upon the pleadings to have been made, and forming part and parcel, therefore, of the alleged misrepresentation. Then comes article 6, wherein it is said that Walter Irvine himself stated on oath in the Court of Chancery that the mortgage debt in 1797 amounted to 30,000*l.* or thereby, and the final report by the master subsequently ascertained it to be 22,000*l.* with interest at 6 per cent. on 20,000*l.* Now I shall afterwards have occasion to refer to the memorial in page 42 of this case, which is part of the statement for the Pursuer. I shall have to deal with it separately immediately, therefore I need not enter further into it now than to state that upon the whole these two articles, the 5th and 6th, when you take the statement on page 41 and the statement on page 42 together, do not set forth, in my opinion, with any distinctness whatever, if at all, the charge of misrepresentation.

Then we come to the 7th article, which I must say is a very extraordinary one, and calls for an expression at least of astonishment on the part of the Judge who considers it, recollecting the importance of the matter with which we are dealing, and the absolute necessity of some clear, and intelligible, and consistent specification. "The said Walter Irvine, as having "or pretending right to the said mortgage debt, was found by

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" the said master to have received payment of the whole of this " debt, both principal and interest, out of the estates of the said " John Leith, being the produce of the Old and New Grange " plantations prior to 1819;" nineteen years after the deed in question, and he is to be charged with prescience,—he is to be charged with a foreknowledge in the year 1798, when one deed was obtained, and in the year 1800, when the other was executed; 21 years and 19 years respectively, of what was to be the produce of the crops of that very regular, clearly-established, and uniform course of cultivation, that of a West Indian estate, where there are no tornadoes, where there are no earthquakes, where there are no changes of weather, where everything is as regular and mechanical as clockwork, as if it were a farm in Norfolk or a farm in East Lothian. That is what he is expected to have had a foreknowledge of in the year 1798, when he obtained the one deed, and in the year 1800 when he obtained the other.

However I dwell not upon that, because, of course, the present Respondent does not mean to rely upon that extraordinary statement. Let me, however, here remark upon the carelessness with which these pleadings are framed. One would have thought that if you wanted to charge parties with a gross fraud, you might have been a little more careful in setting forth known facts. What shall be said of persons who actually aver in their summons that the cause of Leith *v.* Irvine was carried by appeal to the House of Lords, and decided here on the 30th of March, 1833? Nothing of the kind; no appeal was made to this House; they ought surely to have known that. When they charge their fellow men with gross frauds, they should take a little trouble in considering what they are about, especially when they rely upon the Chancery proceedings as the excuse of their delay; and affirm that until these proceedings were over they could not bring the present action. There was an appeal, no doubt, in the Chancery suit, an appeal under which I suffered for 25 days; but it was

not an appeal carried, as the summons sets forth in so many words, from the Court of Chancery to the House of Lords, and decided in the House of Lords on the 30th of March, 1833. It never came near us; there was no appeal here; it was an appeal from Sir John Leach, the Master of the Rolls, to me as Lord Chancellor, and I decided it on the 30th of March, 1833. My Lords, I do not mean to say that this blundering statement goes to the question with which we are now dealing, but I note it in passing to show the great carelessness and remissness which seems to have presided over the whole of this extraordinary case—a case of all others requiring the greatest care and the most cautious circumspection.

I now come to the second head, which is the main ground of the charge of misrepresentation. That is in article 6 of the Condescendence to which I have already referred, where Walter Irvine is said, in certain proceedings in the Court of Chancery, to have stated, as representing his brother Charles deceased, that the mortgage-debt due was "30,000*l*., or thereby." Now upon this I would remark, that if it was intended to charge, as it is, wilful misrepresentation of the mortgage debt, the obvious course was, not to insinuate or to leave room for inference from circumstances merely, but directly to aver that he, Walter Irvine, represented one thing, when he, at that time of so representing, knew another thing to be the fact; that he knew the value to be this when he represented it to be that, or that he represented it as one thing while he knew it to be another thing. This is not done, but things are stated from which it may be gathered inferentially that his representation was incorrect. Now this is the very highest that we can put the averments at, namely, that things are stated from which it may be gathered that Walter Irvine's representations were incorrect, and incorrect to his own knowledge. But when we take all these accounts together, they do not even amount to this, for they end in averments which are quite destructive of the allega-

tion of misrepresentation. The allegation, taken altogether, is self-destructive as an allegation of misrepresentation, just as if one were to say "You pretend to rate the value at 1,000*l.*, "when it is, in fact, twice 500*l.*; and so you deceived us." But a statement that a thing is 1,000*l.* does not deceive persons when you aver as the ground of that deception and misrepresentation, that instead of 1,000*l.* it is twice 500*l.* Nay, in most cases, there was here no representation, but only an estimate, which of necessity, and *ex vi termini*, was conjectural.

Now look at article 6, and compare that article with the Memorial. There the mortgage-debt is alleged to have been stated at 30,000*l.*, whereas the report of the master found it to be 22,841*l.* Compare that with the Memorial at page 42: "It "may be further necessary to observe:" now this is just as much parcel of the alleged misrepresentation as if it had been contained in the summons or the condescendence, because it is imported into it by way of reference. Walter Irvine is condescended upon as having made a representation by means of this Memorial. "It may be further necessary to observe in regard "to the debt due from the estate of Mr. Leith to Mr. Irvine, "that the accounts of his intromissions are not yet finally "settled, nor is it expected they will, but in the Court of "Chancery," which proved too true, and they were not finally settled till the 30th of March, 1833. "The balance due to Mr. "Irvine was supposed by himself to be 37,000*l.* or 38,000*l.*, "and from the before-mentioned transaction entered into "between Mr. Christopher Irvine and the Attorney of General "Leith, it will have been observed, the appraisement of the "estate of the Old Grange amounted to 31,026*l.* 14*s.* 4*d.*, and "that estate was delivered over in due form to Mr. Irvine in "part of his debt."

Now let us look at article 28 in page 18. "These "offers having not been accepted, Walter Irvine, on the 29th "of January, 1800, wrote a letter to his sisters, Mrs. Kirk-

" patrick and Miss Irvine;" this is the letter on which reliance is placed as showing misrepresentation, " in which he thus men- " tions the settlement he had made with his sister, Mrs. Burn, " and his brother Christopher." I do not go upon that, because that comes under the other head, under the head of concealment, at which I have not yet arrived; but the following is stated as the representation. " In this letter," says the condescendence, " he," Walter, " mentioned the mortgage upon " the property in these terms." Now here is the representation, the inconsistency of which with the fact to his knowledge is to be the ground of impeachment; " We will suppose the " Grange debt still to be from 15,000*l.* to 20,000*l.*, call it " 18,000*l.*" Can any man who knows the meaning of words, who is ever so little acquainted with the force of language, whether technical or in common parlance, state or fancy for a moment that this is a representation? It is an estimate, and a very conjectural estimate, and an estimate which leaves a large margin for conjecture. He does not say it is 15,000*l.*—he does not say it is 18,000*l.*—he does not say it is 20,000*l.*—but he says it is from 15,000*l.* to 20,000*l.*—call it, splitting the difference, and inaccurately splitting the difference, 18,000*l.* And how does he preface it? Not, it is so; not, I tell you it is so; not, I represent it as being so, but only, " we will suppose the Grange debt" so and so. Can anything be more manifest than that this is anything rather than a representation? It is actually saying, put it at so much; I do not know what it is, but I will take it to be so much; I will suppose it from 15,000*l.* to 20,000*l.*, say 18,000*l.*

Then article 29 also refers to it. The first part of this article relates to the transaction with Christopher, which I reserve for the next head of my argument; but here is the part that refers to this representation. " And in regard to the " Grange debt, instead of 18,000*l.* it was estimated by Walter " Irvine himself judicially on oath, within eighteen months of

" the time when he wrote this letter, at 30,000*l.*" Well, he might have been quite right at one time in estimating it at 18,000*l.* and at the other at 30,000*l.*; and a man's estimate at different times varying from the one to the other date is no proof that he made a *de facto* representation at the one time and that he, *de facto*, knew it at that time, for he may have known it quite differently when in the Court of Chancery he came to swear to it.

The result then of these statements so taken together, and which are made as averments of misrepresentation, is this—Walter Irvine estimated the debt at 18,000*l.*, he claimed 30,000*l.* He fully and distinctly stated to his sisters that Mr. Leith or his agent set it at 17,622*l.*,—in the year 1792, he as fully stated to them that Charles Irvine believed it to be between 37,000*l.* and 38,000*l.*—he himself, in his answer in Chancery, set it at 30,000*l*, and claimed that sum, but in that Chancery suit, nearly 40 years after the arrangement with his sisters, the amount was found to be 22,841*l.*, at which sum on the final hearing of the appeal, I, and not the House of Lords, determined it and decreed accordingly. This is even somewhat less of a misrepresentation, therefore, than the case which I put of the 1,000*l.* and twice 500*l.*—it is rather as if the charge of misrepresentation were stating the 1,000*l.* when the real value was 500*l.* for it is an allegation that Walter Irvine had given in the sum of 37,000*l.* or 38,000*l.* instead of 22,841*l.*, or some 14,000*l.* or 15,000*l.* more against himself than it really was, or than he could know it to be unless he were gifted with a fore-knowledge of my decree made nearly 40 years after his alleged misrepresentation and 9 years after he had gone to his grave. As to what he is averred in article 28 to have said in his letter of the 29th of January 1800, it is plainly not an averment that he made any representation at all, for the reasons I have already given in dealing with that conjectural statement. It was a conjectural estimate, and nothing else.

Thirdly, the other charge of misrepresentation is, that Walter Irvine represented himself as having given 1,200*l.* to Christopher in his transaction with that brother; and this charge is to be found in article 28, at p. 18. Now, let us see what is there set forth. It signifies nothing what was the fact, but let us see how it is set forth. Observe this is a letter purporting to give an account of those events after they had happened. "I think it necessary to inform you the settlement "I made with Mrs. Burn stands thus: 100*l.* a-year annuity to "be paid on the joint lives of her and her husband in lieu of her "rights. To our brother Christopher I paid," not I have bargained for or bought his rights at so much, but "I paid "1,200*l.* twelve months after he made the assignment. As "for Mrs. Wardrobe, I never gave her a farthing." But ought not this to have been set forth thus, that he had said, to our brother Christopher I paid 1,200*l.*, and no more, as a consideration for his share? It is not so set forth. It is set forth, "To "our brother Christopher I paid 1,200*l.* twelve months after he "made the assignment." Walter Irvine is not alleged to have given the terms of his bargain with Christopher. He is alleged to have related the fact of his paying Christopher 1,200*l.* a year after the bargain, whatever that was. He is not averred to be talking of the terms of the bargain; he is saying nothing about those terms; he is stating,—that is, he is alleged to be stating, —the fact, that twelve months after the bargain, whatever that bargain was, which he does not say a word of, he paid 1,200*l.* to his brother, which is not denied to have been the truth; but in the other parts of the summons and condescendence is, in fact, stated to have been the truth. Therefore that averment really and truly goes for nothin .

Next come we to the graver and greater charge of concealment. Now the case stands thus:—Christopher owed Walter money; it is not ascertained how much,—it is called 5,000*l.* or 6,000*l.*, but that clearly means currency; it is 2,000*l.* or 3,000*l.*

cash. Christopher and he appear to have been, and they are stated (I am taking it only from the pleadings, of course, I cannot travel out of them,) to have been upon very cordial, very affectionate terms. There seems to have been little or none of that affection towards the sisters. Christopher having claims upon the personalty, Walter bargains with him for giving up those claims to him; and as to the bargain, there is some little doubt upon even the pleadings, and I cannot go into the evidence whether that debt was ever meant to have been exacted from his brother Christopher. But be that as it may; assume that in the pleadings Christopher is stated to have owed him money, though that, like everything else, is set forth rather inferentially than *de facto*, as it ought to be in charging fraud. Assume that he owed Walter money, that Walter released the debt, and gave him 1,200*l.* besides; and further (for that is also stated in the pleadings) that he pressed upon him, delicately calling it a condition of the bargain, 200*l.* a year for his life, and 100*l.* a-year for his surviving widow, should he pre-decease her; this was added *ex merâ gratiâ*. Now the charge of concealment is this, that he did not tell the whole of the transaction with his brother Christopher to his sisters: that he kept them in ignorance of it. And it is also set forth that Christopher "aided him," as it is termed, in that concealment; it is distinctly stated that they arranged to conceal the transaction from the sisters, "and the two brothers acted upon this arrangement. "Christopher William aided his brother in misrepresenting the "nature of the settlement between them, and advised his sisters "to trust themselves in Walter's hands, and to confide in his "generosity." Now, when a person is set forth as an accomplice in a fraud, as accessory to, and sharing in the commission of a fraud against his sisters, one expects to see it set forth how he shared. The concealment of a transaction by any person is intelligible, but that another party aids in the concealment is a most vague, indefinite, and unsatisfactory aver-

ment. It is not said how or in what way, but at all events this is the averment, that the transaction with Christopher, by which Walter became entitled to Christopher's share upon the payment of 1,200*l.*, and releasing a debt, was not communicated by him, Walter, to his sister, Mrs. Burn, or to his sister, Miss Irvine, or to the other two sisters, Mrs. Wardrobe and Mrs. Kirkpatrick, at the time or before the time when he obtained from them the two deeds: and it is said that by keeping them in ignorance of this, he kept them in ignorance of the value of what he was getting from them; for the argument is, by way of inference only, that Christopher's share was worth no more than theirs, and that if Christopher's share was worth the debt and the 1,200*l.*, their share must have been worth the debt and 1,200*l.* It is not denied that he told them of the 1,200*l.*,—that is admitted; but it is said, as one of the charges, that he did not tell them of the release of the debt; that he concealed, therefore, a part of the transaction.

A concealment, to be material, must be a concealment of something that the party concealing was bound to tell. It is perfectly evident that if I bargain to buy a property from A. B., and if the person with whom I bargain, the owner of the property, has before that had an offer of 1,000*l.* when he asks me 1,500*l.*; and, to put it stronger, if he has hawked it in every part of the land market to which he could find access, and has found no person to offer him more than 1,500*l.*, and he asks me 2,000*l.*, I have no right, if I give him the 2,000*l.*, to bring him into a Court of Equity, as having deceived me on the value of that property by having failed to inform me that others had only offered him for it 1.500*l.*; that he had tried to get a better price for it, and had failed to get a better price for it, and that yet he made me pay 2,000*l.* for what he himself ought to have known he had never been able to get above 1,500*l.* It is a mode of estimating the value of the property which he has taken for himself; it is a mode of estimating

its value which does not bind him, and does not benefit me. It might be his perfect right to make me pay 2,000*l.* for what he had not been able to sell at 1,500*l.* to others. He had no duty whatever, either in law or morality, to tell me what he had done. His concealment of what he had done, his withholding from me the knowledge of what he had done, is not even any argument, much less is it any ground of equitable relief against him for a fraudulent concealment. To give relief there must be a concealment of something which he was bound to disclose. And Walter Irvine, past all possibility of doubt, was not bound to disclose what had taken place between him and his brother Christopher Irvine.

But observe, I am putting the case lower than the fact, because the fact, as set forth in the Record, is this, that the brother did not stand in the same relation towards Walter Irvine in which the sisters stood. The brother's bargain with Walter was made up, partly of a claim of right, and partly of the favour and bounty of Walter. Walter was so fond of his brother that he not only at once released the debt and gave him 1,200*l.*, whether it was worth that or not, but he pressed upon him, he insisted upon it, says the averment in the condescendence, he insisted upon his taking 200*l.* a-year for himself, and 100*l.* for his widow, all owing to kindness and favour towards that brother Christopher. Did the sisters stand in the same position? Was what passed between Walter and Christopher any rule for what should pass between Walter and them? No such thing. What passed between Walter and Christopher stands upon its own foot, and is totally independent of, and necessarily unconnected with, what was passing between Walter and his sisters.

Therefore I say that this is a concealment of that which the party was not bound to tell—it amounts to absolutely nothing whatever material, that is alleged thus to have been concealed. I should say that it ought to have been set forth a great deal

more particularly, even if it had been so, than it is in the 13th, 14th, 15th, 16th, and 17th articles. But not a word of all this, observe, appears upon the summons. Now the summons ought to contain that which the condescendence specifies, more minutely, but in the summons there is no particular averment whatever under which this can come except the general charge of fraudulent concealment. It should have been set forth that certain things passed between Walter and Christopher, which he was bound to communicate to his sisters, and did not communicate to them, and the not communicating of which was fraudulent. The statement is not by any means so, but it is far more precise than that of misrepresentation with which I have dealt. Let us take that statement of concealment, therefore—let us put it as high as we can, and, admitting it to be validly alleged, let us see whether, when taken altogether, it amounts to a concealment, not only of that which was material as tending to the price of the deeds with his sisters, but whether it is a concealment of something which they had a right to know from him, and his withholding of which amounted to concealment fraudulently done. This question I have shown must be answered in the negative—no such averment is made.

In the *fourth* place I come to article 23, on page 17, and which amounts to this, that Walter had been consulting with Mr. Pigot, afterwards Sir Arthur Pigot, who "advised him that "the personal property descended to the nearest of kin, brothers "and sisters;" that is, not to Walter himself, provided the party was domiciled in Scotland. "Miss Margaret Irvine had "applied to Walter, for some information as to Charles's "succession, in which she and her sisters thought they must "have an interest, and requested leave to wait on her brother, "respecting this business. Walter, on the 27th April, returned "the following answer. 'Mr. Irvine begs leave to acquaint "'Miss Irvine, that all persons who had claims on the estate "'of the late Charles Irvine, were by public advertisement

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"'directed to lodge them with Mr. Charles Steuart, W. S., "'which he deemed sufficient notification; but for her more "'immediate satisfaction, he begs leave to transmit a paragraph "'of an opinion he only received yesterday, from an eminent "'solicitor in London:—'"The whole of the real estate descends '"to the heir-at-law, who is his next eldest brother, if he died '"without issue, and no will, and the personal estate equally '"divided amongst his brothers."'" I have yet to learn that a person receiving an opinion from an attorney, or from counsel, is bound to give that opinion, and to give the case upon which it was taken; for that is implied here, in the usual mode of pleading followed in this extraordinary case, by inference and insinuation, and not directly stated: it is implied that he ought to have given the case, as well as the opinion. "'J,'" that is Walter, "'does not vouch for this opinion being the law.'" There is here no very great misrepresentation even of the law. "'Those who think themselves aggrieved, may have their "'recourse how they may.'" If you are dissatisfied with Mr. Brown's opinion, whom I have consulted,—you who have not seen my case, and which case I do not choose to show you, and which I am not bound to show you, may get another opinion, and a better opinion, if you choose; do not take mine; I do not vouch for its being the law; and I tell you nothing of the facts upon which it is given. The opinion without the case, certainly, or the case without the opinion, is not worth much, but a man is not bound to tell his case, any more than he is bound to give the opinion. He says, I will not tell you. I will not vouch for its being law, and the case I will not show you at all. '"Those who think themselves aggrieved, may have "'their recourse how they may.'" That is to say, you know there are sisters, as well as brothers; go and tell the facts, and get as many more opinions as you choose, of the counsel you like best. "'In the meantime, J,'" Mr. Irvine, that is, "'does "'not consider himself answerable in any shape, further than

"'to secure his own rights." Really, I think anything less like a precise averment of misrepresentation, even as far as we have gone, I have hardly ever seen. However, the charge is partly insinuated, and partly stated, and it is this, that he had consulted Mr. Pigot, and told Mr. Pigot there were sisters as well as brothers; that he had consulted Mr. Brown, or got an opinion from Mr. Brown, who only knew of the brothers, and not that there were sisters; and therefore it is inferred (this is only inferential, it is not stated) that Mr. Brown had been told by him, that there were no sisters, but only brothers; and it is inferred that he tells the opinion of Mr. Brown, which does not mention sisters, and that he does not tell the opinion of Mr. Pigot, which mentions brothers and sisters. That is the allegation. Therefore the gist of this charge is, that he represented the law to them to be a division to brothers, and not to sisters, having got that law from one who did not know that there were any sisters; and who, if he had known that there were sisters, would have said as Mr. Pigot did, that they, as well as the brothers, must have their share; in short, that he did not tell the whole of Mr. Pigot's opinion, but only Mr. Brown's.

Now, as it stands, and without more, I do not think there is sufficient to warrant us in regarding this as a distinct charge. But suppose there were, it is completely contradicted by the rest of the allegations; because we are to couple with the averments in article 23, the statement in the Memorial to which we are referred at page 42, namely, the second page of the Memorial: "If Mr. Charles Irvine,"—now this is Walter's representation to the ladies—"If Mr. Charles Irvine is considered to "have died domiciled in Scotland, then his personal estate "will divide betwixt his youngest brother the said Christopher "Irvine, and Margaret, Eleonora, Isabella, and Ann Irvines, "his four sisters: but should Mr. Irvine be considered a West "Indian, or not to have been domiciled in Scotland, then Mr. "Walter Irvine, the heir, will also come in for a share of the

" personal estate, and which, so far as has been learned, will " consist of all crops off the ground in Tobago, in the store- " houses there, or on its way to Britain, all debts due in the said " island or elsewhere, by bond, mortgage, or otherwise, to the " estate," together with all the other circumstances; and he sets forth a great number of particulars of very valuable property. Is that concealing the law that the sisters were entitled as well as the brothers? On the contrary, it states it most fully and most correctly. It states it upon the supposition of Charles having died, domiciled in Tobago, which Walter, for his own interest, always contended he had; it also states it upon the the supposition, which is the fact in my opinion, contrary to Walter's opinion, that he had died, domiciled for the last six years, from 1792 to 1798, in his own country Scotland, and it states that in the one case, he (Walter) would share in the personalty as heir-at-law, and that in the other case he would be excluded, and the sisters with the younger brother would take. That is just the very thing which Mr. Pigot's opinion told him, which he is charged with concealing, and which Mr. Brown's opinion did not tell him, and which he is charged with giving them as a misrepresentation. The Memorial, to which we are referred as parcel of the representation, states the very thing which they say he ought to have stated.

But that is not all nor nearly all, for there is what puts this part of the case out of Court more signally than the rest. In order that the misrepresentation or the concealment (I care not which—this charge is made up of both) may be of any avail whatever, it must be *dolus dans locum contractui*, it must inure to the date of the contract. If one party misrepresents or conceals, however fraudulently, however wrongly, and however wickedly to another with whom he is treating, and if that other, notwithstanding the misrepresentation, discovers the truth, and notwithstanding the concealment, gets at the fact concealed, before he signs the contract, the misrepresentation and the con-

cealment go for just absolutely nothing, becauae it is not *dolus qui dat locum contractui.* It is of no avail if the party has, in whatever way, become acquainted with the truth at the time, but much more so if he shows that he has become acquainted with it in the very deed which is said to have been obtained from him by the party misrepresenting or concealing. Now this very deed (I need not read it) contains a distinct statement both of the one and the other of the sisters having claimed *quasi* executors-dative and next of kin to Charles Irvine at Edinburgh, on the supposition of his having died domiciled in Scotland. There is an end, therefore, entirely, of this head of misrepresentation or concealment.

Hitherto I have been dealing with the deed No. 55. I have been dealing with the question as regards the Misses Irvine; we now come to that question with respect to Mrs. Burn; it need not detain us so long. The misrepresentation there is charged in article 19. "The first of his sisters with whom "Walter Irvine effected a settlement was Mrs. Burn, who had "married a clergyman. These people appear to have placed "implicit confidence in Walter Irvine and his agent Mr. Steuart. "Mrs. Burn having applied to Mr. Steuart for information as to "the personal succession, Mr. Steuart, on the 6th of June, 1798, "wrote to her a letter, in which he represented it as uncertain "whether the personal estate would be equal to pay the debts "affecting it. This appears to have been the only information "furnished to these simple-hearted people before they agreed to "assign over their rights to Walter Irvine." Then comes the offer made by Walter. Is this a misrepresentation of Walter Irvine or a concealment of Walter Irvine? It is a misrepresentation or it is a concealment of Mr. Steuart, and they attempt to bolster up that by the immediately preceding article 18, saying that he did not tell Mr. Steuart the whole. He was not bound to tell Mr. Steuart the whole if he did not choose. But it ought to have been alleged that Walter Irvine had, by his agent, misrepre-

sented, and that he had told his agent so to misrepresent, for as fraud is never to be presumed against a man, much less is the misrepresentation of his agent to be set down to the debit of his account, as himself fraudulently misrepresenting. Nothing can be more clear and simple than this; nothing, therefore, can be more clear than that the fifth and last head of this case is quite unsupported.

My Lords, I come therefore to the conclusion that upon this Record no judgment can pass to sustain the charges. I come to this other conclusion, that Judgment of Absolvitor must be immediately passed, assoiling the Defenders from the conclusions of the summons. And I have great satisfaction in thinking, that besides the argument which I have held upon the lapse of time, that besides the topics to which I have had recourse upon the frame of the Record, and upon the frame of the issue, the examination of the Record enables me to recommend this course to your Lordships, it being unnecessary to decide the question of the verdict and judgment, making no specification as to misrepresentation and to concealment, because I am of opinion that there is neither an allegation of misrepresentation nor of concealment. The question as to the joint finding and judgment, could only have arisen if there had been a valid allegation of the one, and an insufficient allegation of the other, but there being neither an allegation of the one nor of the other, of course, in that case, the question does not arise to call for decision. I have also, thongh it was wholly unnecessary, looked into the evidence in the cause, and I have anxiously examined the opinions of the learned Judges. Three of them expressed a very doubting and hesitating opinion in favour of the verdict of the Jury; the fourth expressed a clear, deliberate, and, in my opinion, a well considered, and a well answered opinion against the verdict of the jury. It gives me unspeakable satisfaction that I do not dispose of this case without having not only well weighed these learned and elaborate

opinions, but also gone into the mass of the evidence itself. If I had been sitting in the Court below, I should have differed from the majority of their Lordships, and have agreed with the learned President in being utterly dissatisfied with the verdict. But that matter is not now for you or for me to consider. I go upon the grounds which I have already stated, and it is but for me to add, that in my opinion the fair fame and reputation, as an honest man, of Walter Irvine, having passed through the ordeal of this litigation, is, in my deliberate and unhesitating opinion, wholly untarnished.

Sir Fitzroy Kelly.—Will your Lordship be pleased in giving judgment assoiling the Defenders, to give the costs below?

Lord Brougham.—Yes, the costs below. The costs of the appeal we cannot give.

Sir Fitzroy Kelly.—No, my Lords, we do not ask the costs of the appeal.

Lord Brougham.—Clearly in a case of fraud there must be the costs below.

Mr. Parker.—Your Lordship observes that the interlocutor appealed from, gives the Pursuer the costs of trying the issue, and the costs of the application for a new trial.

Lord Brougham.—We cannot help that; you must have, of course, the costs of whatever judgment is unappealed from: for instance, all the proceedings in which you prevailed below, and which could not be the subject of appeal. One was the having an issue at all, the other was the application for a new trial. We must not give you those costs because you prevailed below.

Mr. Parker.—The Pursuer will retain the costs below as to those, I understand your Lordship.

Sir Fitzroy Kelly.—No.

Lord Brougham.—They must not pay the costs of the whole action; they must be paid the costs of those stages in which they prevailed, and which have not been altered here.

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Mr. Parker.—I understand your Lordship to say, that instead of directing the issues, the Court of Session ought to have given an interlocutor of absolvitor with costs.

Lord Brougham.—Absolvitor with costs.

Mr. Parker.—Then of the subsequent proceedings, in which we have been successful, we retain the costs.

Sir Fitzroy Kelly.—Not the costs of the trial of the issues.

Lord Brougham.—No, not the costs of the trial of the issues, but the costs of the motion for a new trial.

Sir Fitzroy Kelly.—Just so; the motion.

Lord Brougham.—The costs of the argument.

Sir Fitzroy Kelly.—There are two matters of costs.

Lord Brougham.—Is there an appeal upon the interlocutor as to the relevancy?

Sir Fitzroy Kelly.—Yes, my Lord; therefore what I understand your Lordships to pronounce is, that the Defenders below were entitled to an absolvitor as at the time of the closed record with costs.

Lord Brougham.—Exactly.

Sir Fitzroy Kelly.—Then all that afterwards passed becomes immaterial, and there will be no costs on either side, except as to the two motions from which there could be no appeal.

Lord Brougham.—They must have the costs of those—the Pursuer must have the costs of those below.

Sir Fitzroy Kelly.—Precisely, my lord, the costs of the motion.

Lord Brougham.—In order to be quite accurate, both sides should give in a scheme, because sometimes it passes incorrectly in giving judgment. Mr. Parker on the one side, and Mr. Anderson on the other, or Mr. Parker's junior on the one side, and Mr. Anderson on the other, should give in a scheme upon the principle just stated.

Mr. Parker.—If your Lordship pleases. To enable us to do that, will your Lordship allow me to ask this question? The

interlocutor says, "Find the Pursuer entitled to the expenses "properly applicable to the trial of the issues." Are we to have those costs or not, in your Lordship's judgment, the costs of the trial in which we succeeded?

Sir Fitzroy Kelly.—Clearly not the costs of the trial.

Lord Brougham.—I am afraid they must pay the costs of the trial.

Sir Fitzroy Kelly.—It ought never to have been directed.

Lord Brougham.—They ought not to have gone to trial—there should have been an absolvitor—it is in consequence of the miscarriage in not giving an absolvitor that there has been an issue.

Sir Fitzroy Kelly.—Yes.

Lord Brougham.—However, you had better give in a scheme, and we will look at it in the course of the morning.

Mr. Parker.—We could not appeal from that, my Lord; we were driven to a trial and we succeeded, and the Court below have given us those costs.

Sir Fitzroy Kelly.—My learned friend says they were driven to a trial—they prayed for a trial.

Lord Brougham.—You do not appeal from that.

Sir Fitzroy Kelly.—No, it is we, my Lord, who were driven to a trial.

Lord Brougham.—I apprehend you were driven to a trial, and could not appeal.

Sir Fitzroy Kelly.—Just so, my Lord.

Lord Brougham.—Must not that be taken as a final interlocutor against you in the Court below?

Sir Fitzroy Kelly.—No, my Lord, for this reason, that the statute expressly permits a reservation of the relevancy of the Record. Accordingly it is upon the statute as to the relevancy of the Record that we now come before the Court. Therefore it is quite clear that we ought not to pay any of the costs of the issues which have been directed.

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Lord Brougham.—I will tell you what will be the best way. In your statement, which you need not give in before Monday, as we shall be sitting here till Wednesday, refer me to that, and Mr. Parker, having notice of what you mean to state, will be able to make a counter-statement. It is a very material thing, and may be very costly.

Mr. Parker.—It is very costly, and those costs have been occasioned by what your Lordship has now pronounced to have been a miscarriage of the Court below.

Sir Fitzroy Kelly.—But it was upon their application.

Lord Brougham.—I think it would be much better that you should give it in in writing.

Sir Fitzroy Kelly.—Precisely, my Lord—without occupying your Lordship's time now. All that we consider as determined now is, that there is to be an absolvitor with costs, as at the time of the closed Record.

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Expenses.—When expenses have been incurred by a proceeding authorized by the Court, which cannot be appealed without leave, they are to be allowed on the Appellant succeeding, in an appeal of the whole cause, in getting the particular proceeding disallowed.

LORD BROUGHAM.—My Lords, In this case I moved the judgment of the House reversing the interlocutor of the Court below, but a question arose of some importance with respect to the costs—important, not only as regards the amount of the costs, but important also as regards the point of practice. It was contended that the costs below should only be allowed up to a certain time, because after that time the costs which were incurred were consequent upon the error of the Court, which had been declared such by our judgment of reversal, and therefore it was contended that the subsequent costs should not be allowed. I have taken time to consider this question on account of its importance in practice.

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The rule is certainly general in the Court of Chancery that costs shall not be paid in consequence of the Court's miscarriage, and therefore the costs of proceedings which are consequent upon a decree or order that should not have been made, and which are the result of that improper decision, are, generally speaking, not given; though I think I have known exceptions to this rule; but then, it must be observed, that every decree or order, however interlocutory or provisional, in our Courts of Equity, is appealable; and the party allowing any one step to be taken, any one thing to be done, without appealing from the order in respect of which it is done, has himself to blame. Thus, among other matters, an order for an issue is subject to appeal. That is the matter in question here, and therefore I take it as an example. Here there was an issue directed, and the Court ought to have given an absolvitor instead of directing an issue upon the pleadings; but instead of absolving the party they directed an issue to be sent of nine or ten hundred closely printed quarto pages to a Jury—of all people in the world—to a Jury of twelve honest men—to consider whether all this showed fraud or concealment, or neither of them; and then it is said that that is an error, and that all these subsequent costs were owing to that error of not giving an absolvitor, but ordering an issue, and that those subsequent costs, according to the practice of the English Court of Chancery, ought not to be paid. I take, therefore, the instance, among other matters, of an order for an issue; but that, as I before said, is subject to appeal. It was expressly held by the Court in Hampson *v.* Hampson, 3*rd Vesey & Beames*, p. 43, that an order refusing an issue is ground of appeal; and the House of Lords reversed in Nicol *v.* Vaughan, 2*nd Dow. & Clarke*, 480, an order of the Master of the Rolls directing issues, and remitted the case to the Court, directing the Judge to decide himself, which he had been very reluctant to do, I may say, and it was only by compulsion that his honour did decide, for he had at first said

he would not do so. This was decided by myself in October, 1831, and Lord Lyndhurst assisted me and concurred in the decision.

With regard to the case at bar it is altogether otherwise. The appeal is by express enactment, 6th Geo. IV. cap. 120, sect. 23, taken away. I will read the words of the Act. "The "determination of such previous question of law or relevancy, "shall not be open to appeal to the House of Lords without "leave expressly granted, *reserving* the full effect of the objec- "tion to the decree in any appeal to be finally taken." No such reservation is made respecting any refusal or any grant of a new trial. That is not subject to any appeal in any stage. However no question arose here on this matter. But on the proceedings in which appeal is shut out with a reservation, the question is raised; and I am of opinion that the costs are justly due in respect of those proceedings which followed upon this miscarriage. An *absolvitor* should have been granted, and the consequence of its not being granted was the costs incurred.

The case of Galbraith *v.* Armour, 4 *Bells Ap. Ca.*, 374, was stronger than the present. There, the Court before answer, directed an issue to be tried; the Lord Ordinary having recalled an interlocutor of the Sheriff, this interlocutor of the Lord Ordinary was altered, and a trial had, which ended in a final interlocutor against the party in whose favour the Lord Ordinary had decided, and against whom the Sheriff had decided. On appeal from the Sheriff's interlocutor, and that of the Court, this House reversed both, and gave the costs in the Court below, including, of course, those which were consequent upon the erroneous interlocutor, although it does not appear that any objection was taken below to the ordering of the issues as there certainly was here.

What has been now said does not at all interfere with the practice of our Courts of Equity here, as stated by the Lord Chancellor in the case of Macmahon *v* Burchell, 2 *Phillips's*

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Reports, 127. The question now disposed of refers to the Scotch Court, the Scottish Statute, and the Scotch cases. Macmahon *v.* Burchell was an appeal in which the Court held the Vice-Chancellor to have been wrong in sending an inquiry to the Master on legal liability, when the facts were before the Court, *i. e.* before the Vice-Chancellor, without any inquiry, and on other grounds also, and his Lordship gave costs up to the hearing, and refused costs to either party subsequent to the hearing. Now it is plain that the Plaintiff had himself to blame for not appealing either to this House, or having the cause re-heard before the Chancellor. He did neither; but suffered all to go on as if the interlocutory order was right. To give him costs would, therefore, have been contrary to justice, as well as to the practice of the Court.

I have looked into the cases to which I was referred on either side, and an examination of them has made no difference whatever in my opinion. Maitland *v.* Horne, in 1 *Bell's Appeal Cases*, and Gordon *v.* Scott in 2 *Bell's Appeal Cases*, are, as far as they go,—I do not say that they are quite on all fours with this,—but as far as they go, they are rather in favour of the Appellant than of the Respondent, and I cannot comprehend how they can have been supposed to be in favour of the Respondent. Both what I said and what Lord Cottenham said there, is in favour of the present Appellant, as far as it goes. Hamilton *v.* Wright, in 1 *Bell's Appeal Cases*, is still more strongly in the Appellant's favour, and so is Stuart *v.* Gibson, 1 *Robinson's Appeal Cases*. The course of practice in the Court of Session seems, by the cases, not to admit the principles adopted by our Court of Chancery. The costs of the whole proceeding seem to be given to the party who finally prevails. This is illustrated by the case of Murray *v.* Murray, 1st *Dunlop, Bell & Murray*.

Mr. Parker.—My Lord, this does not include the costs of the application or motion for a new trial.

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Sir Fitzroy Kelly.—No; we all agree upon that.

Lord Brougham.—No; past all doubt, that is excluded.

Mr. Parker.—Those costs were given us in the Court below, and those we keep, that not being an appealable order.

Lord Brougham.—Of course. Whatever is given by an unappealable order you keep.

It is Ordered and Adjudged, that the said interlocutors, complained of in the said appeal be, and the same are hereby reversed: And it is further Ordered and Adjudged, That the Appellants be assoilzied from the whole conclusions of the summons, and that the Respondent do pay to the Appellants their costs in the Court of Session, including therein the costs of both the jury trials, but excepting those costs which by the interlocutor of the Court of Session of the 23rd day of June, 1838, afterwards affirmed by this House, were ordered to be paid by the Appellants to the Respondent, which last-mentioned costs the said Respondent is to retain, and excepting so much of the said costs as were incurred in relation to the rule for a new trial, which was discharged by the interlocutor of 18th January 1848, and that the Respondent do also repay to the Appellants the expenses which were paid by them to the Respondent under the interlocutor of 6th June, 1846, (*i.e.* the expenses of the application for leave to appeal the interlocutor approving of the issues): And it is further Ordered, that the same cause be remitted back to the Court of Session in Scotland, to proceed with the taxation of the costs so ordered to be paid by the Respondent as aforesaid, and to give decree for the taxed amount of such costs, and otherwise to proceed as shall be just and consistent with this judgment.

GORDON and SON—HALE, BOYS, and AUSTEN.