Friday, May 22.

TENNENT *v.* TENNENT'S TRUSTEES.

Agreement—Partnership—Fraud—Essential Error—Inadequacy of Consideration—Undue Influence—Trust—Proof—Reduction. G. R., a partner along with his father and brother in a mercantile firm, having incurred considerable debts, signed a deed in 1858, whereby, in respect of payment of these debts by the father, G. R. gave up his interest as a partner. The father retained power to repone G. R. If not reponed, G. R. was to receive a certain sum of money by instalments, and although he was reponed, his brother might dissolve the partnership, paying G. R. a certain other sum. G. R. sued for reduction of the deed of 1858 on the grounds of inadequacy of consideration, undue influence, and false and fraudulent misrepresentation. He also pleaded that he had been reponed; and, alternatively, that the deed of 1858 had never been acted upon. After a proof, reasons of reduction *repelled.* (LORD ARDMILLAN diss.) and defender assoilzied. *Opinions* as to effect of inadequacy of consideration as an element in reduction of a deed. *Question,* on the defender's plea that the pursuer's case resolved into an allegation of trust, as to the application of 1696, c. 25.

In this case there were two conjoined actions. The pursuer in both was Gilbert Rainy Tennent of Wellpark Brewery, Glasgow, and the defenders were the trustees of the late Hugh Tennent and Charles Tennent of Wellpark Brewery, the father and brother of the pursuer. The object of the pursuer was to inforce the provisions of a deed of agreement executed by Hugh Tennent, and by the pursuer and his brother in 1855, and to vindicate his rights as a partner of the firm of J. & R. Tennent, and otherwise under that deed. In the first action he sought to have it found that he had right to half of the profit of the business, along with his brother Charles, since 1st September 1855, and in time coming. Charles having died soon after the first action was raised, the pursuer brought the second action, asking to have it found that he is now, in terms of the agreement, the sole partner for behoof of himself and the representatives of Charles. The original defenders were the pursuer's father and brother, but they having both died are represented by their trustees. By the deed of 1855, Hugh Tennent, who was the sole partner, made over to his two sons and the survivor, for behoof of himself and the representatives of tho predeceaser, the whole business and assets of the firm, and his whole estate, with certain exceptions. The value of the whole was fixed by the deed at £214, 403, 10s. 9d. The sons bound themselves to pay him the profits, deducting 20 per cent. for maintenance and enlargement of the works, and their personal expenses, till four-sixths of the sum should be paid to him. They also undertook to pay interest, and to pay one sixth of all legacies bequeathed by their father, not including provisions to his sons and daughters then alive, or their descendants. They renounced legitim in favour of their father. Subsequently, in 1856, they were retrocessed into their right to legitim, and assigned it to him and his trustees and executors. The pursuer avers that his position as partner under this deed was very lucrative, the profits in 1856–7–8 amounting to about £14,000, £28,000, and £39,000; and also that very large profits had subsequently been realised. On 11th January 1858, a new deed of agreement was made, which the defenders say put an end to the pursuer's rights under the deed of 1855, and removed him from the position of a partner. The pursuer says this deed was the result of certain unfortunate speculations which he had entered into, and which had involved him in debts, a statement of which he laid before his father and brother. By that deed the father bound himself, out of his own proper funds, to pay the pursuer's debts; and, in consideration of this payment, which was held to be the value of the pursuer's interest in the business, he ceased to be a partner, and renounced his rights under the deed of 1855. But there was reserved to the father the assignation of legitim. All the pursuer's rights and obligations under the deed of 1855 were transferred to Charles S. Tennent, who took on himself the whole obligations which by that deed he and the pursuer had undertaken to their father. Power was given to the father, after two years, to repone the pursuer in his former position, and the deed bears that it was the father's wish and purpose to do so if circumstances warranted him in so doing. Should the pursuer not be reponed, Charles became bound to pay him £35,000 by instalments, under certain deductions. It was to be in Charles' power, even if the pursuer were reponed, to dissolve the partnership, keeping the whole assets of the firm, but paying the pursuer £40,000 instead of 35,000. By relative memorandum, the pursuer accepted that sum as in full of his whole interest in his father's succession; and he was also to give the firm his services for a salary of £200 a-year, having received a salary of £600 before 1855. The pursuer seeks to reduce the agreement of 1858, as granted for a grossly inadequate consideration, and under undue influence used by the other parties to it, who stood in confidential relations to him. He also alleges as a ground of reduction that the deed was impetrated by false and fraudulent representations to him by his father and brother, to the effect that it was to be kept in reserve and to be used only, if necessary, for the protection of the firm against interference by his creditors. The other grounds of action assume that the deed is to stand unreduced. The pursuer pleads that his father must be held to have exercised the powers reserved to him, of reponing the pursuer into his former position; or alternately, that the deed of 1858, not having been delivered, and not having been acted on, but having been merely deposited with Hugh Tennent for the special purpose referred to, and to meet the special event referred to, the pursuer was entitled to decree in terms of the conclusions of declarator and count and reckoning. The Lord Ordinary (BARCAPLE) sustained the pleas against the relevancy of the action except so far as the pursuer's case was founded on averments that the deed of 1858 had not been acted on, and that the previous one had been reverted to, in regard to which his Lordship reserved consideration of the pleas against the relevancy. The pursuer reclaimed. A proof was taken, and the case was argued.

Lord Advocate (GORDON), D.-F. MONCREIFF, FRASER and SHAND for pursuer. The following authorities were cited:—Corp. Jur.; Dig. lib. 45, t. 1, sec. 36. Kames' Prin. of Equity, book 1, part 1, chap. 1, sec. 3, art. 1, 2. *Mackie* v. *Maxwell,* 24th November 1752. *Brown* v. *Muir,* 1736, Elchies' Pact. Illicit., No. 8; Elchies' Notes, p. 310. *King* v. *Ker,*

1711, M. 9461. *Abercromby* v. *Peterborough*, 1745, Falc. M. 4894; Kilk. M. 16, 429. *M'Guffock* v. *Blairs*, 1709, M. 9483. Erskine's Inst. 4, 1, 27. Ersk. Prin. 4, 1, 11. Bankt. 1, 10, 62, 66. Bell's Law Dictionary, *voce* "Fraud." *Gordon* v. *Crawford*, 1730, Cr. and Stew., 47. *Ferguson*, 1732, Ib. 73. *Sime* v. *Arbuthnot*, 1797, 3 Paton, 613. *Ewen* v. *Mags. of Montrose*, Nov. 17, 1830, 4 W. and S. 346, specially 355 to 358. *M'Diarmid*, 17th May 1826, 4 S. 591; 3 W. and S. 37. *Murray* v. *Murray's Trustees*, 21st January 1826, 4 S. 377. *Leiper*, 9th July 1822, 1 S. 506. *Walker's Executors* v. *Low's Trustees*, 14th November 1833, 12 S. 44. *Campbell* v. *Connell's Trustees*, boxed 12th June 1860; Lord Ardmillan's Judgment, unreported; Reclaiming Note withdrawn. *Anstruther* v. *Wilkie*, 31st Jan. 1856, 18 D. 405. *Harris, &c.* v. *Robertson*, Feb. 16, 1864, 2 Mac. 664. Bell's Com. ii. 658. Tudor's Leading Cases in Equity, 3d ed., 1866, title "Voluntary Settlement—Undue Influence." *Huguenin* v. *Baseley*, p. 504, and notes and authorities, p. 528, *et seq.*; specially pages 530, 539, and 542. Story's Commentaries on Equity, 8th ed., sec. 244, 246, 249, and 251. *Tate* v. *Williamson*, November and December 1866, Law Reports (Chancery Appeals), vol. ii, p. 55; see specially page 61. *Rhodes* v. *Bate*, 1865, Law Reports (Chancery Appeals), vol. i, p. 257. *Smith* v. *Kay*, April 1859, 7 House of Lords Reports (Clarke's), page 750; see specially pages 770, 771, and 778–9. *Williams* v. *Bayley*, 1866, House of Lords, Law Journal (Chancery), vol. xxxv, page 717; see specially pages 724 to 727. *Hall* v. *Hall*, 4th March 1868, Weekly Reporter, xvi, 544. *Blisset* v. *Daniel*, 10 Hare, 493. Bankton, i, 10, 60, *Marshall* v. *Lyell*, 18th February 1859, 21 D. 521. *Wink* v. *Speirs*, 3d December 1867, Sc. Jurist, vol. 40, p. 47. *Young* v. *Peachy*, 1741, 2 Atkyns, 254. 29 Car. II., c. 3, sec. 9 (1676). Daniel's Chanc. Prac., p. 606. *Dixons* v. *Parker* (1750), 2 Vesey senr., 219; last point in case. *Stickland* v. *Aldridge*, 1804, 9 Vesey, 517. Story's Equity, sec. 298, 300, 302, and 695a. *Osborne* v. *Williams*, 1811, 18 Vesey, p. 379. *Sprye* v. *Rennell*, 1852, 1 De G. Macn. & G. p. 660. *Shaw* v. *Jeffrey*, 1860, 13 Moore's P. C. Cases, 432. *M'Aslan* v. *Glen*, 17th Feb. 1859, 21 D. 511. *Flower* v. *Marten*, 1837, 2 Mylne and Craig, 459; branch 1st of case; Lord-Chanc. Cottenham. *Gudgen* v. *Besset*, 1846, 6 Ellis and Blackburn, 986; specially Ch.-J. Erle. *Bargeddie Coal Co.* v. *Wark*, 11th March 1859, 3 Macq. 477. *Wallace* v. *Geddes*, 24th July 1820, 2 Bligh, 270. *Const* v. *Harris*, 1824, Turner and Russell, 523. *Flower* v. *Marten*, 6th April 1837, 2 Mylne and Craig, 459; second branch. *Jackson* v. *Sedgwick*, 1818, Swanst. i, 469.

YOUNG, CLARK, GIFFORD, A. MONCRIEFF and LORIMER for defenders. The following authorities were cited:—Erskine's Institutes, 3, 3, 10. Bankton's Institutes, 1, 19, 3. *Provost of Queen's College* v. *Buccleuch*, 1545, M. 8021. *Fairie* v. *Inglis*, 1669, M. 14,231. *Maitland* v. *Ferguson*, 1729, M. 4956; aff. Craigie and Stuart, 73. *Hamilton* v. *Chiesley*, 1675, M. 53. *Gordon* v. *Ross*, 1729, M. 4956; Folio Dictionary, 1, 336. *Smith* v. *Napier*, 1697, M. 4955. *Scott* v. *Wilson*, 1825, 3 Murray, 518–526. *M'Kirdy* v. *Anstruther*, 1839, 1 D. 855. *Clunie* v. *Stirling*, 1854, 17 D. 15. *Tweddell* v. *Tweddell*, 1822, 1 Turner and Russell (Lord Eldon, 13). *Bellamy* v. *Sabine*, 1835, 2 Phillip's Chancery Reports, 425 (Lord Cottenham, 438–440). *Hoghton* v. *Hoghton*, 1852, 15 Beavan, 278 (Sir John Romilly, M.R.), p. 300, *et seq.*, and cases there cited by him. *Hartopp* v. *Hartopp*, 1855, 21 Beavan, 259. *Dimsdale* v. *Dimsdale*, 1856, 3 Drewry's Chancery Reports, 556. Story's Equity Jurisprudence, §§ 309a, 296–8. *Lubbock* v. *Potts*, 1806, 7 East. 449. *A.* v. *B.*, 21st May 1816, F.C., and 2 Bligh, 196. *M'Ghie* v. *Butter*, 1829, 7 S. 797. *Duggan* v. *Wight*, 1797, M. 12,761; 3 Paton, 610. *Anstruther* v. *Mitchell*, 1857, 19 D. 647–685.

At advising—

LORD CURRIEHILL narrated the leading facts of the case, and described the deed of 1855, whereby the pursuer and his brother Charles Tennent were constituted partners of the firm of J. & R. Tennent, and that of 1858, by which, on getting into pecuniary difficulties, it was arranged that the former should go out of the firm. By this latter deed it was stipulated that, upon the expiry of two years from 31st December 1857, on the pursuer's showing that his debts were paid, his father (Hugh Tennent) should have power to repone him in the firm, or, failing such reponement, that his brother Charles should pay him £35,000, subject to certain deductions. Hugh Tennent never exercised the right of reponement, but, after the lapse of more than four years, he adopted the other alternative of appointing Charles to pay to the pursuer the £35,000. He did so by executing a deed of declaration dated 19th June 1863. The pursuer maintained that the contract of 1858, and what had followed upon it, were not binding upon him; that the rights which were conferred upon him by the original contract of 1855 remained in operation; and that he was still in a position to exercise the rights and enjoy the privileges of the brewery, as being now the sole surviving partner of the firm. He had accordingly instituted the present action in order to enforce the rights he had under the contract of 1855, and to have the contract of 1858 rescinded, or at least declared to be inoperative against his claim as such partner. The grounds upon which he rested his case were, that the contract of 1858 was *ab initio* a nullity, in respect it was granted for a grossly inadequate consideration; that it was impetrated from him by undue influence of the other parties; that in so impetrating it from him they acted fraudulently; and that at the time the contract was entered into he was under the influence of mental depression. What the pursuer contended appeared to be, not that any of these propositions *per se* would be sufficient to annul the contract, but that the combination of them was. But, on carefully analysing the proof which had been adduced, he was of opinion that the pursuer had failed to establish that the facts were such as would vindicate a right to nullify the contract. The proof seemed to establish that the pursuer was by no means deficient in mental power; the reverse appeared to be the case. Then, again, the contract of 1858 was not impetrated from him by his father and brother; he applied to his father to relieve him from impending bankruptcy, which of itself would have deprived him of his position as a partner of the firm, and the contract contained the conditions on which this was to be done. As to the statement that the consideration received was grossly inadequate, that could not be taken off the hands of the pursuer. He himself had the best means of estimating the value of his interest in the brewery in 1858; he himself had been in the management of the business; all the books were accessible to him; and with those means of information he told them in the contract of 1858 what his interest was. That contract having been signed, the pursuer, who was an intelligent man of business, could not get rid of

the contract by pleading that it was impetrated from him by undue means. That he thoroughly understood the practical meaning and effect of that contract, and that the stipulation did not confer upon him an unconditional right to be reponed, but left that matter entirely to the discretion of his father, was made very clear in his own statement when under cross-examination as a witness. The pursuer, however, maintained, as another ground of escaping from the operation of that contract of 1858, that it was intended merely as a pretext for deceiving his creditors, and to be used only as a means of preventing them from obtaining access to the books and papers of the firm; that, accordingly, it was not acted on, and that the business proceeded as formerly under the contract of 1855. This appears inconsistent with the evidence. In the balance-sheet of 1857 the profits of the firm were entered as divided between Charles and Gilbert Tennent, whereas, in the balance-sheets subsequent to the execution of the contract, the whole profits were credited to Charles. So that, although ostensibly to the public the pursuer was allowed to act as if still a partner during the period while the question of reponement remained in suspense, yet during that period he really was not a partner, and the contract of 1858 was in full operation. It only remained to consider the pursuer's contention that he was reponed by his father, and became legally entitled to the same position as if the contract of 1858 had never been executed. Even if it were true that the pursuer was reponed as a partner, Charles Tennent would have had the option of again dissolving the partnership on paying to the pursuer £40,000; and, it appeared to him, would probably have exercised that option. But on analysing the evidence he saw nothing to prove that Hugh Tennent ever exercised the right of reponing in any way whatever; nor did he see anything to indicate that Hugh Tennent believed he had exercised that power. On the contrary, he thought there was evidence that the power never was exercised. One article of that evidence consisted of the conclusive fact, already mentioned, that during the years in question no part of the large and constantly increasing annual profits of the business was ever credited to the pursuer, but the whole was regularly credited to Charles Tennent. Again, in a testamentary deed executed in October 1862, they found Hugh Tennent providing for the payment to Gilbert of such balance of the £35,000 as might remain due to him. Hugh Tennent appeared to have steadily retained his wish to repone the pursuer, until, on certain communications made to him by the pursuer, he resolved that it was his duty to refuse to replace him. The change of mind appeared to have taken place in the spring of 1863, when Hugh Tennent was on a voyage in the Mediterranean. The immediate cause of it seemed to have been the terms of certain letters which he received from the pursuer himself and from his agent. From certain communications addressed by Hugh Tennent to Charles at this time, it was clear that he had come to the resolution not to repone Gilbert, and on his return to this country he put this beyond doubt. In June 1863 he wrote to Charles, arranging for the payment of the £35,000. A deed was prepared and signed which entirely put an end to Hugh Tennent's power to repone the pursuer as a partner. Hence, as he thought, the ontract of 1858 remained in full effect, and ex l uded the present action.

Lord Deas said the question in this case was, whether the pursuer was a partner of the firm of J. & R. Tennent. If he were found to be a partner, it was not disputed that he was the sole surviving partner, and entitled to all the rights and privileges belonging to him in that capacity. Neither was it disputed that he was at one time a partner. He became a partner by the deed of 1855, and the question was whether he ceased to be a partner by the deed of 1858. The pursuer's father, Hugh Tennent, had succeeded to a brewery business in Glasgow, originated apparently by his grandfather, and he carried on that business with increasing prosperity for a great many years. When he reached the age of about 75, he naturally became desirous to make some arrangement with regard to his affairs for the benefit of his family in the event of his death. It appeared clear enough that he had no particular preference for one member of his family more than another as to giving them the advantage of that very prosperous brewery business, but that his object,—and he was a man of strong mind and intelligence,—was to give the business to such member or members of his family as he thought most likely to do it justice, and carry it on prosperously and effectively, as he himself had done. He had a large family. There were other sons besides either Charles or Gilbert, but, as far as he saw, the ground for selecting Charles and Gilbert to be his successors in business was, that he considered they were the only members of the family likely to carry it on as it ought to be carried on, and his desire was to give to each member of his family that which they were likely to make most of. Charles had been bred to the business, and there seemed to be no doubt entertained about his steadiness and capacity for being a partner. Gilbert had been bred a writer, and afterwards he was taken into the partnership, in the belief, on the part of the father, that he would be an efficient partner; and there could be no doubt that he carried on his department of the business with attention, and skill, and success. Thus stood matters at the date of the deed of 1855. In December 1857, it turned out that Gilbert was largely in debt, arising out of certain speculations which he had entered into, chiefly, and he rather supposed altogether, before he became a partner. The result of these transactions was that he became largely indebted, a fact which did not appear to have been known to Hugh Tennent and Charles Tennent till 1857, when the state of credit in commercial transactions in this country brought about a disclosure. It further appeared that the father was then, and had always been, very desirous to keep everything connected with the business as secret as possible; and it was quite intelligible why that should have been so. He was carrying on this business, extending it abroad, making large increases of profit year after year, and it was very natural that he should desire that the names of his customers, and the extent of trade with particular individuals, and so on, should not be known, or even that his prosperity should not be known to other rivals in the trade, who might take means to oust him from the market while he was making all this profit. And, consequently, it was quite intelligible why he was afraid of the interference of the creditors of Gilbert, which might have led to the exposure of the very things that he desired to keep secret. It was very natural that he should be afraid not merely of exposure in respect of these particular creditors, but that he should be alarmed at having introduced into the business a

partner who carried on speculations of this kind, and who might at any time repeat them, and lead the company into the same position. It was therefore quite natural and intelligible that he should be alarmed, and that his confidence in Gilbert, in respect of which he had chosen him to be a partner, should be greatly shaken by what he had learned. Well then, it was very clear that in 1857 Hugh Tennent became very desirous that his son Gilbert should cease, for the time at all events, to be a partner in this business until he had gone through a period of trial, to make sure that things of this kind would not be repeated. Accordingly, a proposition was made to Gilbert with that view. It did not appear, so far as he could observe from the proof, that there was any change of parental feeling on the part of the father to Gilbert in 1857 or 1858. It did not appear that there were any other reasons operating in his mind except such as were now being stated. Now, propositions were made between Gilbert and Charles which were not carried out, but heads of agreement were prepared in December 1857, and it was not disputed that the deed which was ultimately made in January 1858 was substantially the same as those heads of agreement. These heads were submitted to Gilbert, who stated in his evidence that on the 31st December 1857 he read them over. He said that on that occasion he strenuously objected to the clause about reponing him being otherwise than absolute. That clause in the heads of agreement put it entirely in the power of the father either to repone him or not on certain conditions, and Gilbert said he strenuously objected to its being anything less than an absolute right on his part to be reponed. He said, moreover, that there was no dispute between him and his father and Charles except about that clause. It was very clear that then, at all events, he became perfectly aware of the nature of the clause which had given rise to the whole of this question. On 4th January 1858, the full deed was put into his hand. He read it carefully, he said, for about a quarter of an hour, when Charles asked him if he agreed to sign it, and he said he did. Thereupon he did sign it. That was about half an hour after it had been put into his hands. Now, if there could be any doubt about this being deliberately done, that doubt was entirely removed by the account which Gilbert himself gave in his deposition. After reading from the evidence of the pursuer on this point, his Lordship said it was impossible to conceive anything more deliberately and intelligently done than the signing of this deed by Gilbert Tennent—by a man of intelligence and business habits, by a man bred as a lawyer, and who perfectly understood the nature of the deed. The question now came to be—why was that deed not to have effect? The pursuer, in substance, stated two things—first, that it was extorted from him by undue influence and while he was in difficulties; and, secondly, he said he understood that, notwithstanding the terms of the deed, the obligation upon his father to repone him was to be absolute, and that the deed was intended only to be used or shown to his creditors in case they attempted to interfere with the businees. It might be observed here that there were some important points of law which occurred in this case. There were some objections to the competency of a good deal of the evidence, but they were all on the other side; none were taken on the part of Gilbert Tennent. After alluding to some of these objections, his Lordship said he would take the case as if these legal objections to the competency or relevancy of evidence were laid aside—as if all the evidence which had been adduced was admissible and competent; and, on that footing, the question remained, whether the pursuer had proved that this deed of 1858, as it stood, was extracted from him by undue influence or in any fraudulent manner, or whether he had substantiated any arrangement on a view contrary to the terms of the deed—that it was not to take effect on its terms at all, but that it was a deed entirely for a temporary purpose. Now, one great thing which he naturally went upon, and which certainly was the strongest thing he could put forward, was what he called the gross inadequacy of this transaction, and there could be no doubt at all that, assuming the deed to take effect in its terms, by the deed of 1858 he was giving up very valuable rights. He was getting his debts paid, no doubt, upon the footing there stated, and he was getting a share of his father's succession to the amount of £35,000 or £40,000, according to circumstances, but still there could be no doubt that in 1858 he gave up very valuable interests. The concern had been prosperous all along. It might no doubt, have been otherwise, but still it had been prosperous up till that time; and in the year ending 31st May 1856, the profits were £19,591, and in the year ending 31st May 1857, they were £27,829. It was said that the gross inadequacy of that transaction was what was called "unconscionable," and that the deed ought to be set aside upon that ground. But the way in which Gilbert Tennent came into this favourable position should not be left out of sight here. He came into this favourable position in 1855 entirely by the goodwill and voluntary act of his father, and it might be said that he came into it gratuitously. He paid nothing for it, because although there was a large sum stipulated to be paid or laid aside for the father before the profits were to belong exclusively to the two sons, that money was to be paid entirely out of the profits. The effect of that was just stipulating a certain postponement before the beneficial interest of the two sons should come into effect, and if the business had gone wrong the father (Hugh Tennent) would never have got one sixpence from that bargain made in 1855. Therefore, the pursuer came into that position gratuitously. If the father had been attempting a reduction of that deed he would have found it very difficult to get out of it on the plea of its being "unconscionable" that he had made over to Gilbert Tennent, in his own lifetime, a business yielding nearly £30,000, and which had now come to yield £75,000 a-year of profit. He would have found it very difficult to get out of that, because he entered into it with his eyes open. Well, then, the father having done this in the belief that Gilbert Tennent was one of two of the family to whom alone is would be a reasonable and sensible thing to give up the business, but having discovered in 1857, as he said, great reason to doubt whether he had been right in that opinion, he became desirous to rectify the error which he had committed, and to have at all events a period of years during which he might keep the thing in his own hands, and judge for himself whether he had been right in what he had done. That was not an unreasonable thing—not an unpaternal thing to do, if the expression might be used—but the reverse; and the question then was whether Gilbert Tennent—a son entertaining, it was to be presumed, a proper

feeling for his father—would yield to him in so far altering a thing which had been entirely the voluntary act and goodwill of the father. That was the nature of the transaction. Well, then, was it to be contended that a son having the feelings of a son towards his father, and yielding to that arrangement, was a ground for setting aside such an arrangement? Suppose that one of King Lear's daughter's had given him back his kingdom, and had brought an action for reduction of that in her lifetime, would it have been the same case to try whether that transaction in which she gave him back the kingdom was to be reduced, as it would have been if she had got the kingdom independently of him altogether, and was giving him something he never had before at all? It was contrary to common sense and common feeling to suppose that the two transactions were to be looked upon in the same light—that this transaction in 1858 was to be looked upon as if Gilbert Tennent had been giving his rights to some third party altogether. Now, he did not see any allegation of influence other than the influence of the father over the son under these circumstances, and the natural feelings of deference and affection from the son to the father. It seemed to be said latterly in the debate that Charles Tennent operated upon the father. He saw no trace of that in the evidence. Gilbert himself said on oath that Charles had as much deference and fear of the father as he had. He said they both yielded to the father, but Charles always yielded much more than he did. Where, then, on the face of the proof was there any ground for supposing that Charles had any power to exercise undue influence with the father? It was easy to understand the application of the legal principle of influence of a father over a son, or even of one brother over another, in a case where there was any deception practised—where the son was brought to sign a deed giving up valuable rights, the extent and nature of which were not fully revealed to him; but it was important to notice that in the present case there was no allegation, even far less a trace, of anything of the kind. Gilbert Tennent admitted in his deposition that he knew everything in regard to the business and the value of his interest in it. He knew all that as well as, or even better, than his father did, and as well as his brother Charles did, so that there was not the slightest withholding from him of information connected with the concern. In a case of that kind, where the son was of full age and intelligence, and where the transaction related to such a matter as they were considering in the present case, what legal principle was it that entitled the son to say that he was not to be bound to that deliberate deed? I am at a loss to find out any such principle, either in law or common sense. That seemed to dispose of the whole case, with the exception of the double allegation—in the first place, that it was understood or verbally arranged that the pursuer should be reponed; and, in the second place, that he actually was reponed. With regard to the first accusation, he did not see anything the least like proof of that. The pursuer did not say in the course of his long deposition that his father ever proposed, far less agreed, to anything of the kind. It was the father who had the power of reponing, but the question was, whether the father was bound to repone the pursuer because he had the option. Where was the trace of any agreement by the father, that although the deed bore that he was to have the option he was bound to exercise that power? There was nothing in the deposition of the pursuer except some very vague statements about what passed between him and Charles, which did not even amount to a complete verbal arrangement between him and Charles, or anything like it, and far less to any arrangement between him and the father, with whom the power lay. Well, in that view the father had the power, and he lived for a good many years afterwards, and it was quite plain that during his whole life he was anxious to exercise this power, if he had thought and believed that Gilbert Tennent was precisely the man he believed he was when he became a partner. He could see no ground to dispose of the belief that the father did not exercise that power, just because he did not become satisfied that Gilbert Tennent was the man he had originally supposed, or the proper person to be intrusted with that business. But taking the deed as it stood, they had nothing to do with whether the father was right or wrong. According to the deed the father was to have the power of reponing, and it lay with him to decide whether it was right or not. He might know many things which they did not know, and if he appeared to have come to a wrong conclusion, or to a harsh or unreasonable conclusion, they had no right to confer regarding a matter which he reserved entirely to himself. He would only make the remark that he did not see any reason to doubt that the father had what were to him satisfactory reasons for not exercising his power of reponing. Things had emerged in the father's lifetime indicating that there might not be that deference and correct behaviour on the part of Mr Gilbert Tennent towards his father even which would justify his being reponed, although the father had been desirous to do it. Some of these things no doubt occurred after Gilbert had become aware that his father did not mean to repone him, but the father might have seen indications of a spirit of this kind before, although it did not come out till then. But they had nothing to do with whether the father saw such indications or not, if he had it in his power to repone or not as he pleased. With regard to the argument that the whole thing was intended to defeat creditors, the pursuer himself actually rejected that. He said the deed of 1858 never was intended to defeat creditors in any way, and any allegation of an arrangement of that kind was, to a considerable extent, contradictory of the whole previous part of his case, because if that was the understanding there was nothing he had occasion to object to except that it was not followed out. It was not very easy to reconcile with all this allegations about undue influence, by which the pursuer was compelled, he said, to go into that agreement. He did not see any thing like such undue influence, nor any proof that the pursuer was reponed by the father. A written deed was not necessary to reponing. It might be done by facts or circumstances, but that did not in the least carry the conviction to his mind that this was done or meant to be done. All that was founded upon with that view seemed quite explainable by what he had no doubt was the fact, namely, that for several years after the deed of 1858 the father did really desire and intend to repone Gilbert in the business, and, therefore, it was not desirable that there should appear to the world to be any change in the arrangements of the firm in the meantime. The desire not to make it appear that there had been any breaking up of the firm, or any restoration, accounted entirely for the pursuer going on on the footing that he did until

the time when his father might have reponed him, in which case the world would never know he had been out. On the whole evidence, he was of opinion that the pursuer had failed to prove his case.

Lord Ardmillan—In dealing with this case, which I have felt to be one of great importance, and of as great difficulty, it is necessary, in the outset, to observe particularly the position which the pursuer occupies, and the nature of the action which he has brought. The case is very peculiar. A proof has been reported; and, so far as possible, the facts have been ascertained to enable us to reach the truth in this partnership transaction, and this family history.

The brewery business at Wellpark, near Glasgow, was established about a hundred years ago by the grandfather and granduncle of the pursuer. The firm was John and Robert Tennent, and that has been still continued. The late Hugh Tennent died at the age of eighty-six in 1864. The pursuer was his third son, and is now his second surviving son; the defender, the late Charles Tennent, was his fifth and youngest son. The two eldest sons, Robert, who died in 1854, and William who survives, were not in the copartnery; nor was the fourth son, Hugh, who still survives.

In 1855, Hugh Tennent, the father, was the sole partner of the firm, which was a very prosperous concern. On 12th September 1855 this old gentleman, Hugh Tennent, retired from the firm, and made over to his two sons Gilbert and Charles, and to the survivor for behoof of himself and the representative of the predeceaser, the whole business, stock, and assets of the firm, and also his whole estate and effects, heritable and moveable, with certain specified exceptions. The value of the whole was fixed, by the deed executed to carry out this arrangement, at £214,403, 10s. 9d. The two sons became bound to pay to their father the profits of the concern, under deduction of 20 per cent. for maintenance and enlargement of the works, and for their personal expenses, until four-sixth parts of the sum so fixed as the value should be paid up to him. The two sons renounced their legitim in favour of their father; but thereafter, in order more effectually to secure the legitim to their father, they assigned it to him and his trustees and executors.

Under this agreement the pursuer and his brother Charles were the sole partners of the firm, with equal shares; but, of course, under burden of the obligations to their father. The interest of Gilbert in this concern was very valuable, even in 1855, and in 1858 it had become much more valuable, as the profits in the intervening years had been very large. The whole sum due to Hugh Tennent, the father, under the deed of 1855, was, out of the profits of the business, paid with interest by March 1862.

The claim of the pursuer Gilbert Tennent is founded on this deed of 1855. He alleges that he is still a partner along with Charles (or his representatives), and equal with Charles in this concern; and he seeks to enforce his claim by the present action. This is entirely an action *inter familiam et inter socios*. No interest of third parties is involved. If this deed of 1855 is to receive effect, and if the rights of the parties to that deed are to be regulated thereby, there cannot be a doubt that the pursuer is entitled to succeed in this action, and to be declared a partner, and an equal partner, with Charles. The deed of 1855 is not liable to any objection, and none has been stated. It is clear in its terms; it is not unnatural, nor unreasonable, nor unfair; and, if it is still in force, it is conclusive of this case.

But the plea for the defenders is, that the deed of 1855 has been put an end to by a new deed of agreement in 1858, which had the effect of annulling and destroying all the pursuer's rights under the deed of 1855, and of removing him at once and entirely from his position as a partner.

It thus appears that the pursuer's case rests on the deed of 1855, to the extent and effect in which it can be viewed as still in force. The defenders' case rests on the deed of 1858, which they produce and found on, and which they allege to have been acted on from its date. They aver expressly that from its date the pursuer ceased to be a partner in the firm. It is true that there is in the deed of 1858 a power of reponing the pursuer, to which I shall afterwards advert; but the intent and effect of the deed is averred by the defenders to be that, from its date, and unless and until reponed, the pursuer ceased altogether to be a partner, and became a clerk on a salary of £200 a-year. The deed of 1858 is interposed by the defenders as a shield to protect them against the demand by the pursuer for equal rights as a partner under the deed of 1855. To meet the defence thus set up, and to open the way to his claims under the deed of 1855, the pursuer seeks to reduce the deed of 1858.

It is not necessary for me to enter on any detailed explanation of the provisions of the deed of 1858. They have been already noticed by your Lordships; and they are clearly and accurately explained in the note of the Lord Ordinary. It is enough to say that before that deed the pursuer was an equal partner with Charles in that great concern, and that when, under the immediate pressure of pecuniary difficulties, he appears to have surrendered his whole rights and interests as a partner, and as a son, in return for the payment by his father of his debts, amounting to under £11,000, and for payment to him by Charles of the difference between that sum of debts paid and £35,000, payable by instalments of such amounts, and at such dates, as his father should fix. A power of reponing is reserved to the father, and if the pursuer should be reponed, then it was to be in the power of Charles, after payment to his father of the sum due under the deed of 1855, to dissolve the partnership, retaining to himself the whole assets of the firm, and paying to Gilbert £40,000 instead of £35,000. The deed further provided that the pursuer should continue to give his services to the firm for a salary of £200, while he had received the salary of £600 before he became a partner in 1855.

It is clear that, according to the provisions of this deed, the two brothers, who had been equal partners, were placed in very different positions. On the one hand, the younger brother Charles obtained the power of becoming, under any circumstances, the sole partner, either by payment to Gilbert of £35,000 (by instalments of such amounts, and at such dates, as his father should fix) in the event of of Gilbert not being reponed, or in the event of Gilbert being reponed, then by paying him £40,000; in both cases under deduction of the advances to pay Gilbert's debts, amounting to under £11,000. On the other hand, Gilbert, the elder brother, whose services as a clerk, before the partnership of 1855, had been secured by a salary of £600 a-year, and who was undoubtedly an intelligent and assiduous man of business, sacrificed everything for the con-

siderations above expressed, and descended to the position of his brother's clerk on a salary of £200. It is not, as Lord Deas seems to suppose, a return to the father of a gift bestowed on Gilbert. It is a surrender of all to Charles, who was the younger brother, and had not been the giver. The father had, in 1855, retired from the business.

The grounds of reduction of this deed of 1858 are set forth on the record, and have been very ably and elaborately maintained in argument, and may be thus stated:—

1. Great inadequacy of consideration and consequently great lesion to the pursuer;

2. Undue influence arising from the relation of the parties to each other, taken in combination with great inadequacy of consideration and great lesion to the pursuer; and

3. A fraudulent scheme, prosecuted by means of false representation and use of undue influence, whereby the pursuer was induced to sacrifice his rights and interests for a grossly inadequate consideration, and to his great loss and injury.

I do not advert to the pursuer's separate plea that he was actually reponed; because I agree with your Lordships that there are no sufficient grounds for sustaining that plea as a separate ground of action.

I shall now endeavour as briefly as possible to state my view of the principles of law involved in these grounds of action, before proceeding to consider the facts of the case disclosed by the proof, to which these principles of law must be applied.

In regard to the first ground of action, I concur in the opinion expressed by the Lord Ordinary and by your Lordships, that mere inadequacy of consideration does not of itself furnish sufficient ground for setting aside a transaction. But then gross inadequacy of consideration is a circumstance not to be lost sight of in judging of the transaction, when challenged on other grounds. It is an element of importance to be weighed with all the other circumstances, and if, in the relations, or the conduct, of the parties, there are any suspicious circumstances, then gross inadequacy of consideration may reasonably furnish what the English lawyers call "a vehement presumption of fraud." The fact that a transaction is unequal, extortionate and unfair, can not be left out of consideration in conducting the inquiry whether it was fraudulent. There have even been cases in which the inadequacy has been so gross and unconscionable as not only to suggest but to demonstrate some deception or imposition, or some undue influence (Story's Com. on Equity and Jurisprudence, 8th ed., p. 239, 251, 295, &c).

Mr Erskine leaves no doubt of his opinion on this point. He says (book iv, tit. 1, sect. 27) "all bargains which from their very appearance discover oppression, or an intention in any of the contractors to catch some undue advantage from his neighbour's necessities, lie open to reduction on the head of dole or extortion, without the necessity of proving any special circumstance of fraud or circumvention on the part of that contractor;" so also, in Erskine's Principles, in which it has long been understood that our Scottish law is very accurately, though briefly, explained, it is thus stated—"Yet where the deed itself discovers oppression, or a catching an undue advantage from the necessities of our neighbour, dole is said *in esse in re*, and so requires no extrinsic proof." There are many clear and authoritative statements by learned judges in England to the same effect. Lord Hardwicke, in a celebrated case to which all the more recent English authorities refer (*Chesterfield* v. *Janseen*, 2 Vesy, 155), lays it down that a court of equity has undoubted jurisdiction to relieve against every species of fraud; and then, enumerating the different kinds of fraud, he proceeds to state that fraud may be actual, arising from facts and circumstances of imposition, which is the plainest case; or it may be apparent from the intrinsic nature and subject of the bargain itself, such as no man in his senses and not under delusion would make on the one hand, and no honest and fair man would accept on the other—inequitable and unconscientious bargains; and of such even the common law has taken notice. The law has been laid down to the same effect by many other eminent English jurists; and, if I may presume to express an opinion in regard to the manner in which inadequacy of consideration is dealt with by the law of England, I should say that it is not materially different from our own. Inadequacy alone is not, in the general case, a sufficient ground for setting aside a transaction. But gross inadequacy—showing the bargain to be extortionate and unconscionable—is an element, in point of fact, from which fraud may be reasonably and legitimately inferred; and when, from the relations of the parties, or the conduct of the parties, other inferences of fraud arise, then the gross inadequacy of the transaction becomes most important, and augments the composite force of the combined inferences.

On the question of law, therefore, involved in the first ground of reduction, I shall only add that this agreement in 1858 between the two brothers and partners and their old father, who, though not himself a partner, retained a great interest and took a leading part in the arrangement, was one in which equity should have presided, and fair dealing should have been maintained. If it shall appear that there was gross inadequacy of consideration, great inequality in the bargain, and thus the violation of the equity which ought to have presided, then if I find, either in the relations or the conduct of the parties, an undue influence, or an unfair dealing, I am prepared to set aside the agreement.

On the point of law raised under the second ground of reduction, viz., undue influence arising from the relation of the parties to each other, I shall next offer a very few remarks.

I do not think that in this case the relation between the parties is such as to afford of itself a sufficient ground either for setting aside the transaction at once, or for a direct inference and presumption of fraud sufficient to sustain the conclusion for reduction, unless the defenders redargue the presumption.

The parties to the deed of 1858 were an old man of 76 and his two sons, the pursuer being above 40 years of age, a man trained to the habits and practice of business, and well acquainted with the particular business of the copartnery with which he was dealing. It does not appear to me that, out of these relations between the parties, there arises that dominion on the one side, and that subjection to influence on the other side, which the law can hold sufficient to create a presumption of fraud so as to throw on the defenders the burden of overcoming the presumption. But here again I must guard my opinion by saying that, while I do not deduce from the relation of the parties a presumption of fraud sufficient to sustain the pursuer's claim, I feel that the relation of the parties is an

important element not to be overlooked in considering the evidence by which the pursuer alleges that he has instructed a fraudulent scheme devised and executed to his great injury. The rules of equity well recognised in England have been largely and properly referred to by the counsel for the pursuer. I am by no means disposed to reject or undervalue these rules, for, when rightly understood, they are of the utmost importance, and I cannot consider them as inapplicable to our Scottish law. The opinions of the great English jurists to which we have been referred, on a subject involving grave and deep principles of equity and justice, must be highly important and instructive; and, unless excluded by some special Scottish peculiarity in jurisprudence (of which I am not aware), they must, in my opinion, be held as authoritative in this Court, which is a Court both of law and of equity. These rules must be applied by us to the facts of the case before us. I do not think that they carry us quite so far as the pursuer has contended: but, when considered in their bearing on the wider question raised by the pursuer on the evidence, they are of great weight.

A donation or *quasi* donation to a person in a position of dominion or ascendant influence, by one subject to that dominion or ascendant influence, is held in England to be presumably granted in consequence of the exercise of such influence; and, unless the presumption is overcome, the donation will be set aside. Whenever a transaction between such parties is unequal and unfair, it is considered to be *quasi* donation, or, as the English lawyers call it, "a transaction of bounty," and it is liable to the presumption which I have mentioned. The rule is not limited to the particular relations enumerated, such as parent and child, guardian and ward, agent and client, &c.; but it extends to all relations where influence may be exercised and confidence reposed. I remain of the opinion I expressed in *Campbell* v. *Connell's Trustees*, referred to at the bar; and I am prepared again to enforce the English equitable rule in so far as it is applicable to the facts. In the celebrated argument by Sir Samuel Romilly in the case of *Huguenin* v. *Bazely*, —so clear and cogent, that, although only a pleading, it has been accepted by the highest authorities as a statement of the law,—that learned and distinguished gentleman brings out clearly the proposition, that where there is between the parties contracting a relation of confidence on the one side and influence on the other, and where there is inadequacy in the consideration and inequality in the transaction, then, adds Sir Samuel Romilly, speaking in the Chancery Court,—then "if there be the least scintilla of fraud, this Court will and ought to interpose." Lord Eldon decided the case in accordance with this argument; and Lord Cottenham, in the case of *Dent* v. *Bennet*, expressed his entire approval of it. To the same effect Lord Campbell and Lord Brougham have recorded their opinions.

I have already said that I cannot reduce this deed merely because of the relation between the parties as creating a presumption of undue influence. But if, in addition to the fact of gross inadequacy of consideration, there is also the fact of confidence reposed and advantage taken, then these facts must be put together, and, in their combined force, must be carried along with us to the consideration of the remaining ground of action—involving the question of fraud. The whole circumstances must be considered together in judging of the evidence of fraud; and if there is really great inequality and gross inadequacy of consideration, with confidence and influence arising from the relation of parties, these facts must have great weight as elements of proof.

There is no such special question of law directly raised under the third ground of action as to require particular remark in addition to what I have stated. It cannot be doubted, that if in point of fact there was fraud in the inception of this agreement of 1858—if that agreement was adjusted and procured by Charles Tennent, in prosecution of a fraudulent scheme to obtain an unfair advantage, then, in point of law, the agreement cannot stand.

It may be difficult to bring within any special or definite category of nominate fraud the course of procedure by which the pursuer alleges that he was deceived and wronged. But if, on examination of the evidence, written and parole, I arrive at the conclusion that the pursuer reposed confidence, and that confidence was abused; that the pursuer, under the pressure of urgent but temporary necessities, was induced by his brother and his father, and their agent, to enter into an agreement clearly and greatly to his injury, and under an apprehension of its import and object different from that entertained by those who induced him to sign it; and if I find that this agreement was not acted on from its date as truly meaning and involving the tremendous sacrifice now declared by the defenders to have been its intent, and sought to be enforced as its result, but was acted on in a manner more consistent with the pursuer's own understanding of its intent; then, whether I can bring the form of fraud within any definite category in legal nomenclature, I am prepared to reduce the deed as unjust and extortionate in its nature, and procured by an unfair and deceitful device. It is on the proved existence of fraud and deceit, and not on the niceties of legal definition, that a case like the present must be decided. This Court is a court at once of law and of equity, and I cannot suppose that any form of detected fraud can be beyond the reach of justice.

I am not quite prepared to adopt to their full extent the views expressed by Lord Kames in the first book of his Principles of Equity, which have been urged for the pursuer. They are very broadly and unqualifiedly put; and I think they have not been altogether recognised as law, but have been subjected to some qualifications. Still there is much truth and power in many of the remarks of Lord Kames on the great principles of justice according to which the law reads all contracts. I agree with Lord Kames, that deceit in every form must be repressed by courts of justice, otherwise "the grossest frauds would become too stubborn for law." Accordingly, we find that in England, where courts of equity are separate from courts of common law, it is laid down by Lord Coke that "all covins, frauds, and deceits, for which there is no remedy at common law, are, and were, always redressed in the Court of Chancery." In Scotland, where there is no separation of the courts, such redress can be given in this Court, and in my opinion cannot be justly withheld.

Coming now to the questions of fact as applicable to these grounds of reduction, it is not my intention to enter into the details of the proof, which, however, I have very carefully considered. I shall, as shortly as possible, state the conclusion at which I have arrived on the leading points involved.

First, That there was great inequality in this

transaction,—gross inadequacy of consideration,—grievous injury to Gilbert,—does not in my mind admit of any doubt. We have the evidence of Mr Wylie Guild, an accountant of intelligence and experience, well known to this Court, to the effect that "by surrendering his interest in the concern in January 1858, Gilbert Tennent gave up a right to £54,411 of realised money." This is the result of an examination of the books by Mr Guild, and it is uncontradicted. Besides this sacrifice of realised funds, he surrendered his prospective interest as one of two equal partners in a concern of which the clear profit in the immediately previous year had been nearly £28,000, and of which the clear average profit in each of the ten succeeding years was £54,000. That prospective interest amounted to a very large sum. In addition to all this, he who, before he was a partner, had a salary of £600 for his services, undertook to continue these services for a salary of £200.

This was certainly a very great sacrifice. It is natural to ask why was it demanded? Why was it made? No other reason is given than that Gilbert had incurred debts to the extent of about £11,000, and was under temporary pressure for money. The whole sum of debt was much less than his share of profit in any one year after 1856, and not half his share of the average annual profit during the next ten years. That seems to be a very insufficient reason for such a sacrifice. Yet none other has been stated, and no reason is given except these debts for turning Gilbert out of the partnership. It is not said that he was weak or unfit for business. On the contrary, it is put as part of the defender's case, that he was in full possession of his faculties; and he is proved to have been a steady, diligent, and good man of business. It is not proved—it is not even suggested—that he was intemperate or disreputable; the contrary is the fair inference from all the evidence before us; and it appears that, after the date of the agreement of 1858, his father continued to consult him and respect him, and intrust to him the management of most important business, such as the purchase of the estate of Errol, and he made him one of his trustees in December 1861. Apart from that moderate sum of debt, and the temporary pressure arising therefrom, there was no ground for the removal of Gilbert, or for his entire surrender of his interest. No explanation of this great sacrifice, which the pursuer says was not intended, but which the defenders are enforcing, has been suggested, except the consideration set forth in the deed, and that consideration is, in my opinion, clearly and grossly inadequate.

Not on this ground alone could I set aside this deed; but I carry over the fact of gross inadequacy of consideration as an element in dealing with the questions which afterwards arise.

On the matter of fact involved in the second ground of action, I may say that I do not look on the case in the precise light in which it has been by either party presented to us. The great age of Hugh Tennent, and the mature years and business habits of Gilbert Tennent, would go far to exclude the ordinary presumption of undue influence arising from the relation of the parties. I am disposed to think that this case is, on the facts, not so much a case of confidence and influence implied in the relation of the parties, as a case of confidence proved to have been reposed by a son and a brother, in the trustfulness of a son's and a brother's reliance, and proved to have been taken advantage of unfairly, to the great injury of the confiding party.

It is sufficiently proved that Charles Tennent had won his father to his side, and that he and old Hugh Tennent had consulted together, and were of one mind, and acted together, apart from and exclusive of Gilbert, in the whole arrangement and preparation of this deed of 1858. The co-operation and the influence of the father was given to Charles to promote his views, and used to induce Gilbert to sign the deed. Of that there is no doubt. The old man—imperious in temper, and dominant in will, with his influence over his family rather increased than impaired by the great age which claimed reverence—threw his strength of purpose and authority into the scale on the side of Charles; and Gilbert, urged by father and brother, and confiding in their honour, signed reluctantly.

The only living witnesses who have been examined on this matter are Gilbert Tennent himself, and Mr Hugh Lyon, who was the agent employed by Hugh and Charles Tennent in the matter. Mr Lyon was not employed or instructed by Gilbert; and, acting for Hugh and Charles, he certainly did all he could to serve those who did employ him, by advising and urging Gilbert to sign the deed, and to trust to the honour of his father and brother.

The pursuer declares, as a witness, that the arrangement and agreement in 1858 was a mere temporary arrangement to meet the old gentleman's fear and dislike of the interposition or inquiries of strangers in regard to the business, and that he, the pursuer, signed it in that belief. Mr Lyon appears to me to give strong confirmation to this statement, for he represents Hugh Tennent as peculiarly and even morbidly close and secretive in business, and as desiring the deed on that very ground; and, indeed, Mr Lyon's testimony leaves no doubt in my mind that, at the time, he considered that the deed of 1858 was executed in order to prevent the intrusive and unwelcome inquiries of strangers and creditors into the brewery business. If that was the intention of the deed, then it was acted on so long as any necessity for acting on it existed. But the defenders say that the intent and meaning of the deed was, that the pursuer Gilbert should surrender his whole rights and interests, and should cease altogether to be a partner from its date. They say that, to that effect—as instantly terminating Gilbert's right, interest, and character as a partner, and reducing him to a clerk on a salary of £200 a-year—the deed of 1858 was acted on from its date.

To my mind, one of the most important questions in this cause is—which of these statements is true? Was the deed acted on from its date, to the effect only of satisfying the old gentleman by interposing if necessary, for a time, a barrier to the inquiries of Gilbert's creditors? Or was that deed acted on from its date, to the effect of terminating at once and conclusively the rights and status of the pursuer as a partner? This last proposition is put as their case by the defenders—put as matter of fact on the record, involved in their pleas in law, urged on us in argument from the bar, and, if I mistake not, assumed by some of your Lordships to be correct.

As the result of an anxious study of the evidence, I have come to be of opinion—clearly of opinion—that this proposition of the defenders is without foundation. I think that the deed of 1858 was not acted on from its date, to the effect of terminating at once the pursuer's rights and status as a partner.

I think he continued to act, and to be recognise d, as a partner after that date.

I shall immediately proceed to explain, very shortly, the grounds on which I have formed the opinion which I have expressed on these opposing propositions.

Meantime, before passing from the second ground of action, I must say that I think, as indeed one of your Lordships has already said, that the testimony of the pursuer is creditable to him. It is intelligent, clear, and candid. It is, in its general scope, and in important particulars, corroborated by the evidence of Mr Lyon, and by the writings in process. I cannot say that the deed was executed by one under dominion, or subject, in the ordinary sense, to the pressure of undue influence; but I think that the deed was granted for grossly inadequate consideration, by a man in distress and depression, and in great temporary embarrassments, with no separate agent to guide him, under the urgent advice of his father, his brother, and their agent, who acted in concert, and without taking him into their councils, and in confiding reliance on the honour and affection of his near kinsmen.

Taking with me this view of the facts in regard to the relation of the parties, I shall now consider the pursuer's allegation of a fraudulent scheme on the part of Charles Tennent to obtain this confidence in him as a brother, and then to take unfair advantage of that confidence to the grievous injury of his confiding brother.

I have arrived at the conclusion, from the evidence, that at an early period in this family history, Charles Tennent formed a plan for getting his brother Gilbert out of the business. This can be traced from the preparation of the first draft in 1857, which Mr Lyon, acting for Charles and Hugh, prepared without any communication with Gilbert. That agreement was not executed; something "more stringent," as Mr Lyon expresses it, was desired. But even in that first draft we see the purpose of Charles, and we also see the germ of the device, afterwards developed in the clause about reponing, of inserting a stipulation "just for appearance sake" (Lyon's Letter, Pur. Print, p. 12). A further stage in the development of this device of double-meaning and of double-dealing is to be observed in Mr Lyon's letter of Jan. 1, 1858 (p. 25). I think that Charles took occasion and advantage of the temporary embarrassment of Gilbert in 1857 to carry out that plan,—that he obtained the concurrence of his old father, and the powerful aid of his paternal influence; that he availed himself of the agency and co-operation of Mr Lyon; that he framed, with Mr Lyon's assistance, a "more stringent" deed of agreement, so expressed as to amount to a total sacrifice and surrender of all Gilbert's rights and interests as a partner, to his grievous injury; that the arrangement, and the deed, were represented to Gilbert as suited to a temporary exigency, and, having only a temporary effect, as implying a suspension only, not a destruction of his rights; that the clause of reponing was cunningly introduced to reconcile Gilbert to that view of the deed, while that clause, except as to £5000, was of little real avail to him, since it left him absolutely at Charles' mercy, who, in any event as to reponing, could turn him out at pleasure; that he obtained Gilbert's signature to the deed on the footing, and in the belief, on Gilbert's part, that it was a temporary arrangement, and in confiding reliance on Charles' honour; and that the enforcement of that deed of 1858 as a total surrender of all Gilbert's rights and interests in the copartnery, is not according to the footing and meaning of the arrangement as represented to Gilbert at the time, nor according to the good faith of the transaction.

If this be so, then the deed ought not to be permitted to stand as an interposed obstacle to the pursuer's claims as a partner under the previous deed of 1855.

As already stated, I think that the manner in which the deed of 1858 was acted on when its intent and meaning was fresh in the mind of the parties, and while the old man retained a kindly feeling to Gilbert, is of the greatest importance; and I am of opinion that it certainly did not immediately terminate the partnership. It certainly was not acted on from its date to the effect and intent now contended for by the defenders. I think that Gilbert acted as a partner, signed as a partner, paid as a partner, and was recognised by his father and brother as a partner, after the date of the deed which is said to have terminated at once his rights and status as a partner. I have detained you too long to state fully the evidence on this important point; but I shall mention a few of the particular facts from which I have been led to come to this conclusion.

There is evidence that Gilbert was considered and dealt with as a partner; and the testimony of William Tennent, of Andrew Neilson, of Robert Munro, of Thomas Williamson, is not without importance.

But, more particularly, I notice the following points:—

The deed of 1858 was not executed in duplicate, as the deed of 1855 had been. It remained in the hands of Hugh Tennent, and was not delivered, nor was a copy furnished to any one. It is true that delivery is not necessary to the validity of a mutual deed; but the fact of non-delivery, of no duplicate, and no copy, is not unimportant on the present point.

Previous to 1855, the pursuer, before he became a partner, received a salary of £600. Of course, that ceased after 1855, when he became a partner. According to the contention of the defenders, and to the words of the deed of 1858, he returned to his position as a clerk. If the deed was meant to terminate his status as a partner, a salary-account should have been opened, and he should have drawn £200 a-year in name of clerk's salary, as he had done previously, and as other clerks did. But this was not done. He never received a salary No salary account was opened. He did not resume the position which he held before 1855. He continued, as he had done since 1855, to draw from his account to the extent of about £600 a-year.

Again, it had been arranged in 1855 that all new subscriptions for charitable purposes should be divided between Hugh Tennent himself and the firm of J. & R. Tennent. This was done from 1855 to 1858. According to the defenders' present contention this must have stopped, in so far as regarded Gilbert, in 1858, when it is said that Gilbert ceased to be a partner. But it was not so. After 1858 the subscriptions were paid and charged as formerly, and in 1861, and subsequently, Hugh Tennent writes to Gilbert about these subscriptions; and in one of these letters he says to Gilbert, "if you and Charles think of giving him (Rev. Mr Stevenson) anything, you can charge me one-half," and in another letter he says, "if yourself and Charles

think proper, you can send £60 to Dr Patterson." It does not appear to me that this can be explained on the footing of Gilbert being a mere clerk at that date. I do not think he was so considered or so treated. These letters are not explainable on this view.

Again, in the course of a negotiation in October 1861 in regard to the Liverpool agency of J. & R. Tennent—a matter of great importance, as about £5000 a month were received for sales there—Hugh Tennent writes to Gilbert as, I think, clearly on the footing of Gilbert being still a partner, and not a mere clerk. One of the letters, dated October 11th 1861, is quoted in the 26th article of the condescendence. In that letter Hugh alludes to the interest of Gilbert as well as Charles in the concern, and says that a certain arrangement will be for the security of "yourself and Charles." This cannot mean anything but a recognition as a partner. No intelligible attempt has been made to explain it otherwise. The defenders' answer to this article of the condescendence is, that the letter of Hugh Tennent is addressed to Gilbert as the corresponding clerk of the firm." To my mind this answer is very unsatisfactory. I think it is not true. Gilbert was not acting as a clerk, nor paid as a clerk, nor written to as a clerk on that occasion.

It is abundantly proved that, with the single exception of cheques on the bank—an exception explainable on the footing of a temporary suspension for a temporary cause—Gilbert signed letters, bills of lading, and a great variety of other documents for and on behoof of the firm, after 1858, just as he had done before. In like manner, the transfer of the profits to Charles' credit made for a few years after 1858 in the books kept under Charles' directions is explained on the same ground. The large sum due to Hugh Tennent was in the course of being paid till the spring of 1862. During that period the book entries in regard to profits were not inconsistent with the pursuer's view of the special object and temporary character of the arrangement. These book entries were made by Charles' directions, and all that can be said in regard to Gilbert is, that he did not complain.

Again, it was necessary in order to meet the requirements of the revenue laws of America, that in the case of shipments to the United States an affidavit of value should be made by the manufacturer. None but a partner could make these affidavits. The affidavit of a clerk was not sufficient. The making such affidavit was an act of partnership. Now they were made by the pursuer Gilbert Tennent both before and after the deed of 1858—made with the knowledge of his father and brother, and made necessarily as a partner.

Yet again, apprentices were taken by the firm in 1857, and again in 1861. The indenture on the first occasion, dated in December 1857, is signed "John and Robert Tennent" by Hugh Tennent. The indenture on the second occasion, dated 3d January 1861, is signed first by Hugh Tennent himself, and then "John and Robert Tennent" written by Hugh Tennent. In both of these indentures, the one being before the deed of 1858, and the other after it, the sons of "Hugh Tennent" are specially mentioned as in the business, this including Gilbert.

There are other instances on which I need not dwell, of the acting and the recognition of Gilbert as a partner after the deed of 1858. But a still more important particular, showing that Gilbert was recognised as a partner after 1858, remains to be noticed.

Hugh Tennent had retired from the business in 1855, but had not advertised to the public that he had ceased to be a partner. His name was accordingly given up as a partner to the Commissioners for Income-tax. A letter was prepared by Mr Lyon, dated 11th March 1859, which I need not quote; it is on page 40 of the pursuer's print. It refers to these returns, and to the state of the partnership, and it bears to be an undertaking by Charles and Gilbert Tennent, as partners, to relieve their father of payment of income-tax. The document is quoted in the 24th article of the condescendence. It bears the signature of Charles as well as of Gilbert; it bears to be an obligation as a partner by Gilbert as well as by Charles, and it is dated more than a year after the deed of 1858. In the defender's answer to this article, it is denied that this letter "was delivered to Hugh Tennent," as the pursuer alleges. It is not, however, disputed that it is signed by Charles, and it distinctly recognises and binds Gilbert as a partner. It is the obligation of a partner, and it was taken from Gilbert by Charles. But further, Gilbert's own name was, after January 1858, returned as a partner to the Commissioners of Income-tax, and the returns were signed by his father, Hugh Tennent. That is not disputed, and indeed is proved, for Charles in a letter to Mr Lyon, on 17th February 1862, says, "these returns having been made since /58, and were signed by my father." This return of Gilbert's name as a partner has been felt by the defenders to be a matter so important that some explanation of it has been thought necessary. This is attempted, first by production of an alleged copy of a letter by Charles to Gilbert, dated 9th September 1861, page 58 of pursuer's print of documents, to the following effect:—

"Well Park Brewery,
"Glasgow, *9th September* 1861.

"My dear Gilbert,—In the return of the income-tax schedule which was made on the 7th of this month, and also in that which was made in 1859, under the three years' contract, it is stated that you are a partner in the firm of J. and R. Tennent; this you are aware of was not the case at either of the above mentioned dates (of course dependent on whatever arrangements may be made hereafter), this entry being made with the view of keeping business arrangements private, which, at the sametime, it may be said to be a correct statement, as whatever funds may pertain to you are the funds of J. and R. Tennent."

The date of the returns is stated to be in 1859 and 1861. This letter never was sent to the pursuer. It has no signature, but is a mere copy, or it may be a draft, and it has certainly not been proved to have been posted or sent, and it is denied that it was received by the pursuer. Accordingly, it is not evidence. It is next attempted to explain the return of Gilbert's name as a partner by the production of a letter bearing to be addressed by Hugh Tennent to Charles, and to be dated 19th January 1858. That letter is in the following terms:—

"19*th January* 1858.

"My dear Charles,—In the returns made for income-tax, now and formerly, I wish your concurrence, permitting your brother Gilbert's name, and at his own request, to be inserted as a partner in

the firm of J. & R. T., although he was not a partner, *nor had I any*, his name being inserted entirely with the view of saving his feelings, and exposure of his affairs to the Commissioners for the Income-tax.—I am most affectionately yours,

"HUGH TENNENT."

The letter is contained in an envelope addressed, "Mr Charles S. P. Tennent." The first time this letter was ever heard of was in February 1862, just as the time was approaching when, the whole debt to Hugh being paid off, the great prize seemed to be within reach of Charles. He was then seeking private and confidential communication on the subject with his agent Mr Lyon; he was bringing the deed of 1858 specially under Mr Lyon's notice; he was told by Mr Lyon that, on his reading of it, Gilbert had ceased at the date of the deed to be a partner, and that he could not prove that he was a partner. Then these returns of Gilbert, as a partner, to the income tax, signed by Hugh Tennent, occurred to the mind of Charles, and he mentions them to Mr Lyon; and he encloses to Mr Lyon the letter dated 19th January 1858, which I have just read. Mr Lyon received the letter, and returned it to Charles, pointing out the important fact that the letter is dated "eight days after the agreement." The letter and envelope were produced together, and were both shown to Mr Lyon, and, I think, identified. No doubt has been raised, and no doubt can exist, that if the letter bearing date 19th January 1858 was written and sent by Hugh Tennent, it was, when written and sent, enclosed in that envelope. Now, the important question is, when was that letter written; does it bear a true date? or has it been written *ex post facto*, and ante-dated in order to afford some explanation of the return of Gilbert's name as a partner? No one saw it, or heard of it, for four years. It is not alluded to by Charles himself till 1862, though in 1861 he signed a document as a partner along with Gilbert, and binding Gilbert as a partner, relating to these returns. It is not even mentioned in Charles' private memorandum, which, though not dated, refers to events in October 1858, and in the spring of 1859. There is some intrinsic evidence in the terms of the letter itself opposed to the truth of its date. The words "now and formerly" in this letter, if it bears a true date, have no intelligible meaning, because the returns were *after* the date of the letter, viz., in 1859 and 1861, and because up to the 1st January 1858, Gilbert was a partner; but these words are quite intelligible if it was written in 1862, and ante-dated. There is, however, another piece of evidence on this subject which is conclusive of the date of the envelope, and, as I think, of the false date of the letter. It is proved by the clearest evidence that the paper of the envelope of that letter was not made for two years after the date of the letter. I need not read the evidence of this. It is uncontradicted and complete. The fact is beyond dispute. The envelope had no existence in 1858, and the letter with its false date was, at the most critical point of time, and when his mind was troubled by these returns, sent by Charles to Mr Lyon as an explanation of the returns,—the importance being, as Mr Lyon at once perceived, that the date of the letter was only "eight days after the agreement." I do not wish to press this point too far. I only say that the important fact of Gilbert's name being returned by his father as a partner after 1858 is left without any true or fair explanation, while the only explanation attempted is of the opposite character. So left, it is inconsistent with the defenders' averment that the pursuer ceased to be a partner from the date of the deed. There can be no doubt that the pursuer was in many ways and on many occasions treated and recognised as a partner after the date of the deed.

If, between 1858 and 1863, an action had been brought by a creditor of Gilbert to prove him a partner of the company, I cannot imagine that such an action could have failed. Neither Hugh nor Charles Tennent could have maintained a defence against such action. Their recognition of Gilbert as a partner would have been fatal to their defence.

Then suppose that the company which has prospered so remarkably had been unfortunate, but that Gilbert was rich, can it be doubted that the creditors of the company could have proved Gilbert to be a partner? I think not a doubt can exist on this matter. These points are clear. They were suggested in the course of the argument. I did not understand them to be disputed. I assume them to be conceded. But, if so, how can it be maintained that, from the date of the agreement in 1858, the status of Gilbert as a partner ceased? Yet that is the defenders' case.

I have now stated the grounds on which I hold that this agreement of 1858 was not acted on, as alleged by the defenders, from its date; and never was acted on to the effect of terminating the pursuer's rights and status as a partner until the time when, in 1862-3, Charles proceeded to carry out to its completion the scheme which he had formed for extruding his brother from the concern. In my opinion the scheme so formed and executed was unfair and fraudulent, in breach of faith, and deeply injurious to the pursuer.

If I am right in holding that this deed was not acted on to the effect of removing the pursuer from the partnership, it cannot sustain the defence now maintained.

I observe that the Lord Ordinary, who had no opportunity of judging of the evidence, considered this point important.

Now that we have the evidence, its importance is still more manifest.

There remain to be considered two pleas raised by the defenders, and urged as a reply to the pursuer's demand, even on the assumption that he has made out his case on the facts.

The first is, that to view the deed of 1858 as a temporary arrangement for protecting the copartnery estate from inquiry by Gilbert's creditors, would be to set up a *pactum illicitum*. I do not think this plea well founded. *First*, the pursuer is not founding on the deed of 1858. He is seeking to enforce his claims under the deed of 1855. The defenders plead the deed of 1858. If, on the proof, it appears that the deed of 1858 was granted for an illegal purpose, then the defenders cannot set it up as a protection against the pursuer's action. If the truth of the case be, that this deed, prepared by the defenders, was for an illegal purpose, then the deed had no legal existence. But the deed is required for the defenders' case, not for the pursuer's, since, without the deed, the defenders have no answer to the pursuer's claim. *Secondly*, the deed provides for the payment of the creditors, and thus did them justice. No wrong is done, no creditor is said to have been left out, no claim by a creditor is said to have been refused, and no one has complained. *Third*, the deed *inter socios* could not really exclude inquiry by creditors

of Gilbert, if there were any left unpaid, though it might, by offering an apparent obstacle to inquiry, satisfy the secretive mind of Hugh Tennent, by whom and Charles—not by Gilbert—it was proposed and prepared; and, *fourthly*, if the pursuer was wronged and oppressed by this deed, and led to sacrifice his interest by breach of faith and unfair dealing, then I do not think that the defenders can plead, as a ground for retaining the benefit to them, that the intent and purpose of the deed which they prepared was one which, as against creditors, law would not have enforced.

The second of these pleas is, that the pursuer's case resolves into an allegation of trust, and can only be proved by writ or oath. The disposal of this plea is attended with difficulty. It is settled law, under the Act 1696, that, in a proper action of declarator of trust, the allegation of trust cannot be proved otherwise than by writ or oath. It has also been decided, and I think rightly, that when the action is in its nature and substance truly an action for constitution of a latent trust, then the legal limitation of proof cannot be avoided merely by altering the form of the action. But, looking to the nature of this action, as brought to enforce rights under the deed of 1855, and concluding for reduction of the deed of 1858 in order to remove it out of the way on the head of fraud, and looking to the ascertained facts which, in my view, support the charge of fraud, I do not think that this plea on the Statute 1696 is well founded. It is true that the pursuer says that he confided, and that his confidence was taken advantage of and abused to his injury: But if such averments are held to imply an allegation of trust, so as to limit the proof to writ or oath, then no case of fraud, in which good faith was broken and confidence violated, could be fully investigated. Here, fraud in the inception of the transaction—fraud in the scheme prosecuted to completion by the preparation and execution of the deed—is alleged; and of such averments proof at large is competent. The gates of Justice are opened wide in the tracing of fraud. It is quite contrary to the equitable spirit of our law to separate and eliminate a question of *quasi* trust out of the body of a case for investigating a course of fraud, and then to limit the inquiry to writ or oath of party. The violation of confidence, the breach of faith, is an incident and an element in the fraud, and an aggravation of it. Shall it be held to exclude or limit inquiry—to shut out the testimony of witnesses, and the real evidence afforded by the conduct of parties? I think not. The ascertainment of truth, and the doing of justice, is the great end of law. The door cannot be closed against inquiry on a fine-drawn distinction such as this. The present case is not the sort of case to which the Act of 1696 legitimately applies; and the truth could not be reached without a full and complete inquiry. I do not speak of form only when I say that this is not an action of declarator of trust. It is an action between partners of a mercantile company, on the head of fraud.

I know of no authority for holding that a reduction on the ground of fraud can be met by the plea that the pursuer's case discloses a breach of confidence, and therefore resolves into an allegation of trust. In the case of *Anstruther* v. *Mitchell*, 10th March 1857, which has been referred to, there was "no averment of fraud against the defenders"; and Lord Cowan says "no *fraus dans causam contractui* is alleged." That case is not in point. Nor is there any decision to support, in this case, the exception to the general rule, that proof *prout de jure* is open to a party alleging a wrong inflicted by force or fraud in the inception of the contract.

Therefore, I think that, from inquiry into the merits and facts of the case, the defenders cannot escape on this plea; and, on the merits, my opinion is in favour of the pursuer.

Lord President—The question in this case is one of very great importance to the parties, because it involves very large pecuniary interests. It is also of very considerable importance as requiring the consideration of certain legal principles, which in their application are of the greatest possible delicacy. It depends, I think, upon the answer that we give to three questions, and three only. In the first place, whether the deed of 1858 is liable to challenge or reduction upon any of the grounds alleged by the pursuer; in the second place, whether, assuming that the deed is not to be reduced, it never was used or acted on as a deed for dissolving the partnership created in 1855, or for excluding the pursuer from a share in the partnership of the concern, but was used merely as a blind to exclude inquiry on the part of the pursuer's creditors; and, in the third place, whether, upon the same assumption that the deed is not reducible, the pursuer was reponed by his father in the exercise of the powers reserved by the deed itself? With regard to the second and third of these questions, it is not my purpose to offer any observations. They appear to me to resolve entirely into questions of fact, and I am quite satisfied with the exposition of the evidence as applicable to these questions of fact that has been given by my brother upon the right hand (Lord Curriehill). I shall only say with regard to the second that, as I understand the question, it raises no difficulty at all under the Act 1696, because the question, whether this deed, although in form a deed to put an end to the partnership and to exclude the pursuer from the concern, was never used for that purpose, is a question of fact to be proved by parole evidence, and is a different question from that which would fall under the Act 1696, whether it was in its constitution a trust and not an absolute deed. I confine myself, therefore, in the observations I have to offer, to the first question only. I have no intention of entering into the details of the evidence even as regards this question; but there are some facts in the case that appear to me to be entirely beyond dispute, which enter very largely into the grounds of my opinion, and I shall endeavonr to state them as shortly as I can. At the date of that deed of 1858 the pursuer was a man in the prime of life—he was certainly of more than average intelligence; he had received a regular education as a lawyer, and he had been a legal practitioner himself for some years. It is not suggested that there was any temporary weakness of mind or even impaired bodily health, rendering him at the time more than ordinarily liable to circumvention or undue influence. He says, indeed, he was in low spirits or a state of depression in consequence of his embarrassments; and that was not surprising. Any man who was considerably in debt in the year 1857 or 1858, and had no means of liquidating his debts, could not but be in very low spirits and in a state of depression; and I am afraid if we were to hold that every man in that condition is in a condition equivalent to "facility" as known in law, a very large number of gentlemen at that time would have been in that sense incapacitated from attending to their own interests. But

I cannot hold that there is any evidence whatever of weakness of any kind, or to any extent, which made the pursuer at the date of this deed liable to undue influence more than at any other time. His capacity, therefore, to transact and to attend to his own interests being undoubted, the next important consideration is, what was his knowledge, and what were his means of knowledge, of the subject with regard to which he was to deal. He was of course acquainted better than anybody else with the nature and extent of his embarrassments, and with the importance to him of finding an escape from the state of embarrassment in which he was. He was perhaps better acquainted than anybody else with the value of the business of the brewery, and consequently with the value of his own share in that business, because he had for a very considerable time, first as managing clerk, and afterwards as a partner, taken the entire management of the counting-house part of the business. He was an active and intelligent man of business; everyone agreed that he conducted that department of the business with great ability; and therefore it is impossible to doubt that he, as much as anyone else, perhaps more than anyone else, was thoroughly acquainted with the value of the concern, and, of course, with the value of his own share in it. Then was he not a lawyer, fully alive to the nature and effect of the deed which he executed? I think this is made very plain by his own examination as a witness, in which he candidly admits that he made himself master of the contents of that deed before he executed it; that he was satisfied to enter into that deed with some alterations which he proposed; that he did propose certain material alterations in the expression of the deed; that he urged these very strongly upon the other parties; that he could not prevail upon them to accede to his proposal; that he remained absolutely dissatisfied with the deed as it stood, but nevertheless preferred taking it as it stood, rather than not have it at all. And so, with reluctance, no doubt, but with his eyes wide open to the whole circumstances in which he was placed, he executed that deed. Now, my Lords, I must say that I never heard of a deed being reduced at the instance of a party so situated, and it surely would require something very peculiar indeed, in the circumstances of the case, for a party of full capacity, of mature intellect, in the full knowledge of every circumstance bearing upon the transaction, and with a perfect understanding of the nature and effect of the deed which he executed, to be entitled nevertheless to set it aside. There are certain grounds, however, upon which deeds are set aside by parties who are thereby wronged; and I think the ordinary grounds of reduction of deeds may be very easily classified. Incapacity is one well-known ground of reduction; force and fear is another category; facility and circumvention is a third; fraud is a fourth, and fraud may consist either in fraudulent misrepresentation or in fraudulent concealment, or in both together; and lastly, there is essential error. But, really, beyond these categories, I am not myself, as a lawyer, as a Scotch lawyer, acquainted with any other ground of reduction applicable to such cases. No doubt, the head of fraud comprehends within it an infinite variety of elements. We have an allegation of fraud in this case, which, I think, requires very serious and deliberate consideration. It is an allegation of a very peculiar kind. It amounts to this—That when the pursuer's signature was obtained to this deed, under the circumstances I have already explained, it was represented to him, fraudulently represented to him, that the deed was to be used only for the purpose of preventing an unnecessary disclosure of the company's affairs to the pursuer's creditors, and was not to be used for any other purpose; the fraud of making that representation consisting in this, that the parties who made it intended all the time to use it to the full extent to which its terms would carry. Now, that is a valid enough allegation of fraud certainly. It is objected that parol evidence of such a fraud as that is excluded by the Statute 1696. I am not prepared to say that it is. No doubt the Statute 1696 rejects parol evidence of certain frauds, for in every declarator of trust brought by the alleged truster against the alleged trustee there is necessarily involved an allegation of fraud. The truster alleges against the trustee that he fraudulently denies the existence of the trust. But then that fraud, which consists only in denying the existence of the trust which does not appear upon the face of the deed itself, is plainly distinguishable from a fraud which induces the granting of a deed, and that is the nature of the fraud which is alleged here. The distinction is perfectly obvious. It is not necessary, in my view, to determine the matter absolutely as a question of fraud here, because for other reasons, which I am about to give, I cannot sustain this ground of reduction. But I only say at present that I am not prepared to hold that such an allegation as this may not be proved by parol evidence without contravening the Statute 1696. But then, when we come to the question of fact, I do not understand very well the evidence upon which it is rested. I cannot find it in the evidence of the pursuer; I find in the evidence of the pursuer, on the contrary, many things totally inconsistent with such a fact. If he had been assured, and had signed the deed solely in consequence of the assurance, that it was not to be used as a deed dissolving the partnership, and excluding him from the concern, why was he so anxious about the precise expression of one of the clauses of the deed? If the deed was to receive no effect according to its terms, the terms of the deed were of little consequence; and yet he remonstrated over and over again as to the mode of expression of what is called the reponing clause, which is quite inconsistent with the notion that the deed was not to be acted on according to the terms in which it was conceived. Therefore, it appears to me that the fraud thus alleged is not only not proved, but is disproved. There is no other allegation of fraud in the proper sense of the term in this record, and no attempt, as far as I can see, to prove any other fraud in the proper sense of the term as an inducing cause of the execution of this deed. But it is said that there is a combination of circumstances which entitles the pursuer to set the deed aside, and these are—gross inadequacy of consideration, undue influence exercised upon the pursuer by the other parties to the deed, arising from the confidential relation of the parties; and thirdly, the fact that by the operation of the deed the pursuer is greatly injured, and the other parties greatly benefited. These circumstances are said to be sufficient in combination as a ground of reduction, even although there is no proof of deceit; and I use the term deceit instead of the term fraud for the purpose of expressing this, that there is no allegation or proof, apart from that special ground of fraud I have already disposed of, that the pursuer was in

any way deceived or misled in executing this deed. Now, my Lords, to pronounce any general opinion as to whether these three circumstances in combination would in any case be a sufficient ground for setting aside a deed, would, I think, be dangerous; because I am not quite sure whether parties in the course of this argument, and in the course of the judgment we have been delivering, are always using this term, "undue influence," in the same meaning. It is a very vague term; it may mean fraud, or it may mean something greatly short of fraud, and therefore I cannot say, without a more perfect definition of the term, whether the three circumstances which I have mentioned in combination will or will not afford a sufficient ground for reducing a deed. But allow me to observe that the element of gross inadequacy, while it is unquestionably of very great importance, is one about which, also, I think there may be a good deal of misunderstanding. We are all agreed that inadequacy of consideration, however great, is not of itself sufficient for setting aside a transaction. We are also, I think, all of opinion that, in a question of fraud as a ground of reduction of a deed, inadequacy of consideration is an element of great importance, and the more inadequate the consideration the more important the element becomes. But why is inadequacy of consideration an important element? Why is it, as my brother Lord Ardmillan says, a strong presumption of fraud? Is it not because it goes far to show that the party who executed the deed to his own loss and injury did not very well understand what it was about? That is the reason why inadequacy of consideration affords a presumption of fraud; but if it is obvious otherwise—from evidence—that the party who signed the deed knew perfectly well what he was about, the importance of this element very nearly disappears altogether. Again, inadequacy of consideration presents itself as a very important element to the mind of a Court in dealing with a case of this kind, because they are able to contrast the proportion which exists, as they see it, between the consideration and the right surrendered—to contrast that proportion, as they see it, with the proportion which the party executing the deed thought he saw at the time between the consideration and the right surrendered. But are we in that situation? I confess to your Lordships that at this moment I am not so well able to compare the consideration and the right surrendered as the pursuer was when he executed that deed. I have not the same means of knowledge; I never can have the same means of knowledge; I never can put myself in so full possession of the whole circumstances and motives of the pursuer as he was in himself when he executed that deed. I cannot tell of how great importance it was to him then to be relieved from impending insolvency. It is impossible for me to tell that. I cannot tell even how much, as a matter of feeling, that might be a matter of consequence to him. But I can tell that he then knew better than anybody else what he was surrendering; he also knew better than anybody now can know what the value of the consideration was that he obtained. For these reasons it appears to me that the inadequacy of consideration, as it is called here, is an element of much less importance than it has been represented to be in the course of the argument. The undue influence which was exercised to the effect of inducing this gentleman to execute the deed seems to have been, if I understand it rightly, parental authority in the first place; the influence arising from the relation of partnership, in the second place; and, in the third place, the taking advantage of the state of embarrassment in which the pursuer was placed. Now, assuming that the father of the pursuer had some influence with him—the influence which a father commonly has—assuming, also, that there was a very confidential relation subsisting between this family as co-partners in this business; and assuming, further, that the father and brother did take advantage in one sense of the embarrassments of the pursuer—that is to say, because of those embarrassments desired to get rid of him, on the one hand, and, because of those embarrassments, had the power of inducing him or tempting him to resign his partnership by offering to pay his debts — assuming all these things, is there deceit or influence of a kind which makes the execution of this deed anything short of the deliberate and intelligent consent of the pursuer to the transaction which was then executed? I think not; and therefore it is quite impossible for me to hold that the combination of those elements which have been represented as existing in the present case—namely, the inadequacy of the consideration given, the undue influence exercised arising from the relation of the parties, and the great benefit ultimately accruing to those represented by the defenders from this deed, can afford—according to any view of the law of Scotland with which I am acquainted—a sufficient ground for setting it aside. In these circumstances I entirely concur with the majority of the Court in the judgment which is proposed, and I think it is quite unnecessary to add anything in the way of exposition of the facts and the evidence in the case, after what has fallen from my brothers on the bench.

The Court accordingly repelled the reasons of reduction, sustained the defences, and assoilzied the defenders from the whole conclusions of the conjoined actions.

Agent for Pursuer—Adam Morrison, S.S.C.

Agents for Defenders—Maitland & Lyon, W.S., and Campbell & Smith, S.S.C.

Friday, May 22.

MUIR, PETITIONER.

Summary Warrant—Nobile Officium—*Custody of Pupil*—*Factor* loco tutoris—*Foreign.* On petition by factor *loco tutoris* for summary warrant to remove the pupil from the custody of his mother, who, the petitioner alleged, was not a fit person to retain the custody, and was about to go abroad with the child—warrant granted; and recommendation given to foreign authorities to aid the officers of the law in the execution of the warrant.

Muir, factor *loco tutoris* to Robert Kerr, petitioned the Court for warrant to remove the pupil from the custody of its mother, alleging that the mother was behaving in such a way that she ought not to be allowed any longer to have the custody of the child. Answers were lodged, and thereafter the Court remitted to the Sheriff of Ayrshire to inquire into the circumstances of the case and report; remitted the petition to the Lord Ordinary on the Bills during vacation, with power to him to pronounce any interim order that the circumstances of the case might seem to render necessary; and