allowed the son £150 a-year, and at the time of his death was just about to make him a partner, and it appears that he estimated that the double business would afford the son, who was to have half the profits, an additional sum of £200, or £350 in all, so that the business as a whole was expected to yield £700 a-year. Indeed, the contract of copartnery had actually been drafted, although not signed.

Taking these facts, the jury may have said—This is the case of an old man, who, thinking he can fairly trust to the attention and skill of his son, resolves to give him a half of the profits of the business, and relying on him to relieve him of all trouble, and allow him to become a sort of sleeping partner.

In this view of the case the jury may have asked themselves what might be estimated as the advantage to the father to be got from this arrangement, and as the statements made by Mr Horn senior are not denied, and were not called in question at the trial, effect has been given to them. Practically these statements amount to this, that the father and son were each to get £350 for the ten years during which the copartnery was to subsist, and that during that time, if the son and father were both spared, the father would not be called on to do more work for the business than his failing strength would permit.

It is said, however, that there are two sons left to the pursuer who can take their brother's place. But these sons may not enjoy their father's confidence to the same extent as their deceased brother did, and he may not succeed in working so well with them, and even if he did it must be remembered that these two sons had to be summoned from other places where they migbt have been left doing well in other walks of life if their brother had lived.

If this son's services as a partner were worth even a very small sum to the father per annum more than a stranger partner would have been, the jury were fairly entitled to estimate what the father has lost by his death. Suppose they held that he was worth only £100 a-year to his father, then the father would lose what is equivalent to £1000 for the ten years of the copartnery, if it should last so long. Mr Horn senior was really retiring from business, and trusting to his son to carry it on, the relationship between them making him a more valuable and desirable partner than anyone else.

I do not think that in the whole circumstances £550 is too large a sum to give as damages—at least it is not so large as to be unreasonable and out of the question, and not such as to call for the interference of the Court. At least I am not disposed to interfere with the sum assessed by the jury.

The Lord Justice-Clerk and Lord Ormidale concurred.

The Court therefore refused the motion.

Counsel for Pursuer—Dean of Faculty (Fraser)—Mackintosh. Agents—Boyd, Macdonald, & Co., S.S.C.

Counsel for Defenders—Balfour—Jameson. Agents—Cowan & Dalmahoy, W.S.

Tuesday, July 16.

FIRST DIVISION.

[Lord Young, Ordinary.

BROWNLIE *v.* MILLER AND OTHERS (MACALISTER AND WALLNUTT'S TRUSTEES).

Property—Warrandice—Sale—Whether a Disposition Conveying dominium utile *warranted the Conveyance of* dominium directum—*Concealment and Misrepresentation by Sellers' Agents as to Superiority Title of Lands Sold.*

Certain lands were sold with an *a me vel de me* holding, the disposition, by which they were conveyed containing a clause of warrandice in the usual terms. The sellers' agents had previously stated to the purchaser in writing that the lands were held blench of the Crown, and that the sellers were not entered. They further said—"You are aware that the Crown never asks for an entry." A claim to a mid-superiority of the subjects, which had been made by letter to the sellers' agents immediately before the sale, but which on its being disputed had not been at the time further pressed, was not intimated to the purchaser. Two years later this claim was made known to the latter, and on an action being raised it was held good and the purchaser found liable in the amount of a casualty of non-entry.

The purchaser then raised an action against the sellers for repetition of the sum in which he had been found liable, and the expenses of the former suit, founding (1) upon the warrandice clause, and (2) upon the alleged misrepresentation by the agents that the lands were held of the Crown.

Held (1) that as there had been no eviction of the subjects conveyed, *i.e.*, of the *dominium utile* of certain specified lands, there had been no breach of warrandice; and (2) that upon a consideration of the documents and the facts bearing upon them, as elicited on proof, there was no such duty of disclosure as made it incumbent upon the sellers to intimate the adverse claim.

Sale—Clause of Warrandice in Disposition of Heritage.

Observed (*per* Lord Deas) that in a disposition of heritable estate a clause of warrandice is to be read in connection with the dispositive clause, and that in a case where the feudal title of the purchaser remained unchallenged and no part of what had been sold had been evicted, and where there were no incumbrances affecting the subjects which required to be cleared off, no objection could be taken which was based upon that clause.

Fraud.

Opinion (by Lord Shand) that "to found a claim on fraudulent misrepresentation it is necessary not only that the representation be false in fact, but that the person making the representation should know it to be false, or at least should not believe it to be true."

This case arose out of that of *Rossmore's Trustees* v. *Brownlie*, *ante*, p. 129, 5 R. 201, reported of date November 23, 1877. The circumstances out of which the latter sprung, and which led to this, will

be found very fully narrated in Lord Deas' opinion *infra*. They were shortly these :—

Mr Brownlie in November 1874 bought the estate of Monkcastle from the defenders of the present action in the belief that it held direct of the Crown. The foundation for that belief was that the title of the sellers was a Crown charter proceeding on a decree of forfeiture of the superiority against the heir of line and the heir-male of the superior last infeft. An action was raised against Mr Brownlie after he had bought the estate and recorded his conveyance, for payment of a year's rent as composition upon his entry, the pursuers of that action being parties who had held for upwards of seventy years a personal title to the superiority. Mr Brownlie defended that action on the ground (1) that the superiority had been duly forfeited, and (2) that he was entitled to put forward the heir of the last-entered vassal, and so escape by payment of relief-duty merely. Both of these defences were repelled, and he was found liable in a year's rent of the lands, as reported of date Nov. 23, 1877, *ante*, p. 129.

He then raised this action against the parties who had sold the estate to him—Mrs Anna Maria Campbell or Miller, relict of William Miller of Monkcastle, and others, trustees under the marriage-contracts of Mrs Macalister and Mrs Wallnutt (heirs-portioners who had succeeded to Monkcastle). The summons concluded for £2000, being the loss and damage, consisting of the amount of the casualty for which he had been held liable, with the expenses of the action above referred to, and the sum necessary to enable him to purchase the mid-superiority.

The pursuer averred, *inter alia* (Cond. 12)—"On 9th October 1873, immediately prior to the said negotiations and sale of the estate of Monkcastle by the defenders to the pursuer, the defenders and their agents Messrs M'Ewen & Carment had been informed that the superiority of Monkcastle estate, which formerly belonged to the Dukes of Hamilton, had been conveyed by Douglas Duke of Hamilton to Lady Rossmore, and that it now belonged to Lord and Lady Rossmore's marriage trustees, who had made up their title thereto. A claim at the same time was made upon the defenders to take out an entry, and a correspondence ensued between the defenders' agents and the agents for the Rossmore trustees, in which the defenders' agents denied the claim of the Rossmore trustees, although they had before them all the information necessary to enable them to judge as to the validity of the said claim. The correspondence on the subject continued to the end of November 1873, at which time it was dropped, without, however, the Rossmore trustees having in any way withdrawn from their claim to the said superiority, but apparently leaving the matter over till they should have an opportunity of searching out and investigating the titles of the defenders, who declined to exhibit them. The decree had not been seen by the Rossmore trustees. (Cond. 13) At the time of the said negotiations for the sale of Monkcastle to the pursuer the defenders were thus well aware that the superiority of the lands of Monkcastle belonged to the Rossmore trustees, and that no notice of the petition for forfeiture of the feu in 1849 had been given to the said trustees by the ancestor and predecessor of the defenders, and that consequently the decree following upon said petition was of no avail as against the said Rossmore trustees. Or at all events, the defenders were at the said time well aware that the said superiority was claimed by the said Rossmore trustees, and that their own title to hold of the Crown was challenged. (Cond. 14) In the knowledge of the claim put forward by the Rossmore trustees, the defenders, in the negotiations which preceded the sale to the pursuer, represented that the property was held of the Crown, and thereby in intention and legal effect warranted that the subject of sale was a freehold estate held immediately of and under the Crown. Further, notwithstanding the said knowledge on the part of the defenders, they did not, as they ought to have done, give the pursuer any intimation of the existence of such a claim, or of what was, so far as regarded him, a latent defect in their right to the lands, but of which defect they themselves had notice. On the contrary, they fraudulently and wrongfully concealed the fact that such claim had been made, and fraudulently and wrongfully, or at least recklessly, and without taking means to satisfy themselves of the truth of their representation, they represented to the pursuer that the said lands were held directly of the Crown."

The pursuer pleaded, *inter alia*—"(2) The defenders having sold to the pursuer the *plenum dominium* of an estate held immediately of the Crown, and the said estate having been divided, and the estate of superiority thereof having been evicted from the pursuer, the defenders are, in the circumstances, and in respect of the warrandice granted by them to the pursuer, bound to make good to him the loss thereby occasioned, and to relieve him of the expenses of maintaining the defence of his right to the said estate. (3) The defenders having at the time of the sale of Monkcastle been made aware that the *dominium directum*, or estate of superiority held immediately of and under the Crown, was claimed by third parties, and having in that knowledge made the said representations and bound themselves by the said clause of warrandice, without notice to the pursuer that such claim had been made, thereby warranted the title to be a good Crown title, and are now liable to the pursuer as concluded for. (4) The defenders having at the time of the sale by them to the pursuer been made aware that the said estate of superiority belonged to, or at least was claimed, by third parties, and having fraudulently and wrongfully concealed the existence of said fact from the pursuer, and, *separatim*, having fraudulently, or at least recklessly and wrongfully, and in the knowledge of said claim, represented to him that the said lands were held of the Crown, they are liable in reparation to him as concluded for."

The defenders, *inter alia*, denied any misrepresentation, and stated that they had believed the decree of forfeiture to be a good answer to the claim that had been intimated to them, and that the acquiescence of the claimants, when their demand was refused, had confirmed them in that belief.

They pleaded, *inter alia*—"(1) The averments of the pursuer are not relevant or sufficient to support the conclusions of the summons. (2) None of the subjects contained in the disposition by the defenders in the pursuer's favour having been evicted from him, there has been no breach of the warrandice therein contained, and the de-

fenders are entitled to absolvitor. (6) The statements of the pursuer being unfounded in fact, the defenders are entitled to absolvitor."

The Lord Ordinary (YOUNG) sustained the defenders' first plea-in-law and assoilzied the defenders.

The pursuer reclaimed, and argued—In cases where fraud was alleged the purchaser had it in his option to rescind the contract, or to claim damages while he retained the subject—*Dobbie* v. *Duncanson*, June 18, 1872, 10 Macph. 810, and cases there referred to. That that was competent was plain from the fact that in case of a total eviction the right of the party suffering that eviction was damages as at the time of eviction—*Hill* v. *Yearman & Hogg*, M. 16,631; *Reddie* v. *Syme*, 1832, 9 S. 413, 6 W. & S. 188. As to the clause of warrandice and the claim under it, it was clear that the position in which the pursuer found himself was just the same as if there had been a bond affecting the property. If one looked at what the true bargain between parties was, it certainly included the manner of holding—*Leith Heritages Company* v. *Edinburgh and Leith Glass Company*, June 7, 1876, 3, R. 789; *Gordon* v. *Hughes*, June 15, 1815, F.C. The reversal of the latter case in the House of Lords was only as to the form of the action —1 Bligh 287.

The defender argued—The clause of warrandice only applied to the subject of conveyance in the dispositive clause—Menzies 154; Erskine, ii. 3, 25. There might have been a special warrandice of the manner of holding—*Drummond* v. *Stewart*, March 28, 1549, 16 M. 565; and warrandice being *stricti juris*, and there being an obligation on the purchaser to see that everything he considered of importance was warranted (Bell's Prin. 893), that precaution having been neglected here, the purchaser had no remedy. As to the duty of a purchaser and seller, *see* Lord Curriehill's opinion in *Gillespie* v. *Russel*, Feb. 28, 1856, 18 D. 686. The warrandice clause could not be enlarged by going back on antecedent negotiation—Lords Robertson and Medwyn in *Gordon* v. *Hughes*. But even if there was a relevant averment of fraud, a reduction of the contract and not a claim of damages was the remedy—Authorities in *Dobbie* v. *Duncanson*, quoted *supra*.

After hearing parties the Court allowed the pursuer a proof before answer. It was led before Lord Deas, and its result is stated in his Lordship's opinion (*infra*). Mr Carment's evidence amounted to this, that he believed the claim made by the Rossmore trustees to be unfounded both on account of his own knowledge of the titles and his reliance on Mr Patrick, who had at the time of the forfeiture been the leading partner in his firm.

At advising—

LORD DEAS—It will be necessary for the decision of this case to attend carefully to some of the title-deeds and documents referred to in it, and to certain portions of the correspondence between the agents for the parties, but the general nature of the case may, in the first instance, be indicated very briefly.

By missives dated in February and March 1874, and minute annexed to certain articles of roup under which the lands had been unsuccessfully exposed to sale, the marriage-contract trustees of Mrs Macalister and Mrs Wallnutt, the two sisters and heirs-portioners of the deceased William Campbell Miller, agreed to sell to the present pursuer Mr Brownlie the estate of Monkcastle at the price of £26,500. The sale was completed by disposition executed in October 1874, and feudalised in the person of Mr Brownlie by being recorded in the General Register of Sasines on 11th November same year. The disposition contained a clause of warrandice against the facts and deeds of the trustees, and of absolute warrandice as regarded the beneficiaries. The term of entry was Martinmas 1873, and the holding bore to be *a me vel de me*.

In answer to an inquiry on behalf of Mr Brownlie, the sellers' agents had stated in writing on 6th January 1874 that the lands were held blench of the Crown, and that the sellers were not entered, but adding—"You are aware that the Crown never asks for any entry."

The way in which it had come to be assumed that the lands were held directly under the Crown was this — Douglas Duke of Hamilton stood infeft at his death in 1799 in the mid-superiority of the lands, but the progress of title-deeds in favour of the sellers comprehended a decree of declarator of tinsel of that mid-superiority obtained in 1813 under the old Act of 1474, and likewise a decreet of forfeiture of the same mid-superiority obtained under the Act 10 and 11 Vict. c. 48, sec. 8, on 27th June 1849, and it seems to have been understood that by this decreet of forfeiture the mid-superiority had been permanently extinguished.

In October 1873, however, the agents for the marriage trustees of Lord and Lady Rossmore (the latter of whom was a natural daughter of Duke Douglas) intimated to the sellers' agents that they claimed the mid-superiority as having been left to her by the Duke, that the lands were in non-entry, and that they required the parties who had advertised the lands for sale to take an entry. The answer made to this was that the mid-superiority had been extinguished by the decreet of forfeiture of 1849 obtained in respect of the failure of the immediate superiors to complete their title and grant an entry, so that the estate was now held directly of the Crown. The agents for the Rossmore trustees then requested to see the decree of forfeiture and the prior titles, but after some correspondence this was declined by letter dated 29th November 1873, for two reasons—1st, That the titles were required for exhibition to an intending purchaser by private bargain (referring no doubt to Mr Brownlie); and 2d, that the proprietors could not be expected to exhibit their titles when the object was to make a claim against them which they were advised was not well founded, and which they were prepared to resist.

The sellers' agents did not communicate to Mr Brownlie the objection which had thus been intimated to the right of their clients to hold the lands directly of the Crown, but proceeded with their negotiation for a sale, which was effected in the following spring by the missives and minute already mentioned, and completed in the following November by the disposition and infeftment in favour of Mr Brownlie. The Rossmore trustees had in the meantime allowed the correspondence with the sellers' agents to drop on receipt of their letter declining to show them the

titles, and they took no further steps in the matter till 6th August 1875, when their agents, after some personal communication with Mr Brownlie, addressed to him a letter bearing that date, intimating that they claimed the right of mid-superiority; that the lands were in non-entry; that they were advised that the decree of forfeiture of 1849 was ineffectual, as directed against the wrong parties; and requesting the titles to be sent to them that they might fix the amount of composition payable in consequence of the death of the last vassal. I do not doubt that Mr Brownlie was unpleasantly surprised when he received this intimation, which he immediately communicated to the agents for the sellers, who disclaimed all consequent liability, and the result was that after some correspondence the Rossmore trustees instituted an action of reduction, declarator, and payment against Mr Brownlie and the sellers, the petitory conclusion of which (under the recent Statute 37 and 38 Vict. c. 94) was for payment of a year's rent, which they estimated at £900. The sellers having declined to enter appearance in that action, Mr Brownlie defended it in his own name after intimating to the sellers that he reserved his right of relief. The Lord Ordinary held the decree of tinsel of 1813 to have been temporary only in its effect, and the decree of forfeiture of 1849 to have been directed against the wrong party, namely, against the heir of Duke Douglas in place of against the Rossmore trustees. He therefore reduced the decree of 1849 and the Crown title following upon it, and decerned against Mr Brownlie for £480 as the amount of the casualty of non-entry, but found no expenses due. This interlocutor was adhered to by this Division of the Court on 23d November 1877, with expenses from the date thereof. The object of the present action at the instance of Mr Brownlie is to make good his claim of relief against the sellers for the £480, with interest, and the expenses he has had to pay on both sides in that litigation.

Mr Brownlie's claim of relief comes substantially to rest on two grounds—1st, The warrandice in the disposition by the sellers in his favour; 2d, the representation—or as he terms it the misrepresentation—made by the sellers that the lands were held of the Crown, and their concealment, which he characterises as fraudulent, of the intimation made to them of the claim of the Rossmore trustees to the mid-superiority which these trustees have since succeeded in vindicating.

The first ground of action therefore to be considered naturally is the claim upon the warrandice. The brief words in which the clause is now expressed have, as your Lordships know, by force of a modern statute, precisely the same import with the more ample words in which the clause was formerly expressed. The defence to this ground of action is thus stated by the defenders in their second plea-in-law—"None of the subjects contained in the disposition by the defenders in the pursuer's favour having been evicted from him, there has been no breach of the warrandice therein contained."

I am of opinion that this plea is well founded.

The disposition conveyed only the *dominium utile* of the estate to be held *a me vel de me*. No part of what was so conveyed has been evicted. Mr Brownlie's feudal title to the estate is unchallenged, and so far as appears unchallengeable. It is not said that there are any incumbrances requiring to be cleared off. The clause of warrandice extends no further than these different heads. The clause does not cover feu-duties and casualties of superiority, although these may materially affect the value of the estate. It must be kept in view that what we are here dealing with is the warrandice in a disposition of heritable estate. It would be misleading to go into cases of a different description where certain qualities of what is sold may be comprehended in the warrandice, and I refrain from doing so. In a disposition of heritable estate we are to read the clause of warrandice in connection with the dispositive clause. What is disponed in this case is, All and whole the lands of Monkcastle, with parts, pendicles, and pertinents, extending to an eight merk land of old extent, lying within the regality of Kilwinning, with all right, title, and interest which the granters or consenters had thereto, to be holden *a me vel de me*. All that was thus disponed to him the purchaser has got, and in virtue of the clause of warrandice he can claim no more. The operation of the clause cannot be extended by referring to prior writings, whether letters, missives, or what else these may be, but not so referred to in the disposition as to be imported into it, and still less of course can the clause be so extended by verbal communings to be proved by parole. Whatever may have been previously contemplated, the parties were entitled to change their minds when they came to adjust and execute the full and formal deed in which alone we are to look for the concluded contract of the parties so far as concerns the estate disponed by the seller or sellers and warranted to the purchaser.

The case of *Gordon* v. *Hughes*, as decided in the House of Lords, March 25, 1819, 1 Bligh's Ap. 287, is a leading authority to the effect now stated. A majority of the Court of Session had decided otherwise on 15th June 1815 (Fac. Coll.), but the judgment was reversed on appeal, and the doctrine which had been laid down by Lords Robertson and Meadowbank, who formed the minority of this Court, was authoritatively established. Lord Robertson had observed—"The transaction between the parties, after a great deal of previous correspondence, was concluded by a regular and formal disposition and payment of the price. I conceive we are not to look beyond the terms of the disposition itself. That was the conclusion of the whole transaction. . . . It is said that it was the wish of the one and the intention of the other to give a freehold qualification. Very true. But the rule of *caveat emptor* applies."

Lord Meadowbank had said—"I am of the same opinion. It appears to me to be of the last importance that your Lordships should adhere with firmness to the doctrine of the law of Scotland that when communings and correspondence result in regular title-deeds you are to consider everything previous to the actual title as burnt. No person is entitled to keep them. They cannot qualify—far less can they overturn or interpret or construe—the transaction. It appears to me that if you were to admit of construction of feudal titles by communings you would turn the law of Scotland upside down."

In delivering judgment in the House of Lords

Lord Redesdale, after carefully analysing the summons, said—"I have stated this summons of warrandice at length, because it is important to be considered whether this is to be taken as an action principally on warrandice, or of two descriptions, on warrandice and for damages. It appears to me, following the opinion of one of the Judges of the Court below, that the action rests on the warrandice, and the question is whether anything has been evicted. It is admitted that the respondent has the superiority, and the complaint is that he has no vote. But the warrandice is not of the vote, and you cannot go beyond the disposition." He then says with reference to the missives and correspondence—"It is highly dangerous to admit such evidence to explain a deed unless there is fraud or misrepresentation to afford a ground. When a transaction is concluded by solemn deed, that settles the right between the parties, and unless there be misrepresentation knowingly made by one of the parties the legal and technical import of the deed must prevail." He then points out that the summons contained no conclusion for damages except on the ground of eviction, while the judgment of the Court below was not a judgment on the warrandice, but "upon the supposed previous contract between the parties;" that "it is important to preserve the forms of actions," meaning that in the case before him it was important to preserve the distinction between an action on the warrandice and an action of damages on the ground of misrepresentation; and he added —"But if he is advised that he has grounds to maintain such action, the judgment here is not to preclude Mr Gordon from insisting upon his claim in a right form of action." Accordingly the report bears—"Judgment reversed without prejudice to any relief which in any other form of action the respondent may be entitled to."

In that case of *Gordon* v. *Hughes* the only subject disponed was the mid-superiority. In the present case the only subject disponed is the *dominium utile*. In the one case, as in the other, the purchaser has got the whole subject disponed to him, and he can ask no more under the clause of warrandice.

The principles thus affirmed in the case of *Gordon* v. *Hughes* have, so far as I know, been recognised as law ever since. We have often had occasion to apply them directly and indirectly, and I do not think it necessary to say more than I have done to support the conclusion I have arrived at, that in so far as this action is of the nature of an action of warrandice the defenders are entitled to absolvitor.

But the present action is not, as in the case of *Gordon* v. *Hughes*, confined to a claim upon the warrandice. It is true the summons contains only one pecuniary conclusion, viz., for payment of £2000, but the pursuer's pleas-in-law as well as his statements of fact show that he rests this conclusion on two separate grounds. His second plea in the record is no doubt rested exclusively upon the warrandice, and the same ground of liability is mixed up somewhat confusedly with his third plea. But his fourth plea is distinctly rested upon misrepresentation and fraudulent concealment, and, taking it in connection with his 13th and 14th statements of fact (although neither the plea nor the statements are so artistically framed as they might have been) I am not prepared to send the case out of Court without inquiring into its merits upon the preliminary or prejudicial plea that the action as laid is irrelevant. It has been suggested that because the words "wrongfully or at least recklessly" are added in the 14th article of the condescendence these words limit the whole charge to something short of fraud. But I think that would be dealing more strictly with the record than is warranted by recent practice under the Court of Session Act. If the pursuer had asked for a jury trial, he might, I think, have deleted these words and taken an issue simply upon the fraud. To decide upon the footing that the documents, including the letters, are part of the averments, would really be to decide the merits and to misname the decision one upon relevancy. I think that would be both inexpedient and unjust.

The whole facts and documents are before us, and it appears to me to be our duty to decide upon them. If there was misrepresentation and fraudulent concealment it is right that the consequences should be visited on the offending parties, and if there was no fraud it is equally right that the character of the sellers and their agents should be cleared by a judgment on the merits in place of a mere dismissal on relevancy, which (as laid down expressly by the House of Lords in *Gillespie* v. *Russell*, July 1859, 3 Maclean 757) would not be *res judicata*, and consequently would not bar another action differently libelled on the same *medium concludendi*.

I have no doubt that on this branch of the case the sellers are responsible for whatever was said or written by their agents, including the fraud of the agents, if there was fraud. In this view, the important question really comes to be, Whether it was so clear in law that the decreet of forfeiture of 1849 was bad, that the sellers' agents, as able and intelligent men of business, could not *bona fide* have believed it to be valid.

Unless that question can be answered in the affirmative I do not see how there can be held to have been either fraudulent misrepresentation or fraudulent concealment on the part of the sellers or their agents. In place of answering that question in the affirmative I think it may be satisfactorily answered in the negative in both its branches by a careful consideration of the documents now submitted to us, along with the explanatory facts so far as the parties do not differ in regard to them in the record. If that be a correct view in itself, it cannot possibly be contended that the view is affected favourably for the pursuer by the uncontradicted evidence of Mr Carment, which is all the other way.

The claim of the Rossmore trustees to the mid-superiority was based entirely on the footing that the decree of forfeiture of 1849 ought to have been directed against them, and not against the heir-male or heir-of-line of Duke Douglas; or at least that they—the Rossmore trustees—ought to have been made parties for their interest to the petition upon which that decree was pronounced.

It appears to me to have been a question of great nicety and difficulty whether the decree of forfeiture was invalid on the footing alleged. In the action already mentioned at the instance of the Rossmore trustees against the sellers and Mr Brownlie, we no doubt adhered to the Lord Ordinary's interlocutor, which sustained the objec-

tions to the regularity of that decree, and consequently reduced it along with the Crown charter of confirmation which had followed upon it—November 23, 1877, *ante*, p. 129, 5 R. 201.

But although I concurred in that judgment I think the question was one on which there may quite reasonably be a difference of opinion, and I have no overweening confidence that we arrived at a right result in regard to it.

The circumstances under which the question arose were these—Douglas Duke of Hamilton stood feudally vested at his death on 1st August 1799 in the mid-superiority of the lands of Monkcastle, and William Miller, his vassal, stood feudally vested in the *dominium utile*.

Duke Douglas, it now appears, left a general trust-disposition and deed of settlement in favour of certain trustees, of whom the present Rossmore trustees are the successors. By that deed the trustees were directed to hold the general residue of the Duke's means and estates for behoof of his natural daughter already named, afterwards Lady Rossmore, but the deed contained no special conveyance of heritable subjects, and no procuratory or precept on which infeftment could follow in favour of the trustees. The lands of Monkcastle were not mentioned in the deed at all either with reference to property or superiority. All this is clear from an excerpt from that deed, now for the first time printed and laid before us.

In consequence of the general terms of the deed the Rossmore trustees brought an adjudication in implement in 1805 against the late Earl of Derby as nephew and heir-of-line of Duke Douglas, in which they obtained decree on 10th July of that year, and which decree after being extracted was recorded in the usual manner in the Register of Abbreviates and Adjudications on 13th August of the same year. Lord Derby had been charged to enter in the form usual and necessary to found an adjudication in implement, but he never actually entered. Although the Rossmore trustees thus obtained a personal right to the mid-superiority, provided it had really belonged to the Duke, they did not feudalise that right till 22d February 1872, when they did so by recording a notarial instrument in the Register of Sasines, as mentioned in the report of the former case—5 R. 202.

But in the meantime important proceedings had intervened. In 1813 Alexander Miller had obtained decree of tinsel of superiority under the Act 1474, c. 57, against the late Lord Derby as heir-of-line to Duke Douglas, and, in virtue of that decree, had procured a precept from Chancery on which he (Alexander Miller) was infeft directly under the Crown, and his infeftment was recorded in the Particular Register of Sasines at Ayr on 22d October 1813. It is true that that decree had not the effect of permanently annulling the right of mid-superiority, but only suspended or voided it during the lifetime of the vassal who obtained it. But Alexander Miller survived till in or about 1847—a period of about thirty-four years. The Rossmore trustees saw the feudal title he had thus completed under the Crown (in virtue of the decree of tinsel) standing in the public record of sasines, and allowed it to operate unchallenged during all that time, leaving it to be inferred that the mid-superiority had descended to the late Earl of Derby as heir-of-line, and that they themselves did not claim that mid-superiority.

Consequently, when in 1849 the factor *loco tutoris* of William Campbell Miller, the heir-of-line then infeft in the *dominium utile*, instituted the proceedings of that year, these were naturally directed against the Earl of Derby as the heir-of-line of Duke Douglas, although *ob majorem cautelam* they were likewise directed against the Duke's heir-male.

On the assumption that the Duke had died intestate as to the mid-superiority, it does not appear what other course the vassal could have taken. The Register of Sasines contains, of course, no substantive record, to be appealed to in such a case for the propinquity of an unentered heir. Propinquity is a fact to be otherwise ascertained, and in this case there neither was nor is any doubt about the fact that the late Earl of Derby was the heir-of-line of Duke Douglas. It is true the Earl had not connected himself feudally with the mid-superiority; but that was just what rendered the proceedings for an entry and alternatively for forfeiture necessary. If the Earl had made up his title to the mid-superiority the vassal's remedy would have been obvious but quite different, viz., by personal diligence to compel the superior to enter him in terms of the Statute 20 Geo. II. c. 50, secs. 12 and 13.

Having obtained his decree of forfeiture under the Statute 10 Geo. III. c. 48, sec. 8, the factor *loco tutoris* of William Campbell Miller duly recorded it in the Register of Sasines on 24th July 1849, and a Crown charter of confirmation in favour of William Campbell Miller was thereafter obtained on 6th June 1850 confirming his base infeftment and his right to the lands, to be holden of and under the Crown as immediate lawful superior for payment of the duties incident to a Crown holding. Nothing adverse to this title appeared in the Record of Sasines till the date already mentioned, 22d February 1872, when the Rossmore trustees recorded the notarial instrument on their decree of adjudication in implement proceeding upon the trust-deed and settlement executed by Duke Douglas in 1796.

At the date when the Rossmore trustees thus feudalised their title by recording their notarial instrument, a period of seventy-three years or thereby had elapsed after the death of Duke Douglas without the trustees under his settlement having made or intimated any claim to the mid-superiority in question. It is far from clear that in these circumstances the sellers of Monkcastle were not in a position which entitled them in a question with the Rossmore trustees to the privileges of singular successors who had taken their proceedings and made up their titles in 1849 upon the faith of the public records, and so did not require the aid of prescription to fortify these titles. If Mr Brownlie had made his purchase and been infeft under the Crown prior to 22d February 1872 I do not see how his position as a singular successor could have been afterwards assailed, and it was a narrow enough question, although not made so prominent in the former case as it deserved, whether the sellers were not entitled to assert a similar privilege? Be this as it may, however, I cannot think it surprising if, when a claim to the mid-superiority was made, for the first time, in October 1873, the agents for the proprietors of Monkcastle regarded it as a claim not likely to be pressed to judgment, or at all events not likely to be successful. If such was their *bona fide*

opinion, I am not prepared to say that there was such a duty of disclosure as made it incumbent upon them, on behalf of their clients, to communicate to intending purchasers the fact that an adverse claim had been made to the mid-superiority, and still less can I hold that their not having done so necessarily infers either fraudulent misrepresentation or fraudulent concealment so as to render competent the present claim.

Mr Brownlie himself, after he had mastered the facts and examined all the titles and documents, seems to have formed an equally confident opinion with the sellers' agents that the objection of the Rossmore trustees to the decree of forfeiture of 1849, and their claim to the mid-superiority were untenable. On 14th September 1875 he addressed to Messrs M'Ewen & Carment the following letter under the signature of his professional firm—"We wrote you on 10th inst., and we have this morning received from Messrs M'Innes, Macfarlane, & Co., the titles of Lord and Lady Rossmore's trustees, per inventory we send you enclosed along with copy notarial instrument in favour of the trustees, recorded in the Ayrshire Division of the General Register of Sasines, 22d February 1872.

"It appears that, until the recording of the above notarial instrument no infeftment whatever had been passed in favour of any of the disponees of Douglas Duke of Hamilton as regards the property, although that Duke granted the general disposition and settlement so far back as 29th July 1796 (recorded in the books of C. and S., August 7, 1800), and his trustees had registered a decree of adjudication in implement, 13th August 1805. If such is the case, the proceedings raised by Alexander Miller in 1813, and by William Campbell Miller in 1849, were surely directed against the proper parties when directed against the nearest heirs of the Duke last vested in the superiority.

"We will be obliged by your returning us the enclosed copies after perusal with any suggestion or remark you have to make."

I refrain from quoting the letters written by Mr Brownlie to the agents for the Rossmore trustees, because, in these, he might naturally be expected to depreciate his adversaries' case. But in writing the above letter to the sellers' agents at the time he did so, I can see no motive he could have had for expressing the opinion contained in it unless it had really been his own professional opinion. I attach some importance to this, because I am satisfied from Mr Brownlie's letters that he was just as well qualified to form an opinion as to the legal objection taken to the decreet of forfeiture as the sellers' agents were. In the letter just quoted he suggests at once, with the practised pen of a feudal lawyer, the leading answer to the objection taken to the decreet of forfeiture—an answer which the fuller development now made of the grounds of it only shows, I think, to have been more formidable then than it appeared to be in the former discussion. Mr Brownlie's letter may not preclude other grounds for the charge of bad faith he makes against the sellers' agents, but it seems difficult for him now to turn round and rest that charge upon the footing that they could not reasonably have believed the heir of the last-entered vassal to be the party against whom the demand for an entry, and consequently the alternative conclusion for forfeiture, fell to be directed.

On the whole, the law applicable to this branch of the case appears to me to be that stated by Mr Bell in the fourth edition of his Principles, sec. 893, where he says, if there is no warranty the purchaser "can have remedy against the deponees only on one of two grounds—either he must make out a case of misrepresentation and fraud, or he must prove an error *in substantialibus* sufficient to annul the whole contract. He can have no remedy on the principle of the *actio quanti minoris* of the civil law—a doctrine not recognised in Scotland."

Error *in substantialibus* to void the bargain is not pleaded by the pursuer. His case is that he is entitled to keep the estate and claim damages. To that remedy I think he is not entitled. He must accept the maxim (not very palatable I admit) of *caveat emptor*, and submit to an adverse judgment, which in my opinion ought to be one of absolvitor on this branch of the case as well as on the other.

Lord Mure—On the first question, the important matter of warrandice, I concur entirely with the reasoning of Lord Deas, so that it is quite unnecessary that I should trouble your Lordships by going into any detail.

With reference to the second point, viz., the alleged fraudulent concealment of the state of the title, when the case was last before your Lordships it was considered necessary, before disposing of the relevancy of the allegations, to have that matter investigated, and to permit any evidence to be adduced that might be available in addition to the documents before us. That has now been led. I am unable to discover anything in the written or oral evidence sufficient to show any unfair concealment on the part of the agents in this matter. The evidence shows that Mr Carment was in the firm belief that this estate was held of the Crown, and besides that he had very good grounds for that belief. Mr Carment had been cognisant of the state of the titles for years, and that had also been very well known to Mr Patrick, formerly senior partner in Mr Carment's firm. It is an admitted fact in the case that from 1796 to 1872 the record is silent as to any right on the part of the Rossmore trustees. There were two tinsels of the superiority, and it appears from the minutes of a meeting of the Miller family trustees during Mr Patrick's life, of date March 15, 1849, that it was assumed that Lord Derby was the person in right of these superiorities. Besides, the inventory of the estate of Monkcastle, prepared from information obtained in 1845, speaks of the Earl of Derby as in right of the superiority, and at the meeting of trustees at which Mr Patrick presided it was resolved in that state of matters to take the steps necessary to obtain forfeiture of it. These steps were taken, but your Lordships decided in the former case that they could not stand.

In the correspondence passing in 1874 Mr Brownlie is informed that the estate held direct of the Crown, and there is nothing in the proof to lead one to any conclusion except that Mr Carment had a *bona fide* belief that that was the case. Messrs M'Innes & Macfarlane, the agents of the Rossmore trustees, had previously, on the 9th November 1873, written to Mr Carment's firm inquiring whether the Rossmore trustees had a right of the kind. They say—"The superiority formerly belonged to the Dukes of Hamilton, and through

Douglas Duke of Hamilton to Lady Rossmore, whose marriage trustees recently made up a title to it, along with other superiorities belonging to the trust. There was some impression that this superiority had come into the possession of the owner of the property, but we cannot find the slightest evidence of it. The titles should make this clear." That is thus answered—"The superiority to which you refer was extinguished by decree dated 27th June 1849, under the Act 10 and 11 Victoria, cap. 48, in respect of the failure of the immediate superiors to complete a title. The estate of Monkcastle is now held of the Crown." That answer led to the Rossmore trustees coming to demand a certain payment as the value of the superiority which had been forfeited, and as the sellers of Monkcastle, who are the defenders in this action, thought, regularly forfeited. In that way the only thing alleged, or that can be alleged, is that they should have intimated to Mr Brownlie that M'Innes & Macfarlane had raised the question. I cannot see that there was any call upon them to do so. I think the omission to do this does not entitle the pursuer to say that the other party has acted fraudulently and wrongfully.

Lord Shand—In so far as the action is founded on the obligation of warrandice, I think it is clear that the pursuer's rights must be measured by the terms of the conveyance granted in his favour, which embodies the obligation of warrandice for which the pursuer stipulated, and which the defenders agreed to undertake. That deed contains the usual abridged clause in the statutory form by which warrandice of lands is now commonly granted. The pursuer has maintained, in terms of the 11th article of the condescendence, that this amounted to a warrandice that the lands were held direct of the Crown as superior. I am of opinion that the ordinary clause of warrandice cannot be held to imply that lands hold of any particular superior. What is warranted is that a legal and valid right to the lands exists and has been conveyed by the deed. Whether the lands are held of one superior or another is a mere incident, not an essential, of the title; and if a purchaser should desire a warranty that the lands hold of a particular superior, he must stipulate for and obtain a special clause of warrandice to that effect. Even if the preliminary correspondence, which resulted in a sale, were looked at, I do not think the statement as to the Crown being superior was either intended or accepted as a warranty to that effect. But the pursuer has obtained all that the defenders undertook under the general clause of warrandice in the conveyance—a valid title to the property of the lands purchased.

On the other branch of the case I was formerly of opinion with the Lord Ordinary that the pursuer's statements were not relevant to support the conclusions of the action, and that proof ought not to be allowed, because, as I read the record, it is not averred, or meant to be averred, that either the defenders or their agent in entering into the transaction were not in the honest belief in the truth of the representation made that the lands were held of the Crown as superior. It is unnecessary now, however, to consider the question of relevancy, for the facts are fully ascertained by the evidence.

It appears beyond question that while the defenders personally had probably no knowledge or belief on the subject, their agent Mr Carment, who transacted the sale on their behalf, and who represented that "the lands hold of the Crown," only stated his honest belief to that effect. He was in the *bona fide* belief that the Crown had the right of superiority, and that there was no substance or reality in the claim to the superiority which had been made on behalf of the Rossmore trustees by their agent's letter of 9th October 1873, and in lieu of which a pecuniary claim had been substituted by the subsequent letter of 31st October, some months before the sale was entered into.

In that state of the facts, I am of opinion that the pursuer has no legal claim against the defenders on the ground of fraudulent misrepresentation or concealment. The claim in so far as rested on alleged warrandice has been disposed of. It might be suggested that a claim existed on the ground of error *in essentialibus* induced by misrepresentation even of an innocent kind, but that ground of action has not been maintained, obviously because the appropriate remedy in that case would be reduction of the contract, and restitution, and probably also because it would be difficult to show that a statement as to the owner of the right of the superiority was *in essentialibus* of the contract, or had reference to anything more than a collateral fact—an incident or quality of the title. The sole ground of action then on this branch of the case is fraud, and so far as my opinion is concerned I cannot see that a statement can be characterised as fraudulent either in fact or in law when it is made with an honest belief in its truth. To found a claim on fraudulent misrepresentation it is, in my opinion, necessary not only that the representation be false in fact, but that the person making the representation should know it to be false, or at least should not believe it to be true. The state of knowledge or belief of the person making the representation is to be determined on the evidence, and if he have refrained from making inquiries which would have disclosed the truth, it may often be a legitimate inference that he did not believe in the truth of his assertion. But if he refrained from inquiry, not from any unwillingness to know the truth, but because he was truly satisfied he had reasonable grounds of belief, and his belief be thus honestly entertained, I do not think his statement, though false, can be held to be fraudulent in law, as it certainly is not in fact. A statement made in an honest belief in its truth cannot be fraudulent, and if not fraudulent in fact I cannot see that it can be fraudulent in law.

The pursuer, in support of his argument that the representation by the defender's agent must be held to be fraudulent in law because made, as he alleges, recklessly and without due inquiry, has referred to the case of *Addie* v. *The Western Bank*, L.R. 1 Sc. App. 145. The Lord President in his charge there said:—"If the case should occur of directors taking upon them to put forth in their report statements of importance in regard to the affairs of the bank, false in themselves, and which they did not believe, or had no reasonable ground to believe to be true, that would be a misrepresentation and a deceit." The decision of the case was given on the relevancy of the pursuer's averments, and did not to any extent turn on the soundness of this direction. Lord Chelmsford

expressed a view of its meaning which would certainly not aid the pursuer in this case; while Lord Cranworth, after giving the ground of his judgment, said—"His Lordship told the jury that if the directors put forth in their report important statements which they had no reasonable ground to believe to be true, that would be misrepresentation and deceit, and in the estimation of the law would amount to fraud. I confess that my opinion was that in what his Lordship thus stated he went beyond what principle warrants. If persons in the situation of directors of a bank make statements as to the condition of its affairs which they *bona fide* believe to be true, I cannot think they can be represented as guilty of fraud because other persons think, or the Court thinks, or your Lordship thinks, that there was no sufficient ground to warrant the opinion which they had formed. If a little more care and caution must have led the directors to a conclusion different from that which they put forth, this may afford strong evidence to show that they did not really believe in the truth of what they stated, and so that they were guilty of fraud. But this would be the consequence, not of their having stated as true what they had not reasonable ground to believe to be true, but of their having stated as true what they did not believe to be true." The view thus stated by Lord Cranworth is in accordance not only with much previous authority, but, in my humble judgment, with much sound principle; and in that state of opinion in the case of *Addie* it cannot be accepted as settled that a statement or representation may be held to be fraudulent because false in fact, if made upon what some persons would regard as insufficient grounds, although made in an honest belief in its truth. There is much weighty authority, and in my opinion conclusive reasoning, to an opposite effect in the leading case of *Evans* v. *Collins*, 5 Q. B. 804, 13 L.J., Q.B. 180; and the subsequent cases of *Ormrod* v. *Huth*, 5 Q.B. 820; *Barley* v. *Walford*, 9 Q. B. 197, 15 L.J., Q.B. 369; and *Wilde* v. *Gibson*, 1 H. of L. 633.

Supposing, however, it were necessary to go into the question whether the defenders' agent who carried through the sale of the property had reasonable grounds for the belief which he honestly entertained that the superiority of the lands belonged to the Crown, I am further of opinion that the pursuer's case fails. I think he had reasonable grounds for his belief or opinion, and after all it was a matter of opinion to be formed on the titles and in the circumstances of the parties. In the first place, after the letter intimating the claim of the Rossmore trustees, the person who made that claim acquiesced in the decree of forfeiture and claimed a money payment on the footing that the right of superiority could no longer be vindicated. That circumstance, coupled with the decree of forfeiture itself, was I think sufficient as a reasonable ground for Mr Carment's belief that the Crown and not the Rossmore trustees had the right of superiority. In the next place, the alleged superiority title had been latent for seventy years, and had only then been mentioned for the first time. Again, even if the Rossmore trustees had the personal right which had never entered the record, the proceedings in the action of forfeiture had been taken against the heir of line of the person who had held the superiority *ex facie* of the records. Mr Carment was of opinion that in any view this was the proper course, and that the decree was effectual under the statute. Opinions might differ on that subject, and I am not prepared to say there were not reasonable grounds for the view which Mr Carment held. But beyond all this, the pursuer was himself so much of opinion that this view was in itself reasonable that he maintained its soundness before the Lord Ordinary, and again before this Division of the Court in the former case, and the full argument submitted was sufficient to show that the question was attended with difficulty. How in the face of all these facts it can be reasonably maintained that Mr Carment was without reasonable grounds for believing that the Crown had the right of superiority to the lands I am at a loss to understand.

The LORD PRESIDENT concurred.

The Court adhered to the Lord Ordinary's interlocutor.

Counsel for Pursuer (Reclaimer)—M'Laren—Jameson. Agent—John Martin, W.S.

Counsel for Defenders (Respondents)—Asher—Guthrie. Agent—John Carment, S.S.C.

Tuesday, July 16.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

CHARPENTIER & BEDEX *v.* DUNN & SONS.

Shipping Law—Charter-Party—Breach of Charter-Party when Port of Loading such that Full Cargo could not be taken in.

A ship was chartered for a voyage abroad and home, the home cargo to be loaded at a port to be named abroad. A sub-charter was arranged at the outward port, in which a place was named where a full cargo could not be loaded owing to the ship's draught of water and inability to cross the bar. The charterer's agent, while requiring that the ship should proceed to that port, maintained that there could be no claim for dead freight. Thereupon the master of the ship got other employment for her. *Held* that the owners had a good action of damages for breach of contract against the charterers, and damages assessed accordingly.

This action was raised at the instance of Messrs Charpentier & Bedex, joint-owners of the barque "Perseverant," of France, against Messrs Dunn & Sons, shipowners in Glasgow, for payment of £398, 8s. 10d. in respect of a breach of charter-party entered into between the pursuers and the defenders on September 16, 1875.

By that charter-party the pursuers undertook that their barque should load a cargo of gunpowder at Glasgow, and proceed therewith to Rio or Santos, in Brazil, and that after discharging that cargo the barque should, at the port of discharge, or at one port in Brazil not south of Santos nor north of Maranham, load a cargo of sugar or other lawful produce, and thence proceed to Cowes, &c., for orders. The freight was to be