and elected to take compensation under the Workmen's Compensation Act. The case goes far beyond any case that has hitherto come before this Court, and I am not prepared to hold on the evidence that the pursuer elected to take compensation under the Workmen's Compensation Act and to abandon his claim at common law. If payments had continued to be made for a number of weeks or months, and a receipt in this form taken for each weekly payment, that would have been evidence on which we probably should have held that the pursuer had sufficiently and finally made his election. But all that happened was that 12s. 6d. was paid to him and a receipt for that sum taken from him. I think that that evidence is quite insufficient to prevent him from now insisting in his claim at common law.

The Court pronounced this interlocutor:—

"Sustain the appeal and recal the said interlocutor appealed against: Find that it has not been proved that the pursuer elected to take compensation under the Workmen's Compensation Act 1897: Therefore repel the first plea-in-law for the defender, and remit the cause to the Sheriff to proceed," &c.

Counsel for the Pursuer and Appellant—Salvesen, K.C.—M'Clure. Agents—Gill & Pringle, S.S.C.

Counsel for the Defender and Respondent—Shaw, K.C.—T. B. Morison. Agents—Macpherson & Mackay, S.S.C.

Tuesday, January 27.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

SUTHERLAND *v.* BREMNER'S TRUSTEES.

Error — Mutual Error—Error induced by Misrepresentation — Misrepresentation—Innocent Misrepresentation — Statement of Opinion.

The law agents on the trust-estates of A and B wrote a letter to C informing him, as agents for A's trustee, that on A's estate being realised they thought a sum of about £150 would fall to be paid to each of D and E as their shares of said estate, and agreeing on C's paying them (the law agents) a certain sum and interest, to assign to C a decree in favour of B's trustees against D and E and an arrestment following thereon used by B's trustees against D and E in the hands of A's trustee.

C agreed to take the assignation, paid the sum of £256, 6s. 1d., and received an assignation of the decree and arrestment.

In an action brought by C against the trustees of A and B for reduction of the assignation in his favour, and for repayment of the £256, 6s. 1d., he averred that in the course of the realisation of A's estate it had been discovered that D and E were not and had never been beneficiaries on A's estate, and that consequently nothing was attached by the arrestment assigned to the pursuer. The grounds on which the action was based were (1) mutual error and (2) misrepresentation by the defenders. The pursuer admitted that at the date when the letter was written and the assignation was made the trustees of A and B *bona fide* believed that D and E were entitled to £150 each from A's estate.

Held that the action was irrelevant on the ground (1) that as regards both the subject and the character of the contract sought to be reduced the parties had been at one, and (2) that there had been no representation in the letter of the law-agents that D and E were as matter of fact entitled to a share of A's estate, but only an expression of opinion to that effect, and that this opinion had been expressed upon a matter as to which C might have informed himself.

In November 1901 Symon Flett Sutherland, S.S.C., Edinburgh, raised an action against Andrew Bremner, fish-curer, Wick, Andrew Louttit, Edinburgh, and William Smitton, Bank Agent, Wick, as trustees and executors under the trust-disposition of the deceased Mrs Margaret Mackay or Bremner, the said Andrew Bremner as trustee under the trust-disposition and settlement of Mrs Marjory Wares or Mackay, and the said Andrew Bremner, Andrew Louttit, and William Smitton as individuals.

The conclusions of the action were (1) for reduction of an assignation dated 31st January and 4th February 1901, granted by the defenders Andrew Bremner, Andrew Louttit, and William Smitton, as trustees and executors of Mrs Bremner, in favour of the pursuer, assigning to the pursuer the sums contained in a decree dated 26th November 1898 obtained by Mrs Bremner's trustees against Mrs Margaret Bremner or Sutherland and Mrs Catherine Bremner or Musgrave, with interest, together with the extract decree, and the execution of arrestment dated 26th January 1899 following thereon used by Mrs Bremner's trustees in the hands of the said Andrew Bremner as trustee of Mrs Mackay to the extent of £250, and the said defenders' claim or right to the funds or goods or others arrested thereby; and (2) for decree ordaining the defenders as trustees and executors foresaid and also as individuals, conjunctly and severally or severally, or otherwise equally or in *pro rata* shares, to make payment to the pursuer of £256, 6s. 1d., being the consideration in respect of which the above assignation was granted to him, together with interest thereon from 26th September 1899.

The pursuer averred (Cond. 2) that in 1898 Mrs Bremner's trustees obtained a decree for expenses, amounting to £244 odds, against Mrs Sutherland and Mrs Musgrave, who were daughters of Mrs Bremner and

sisters of the defender Andrew Bremner, and used arrestments proceeding on said decree in the hands of the trustee of Mrs Mackay; (Cond. 4) that in 1898 and 1899 Mrs Bremner's trustees were in the *bona fide* belief that Mrs Sutherland and Mrs Musgrave were beneficiaries on the trust estate of Mrs Mackay, and in consequence of that belief used the arrestments above mentioned; (Cond. 5) that in March 1899 Hector Sutherland, of Hector Sutherland & Green, who were agents in the trust estates of both Mrs Bremner and Mrs Mackay suggested to the pursuer that it would avoid unpleasant complications between Mrs Bremner's trustees and Mrs Sutherland and Mrs Musgrave as members of Mrs Bremner's family if the pursuer were to pay Mrs Bremner's trustees the amount contained in the decree and the expenses of charging, and take over the decree and the arrestment following thereon; and that the pursuer, although he was not at this time or throughout the subsequent negotiations aware of the terms of Mrs Mackay's settlement, intimated that he was willing to adopt this course provided he was certain to obtain repayment from the arrested funds.

He also averred (Cond. 6) that on 11th April 1899 Messrs Hector Sutherland & Green, on the instructions of Andrew Bremner in his trust capacities and as an individual, wrote to the pursuers as follows:— "*Wick, 11th April* 1899.

"Dear Sir,—1. As agents for the trustee on the trust estate of the late Mrs Marjory Wares or Mackay, we beg to inform you that on said estate being realised we think a sum of about £150, more or less, will fall to be paid to each of Mrs Alexander Sutherland, 5 Granville Terrace, Edinburgh, and Mrs Edgar Musgrave, 13 Queen's Road, Bradford, as their shares of said estate. 2. We agree, on your paying us the sum of £244, 7s. contained in a decree of the Court of Session held by the trustees of Mrs Marjory Mackay or Bremner against Mrs Sutherland and Mrs Musgrave, dated 14th July and 26th November 1898, together with £2, 7s., the expense of the extract thereof, and interest on said sum at the rate of 5 per centum per annum from 19th December 1898 until payment, and also £ as expenses incurred since said 19th December 1898, to have assigned to you the said decree with all diligence that has followed thereon. 3. We also agree to pay to Mrs Sutherland her said share on production of a discharge by her and her husband, and with the consent of your firm, as agents for Captain John Henderson, 5 Smith's Place, Leith, when the estate of the said Mrs Marjory Wares or Mackay has been realised and is ready for division, it being of course understood that there be no legal cause then supervening preventing the said trustee of Mrs Mackay from doing so. 4. We further agree, on your producing to us a decree of furthcoming under the arrestment of Mrs Musgrave's said share, used at the instance of Mrs Bremner's trustees in the hands of Mrs Mackay's trustee, to pay you the sum decerned for in said decree. . . . 6. On settlement as above our clients, the trustees of the late Mrs Bremner, will have no claims in any manner of way against Mrs Sutherland or Mrs Musgrave.—Yours faithfully,

"HECTOR SUTHERLAND & GREEN."

The pursuer also averred (Cond. 7) that on the faith of the representations contained in this letter the pursuer agreed to take an assignation of the decree and diligence and to pay Mrs Bremner's trustees the full amount of the debt due to them by Mrs Sutherland and Mrs Musgrave; that accordingly, on 26th September 1899, he paid Mrs Bremner's trustees £256, 6s. 1d., and received from them the assignation now sought to be reduced; (Cond. 9) that from an opinion of counsel obtained in 1901 by the purchaser of the heritage of Mrs Mackay's trust estate the parties became aware that Andrew Bremner, as Mrs Bremner's heir in heritage, was entitled to the whole of the proceeds of the heritage belonging to Mrs Mackay's estate, and that the pursuer was advised that this was so, and that Mrs Sutherland and Mrs Musgrave were not and had never been beneficiaries to any extent on Mrs Mackay's trust, and that nothing was attached by the arrestments assigned to him.

The pursuer further averred as follows:—"(Cond. 10) The pursuer and the defenders Mrs Bremner's trustees, and the defender Andrew Bremner as Mrs Mackay's trustee and as an individual, all entered into said assignation under the mutual essential error that the said Mrs Sutherland and Mrs Musgrave were beneficiaries to the extent of £150 each or thereby upon Mrs Mackay's trust estate, and that the defenders Mrs Bremner's trustees were in a position to convey, and did in point of fact convey, said beneficial rights to the pursuer by virtue of the arrestments assigned. Further, the pursuer entered into said assignation under essential error to the effect foresaid induced by the representations contained in the said letter dated 11th April 1899 by Messrs Hector Sutherland & Green, written by them as agents for the defenders Mrs Bremner's trustees, and for the defender Andrew Bremner as Mrs Mackay's trustee and as an individual, which representations now prove to be false and unfounded. In the defences the defender Andrew Bremner for the first time repudiates the position that when the assignation was arranged for in 1899, and down to the time when it was executed in 1901, he was in the *bona fide* belief that Mrs Alexander Sutherland and Mrs Musgrave were entitled to £150 each or thereby from Mrs Mackay's trust. On the assumption that his repudiation is well founded the representations in the said letter of 11th April 1899 were not only false and unfounded but were made by the said defender fraudulently for the purpose of inducing the pursuer to enter into the said assignation. In these circumstances the pursuer has called upon the defenders Mr Bremner's trustees to repay him the said sum of £256, 6s. 1d., with interest thereon since the date of payment on 26th Septem-

ber 1899, but they decline or delay to do so, and the present action has been rendered necessary."

In the assignation, of which reduction was sought, warrandice was granted by the granters "as trustees and executors aforesaid from all facts and deeds done or to be done by us."

The pursuer pleaded—"(1) The pursuer is entitled to decree of reduction as concluded for because the pretended assignation sought to be reduced was entered into under mutual essential error on the part both of the pursuer and of the defenders Mrs Bremner's trustees. (2) The pursuer is entitled to decree of reduction as concluded for—(1st) Because the said pretended assignation was entered into by him under essential error; (2nd) because in entering into said assignation he was under essential error induced by the defender Andrew Bremner, and by Messrs Hector Sutherland & Green acting as agents for said defender, both as an individual and in the various trust capacities condescended on; and (3rd) because said essential error was induced by false and unfounded representations made by or on behalf of the said defender; and (4th) *Separatim*, because said essential error was induced by false and fraudulent representations made by or on behalf of the said defender."

The defenders pleaded, *inter alia*—"(1) The action as laid is incompetent. (2) The averments of pursuer being irrelevant and insufficient to support the conclusions of the summons, the defenders are entitled to absolvitor with expenses."

On 29th October 1902 the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor:—"Repels the first plea-in-law for the defenders, and under reservation of the pleas of parties allows both parties a proof of their respective averments on record and to the pursuer a conjunct probation."

Note.—"This is an action of reduction of an assignation dated 31st January and 4th February 1901 granted by the trustees of the deceased Mrs Bremner, one of whom is her son Andrew Bremner, in favour of the pursuer, and for repayment to the pursuer of the sums paid by him in consideration of the assignation.

"The assignation bears to assign the sum in a decree for expenses in favour of Mrs Bremner's trustees against Mrs Musgrave and Mrs Sutherland, daughters of Mrs Bremner, pronounced in a litigation between them, together with the decree and executions and the claim of Mrs Bremner's trustees to the funds attached by them by arrestments used in the hands of Andrew Bremner as trustee of Mrs Mackay (Mrs Bremner's mother) of the funds due by him as such trustee to Mrs Musgrave and Mrs Sutherland. It is averred that the pursuer in consideration of the assignation paid the sum in the decree to Mrs Bremner's trustees.

"The assignation is peculiarly expressed, but I think it clear enough that the arrestments were assigned only to enable the pursuer to repay himself.

"The reason why the pursuer desires to reduce this assignation in his own favour is that he avers that nothing was due by Mrs Mackay's trustee to either Mrs Musgrave or Mrs Sutherland, and therefore that the arrestments used by Mrs Bremner's trustees attached nothing, and that the assignation by Mrs Bremner's trustees of their claim on the funds said to be arrested carried nothing. This is clearly enough averred (if there be anything clear in this confused case) and on what I think very plausible grounds, and I assume it to be true for the purposes of this judgment.

"I cannot, however, find any averment that the pursuer ever asked payment of the sum in the decree from Mrs Musgrave or Mrs Sutherland, or that he is unable to recover payment from them.

"The ground of reduction is error in regard to this arrestment. No question is raised about the decree nor about the validity of the arrestment, but only about its value, which it is said plausibly (probably truly) is nothing.

"The pursuer maintains that this error was essential, and pleads (1) that it was a mutual error, or (2) an error of the pursuer induced by the misrepresentations (not fraudulent) of the defenders, or (3) (inconsistently, or at least alternatively) induced by the fraudulent misrepresentations of the granters, Bremner's trustees.

"The pursuer has moved for a proof. The defenders plead that the action is incompetent, and that the averments are irrelevant.

"The record is very verbose, difficult to read, and extremely obscure.

"It is averred that Mrs Bremner's trustees, in using arrestments in the hands of Andrew Bremner as Mrs Mackay's trustee, did so in the belief that under Mrs Mackay's trust-deed certain sums of money were payable to Mrs Musgrave and Mrs Sutherland. This averment is supported by a very confused letter dated 11th April 1899, written to the pursuer by the agents of Andrew Bremner as Mrs Mackay's trustee and of Mrs Bremner's trustees, intimating that they (law-agents on Mrs Mackay's trust) thought that £150, more or less, would be payable out of Mrs Mackay's estate to each of Mrs Musgrave and Mrs Sutherland, and there is no reason to doubt that such was the belief of Mrs Bremner's trustees at that time; and it is averred that the pursuer, believing this statement made by the agents on Mrs Mackay's estate, was of the same opinion. It is now averred (as I have said, on plausible grounds which I need not here discuss) that this was a total mistake, that no such sums were payable, and that the arrestments were worthless. I see no reason to doubt that there is a relevant averment of mutual error on this point when the assignation was granted and the sum in the decree paid by the pursuer.

"The first question is—Was it an essential error? It was not an error regarding the whole subject assigned or the principal subject assigned, which was the decree and the sum in the decree, but a secondary and

accessory subject, namely, the arrestment. But it might be essential error notwithstanding. One of the clearest definitions of essential error to be found in our books is that by Lord Watson in *Menzies* v. *Menzies*, March 10, 1890, 17 R. (H.L.) 25, 29. His Lordship says, 'Error becomes essential whenever it can be shown that but for it one of the parties would have declined to contract.' I find no averment on record in terms of this *dictum*. But perhaps it might be reading the record too strictly to hold that such an averment should not be implied from what is said in Condescendence 5; and I would not be disposed to hold the record utterly irrelevant on that ground. It is too common in framing records to leave the essential points to be reached by inference.

"On the subject of mutual error there are not many cases in our reports. The pursuer referred to *Hamilton* v. *The Western Bank*, June 12, 1861, 23 D. 1033, which is authority for him, so far as it goes, both on the point of mutuality and essentiality. He further referred to Pollock on Contracts, p. 488, and to the following cases—*Couturier* v. *Hastie*, 1856, 5 H.L. 673; *Emerson*, 1866, 1 Ch. 433; *Strickland*, 1852, 7 Exch. 208; *Cochrane* v. *Willis*, L.R. 1 Ch. 58; *Cooper* v. *Phibbs*, 1867, L.R. 2 H.L. 149. But I doubt the application of these cases. They related to errors which regarded the whole subject of the contract, and consisted in believing that there was an existing subject of contract when in fact there was none; as for example when it related to an annuity when, unknown to either contracting party, the annuitant was dead at the date of the contract. These cases might have applied had nothing but the arrestments been assigned. But as it is there seems to be difficulty in applying them.

"But it seems unnecessary to decide this point at present, because the pursuer has an alternative case of essential error induced by the misrepresentations of the defenders, as to which he relies on *Stewart* v. *Kennedy*, 1890, 17 R. (H.L.) 25.

"Further, the pursuer avers essential error induced by the fraud of the defenders or those acting for them. This ground of action seems wholly inconsistent with the averments of mutual error; but the case on this point is very special, and I am disposed to think that this is a case in which it may be possible to put forward these alternative views.

"The misrepresentations said to have been made by or on behalf of the defenders are said to be contained in the letter of 11th April, and it is said that if Bremner's trustees believed the statements in that letter then there was misrepresentation without fraud, but if they did not believe them the averments were fraudulent.

"On the whole, I am disposed to think that the pursuer has stated a case which, confused as it is, is not utterly irrelevant.

"The defenders maintained in argument two separate grounds of defence in answer to the pursuer's case. The one was that the assignation is only a part of or incident in a complex contract expressed in the letter of 11th April, and that it is really a partial reduction of the contract. I doubt, however, whether this letter can be called a contract at all, and when it is considered that the pursuer's case rests on the averment that the arrestments attached nothing, I am disposed to think that in any view this assignation of the decree is separable from the other paragraphs in the letter, and to reject this defence at this stage as not sufficiently substantial.

"Again, it was argued that the defenders should be assoilzied because the pursuer does not offer restitution *in integrum*. But it seems to me that there is nothing to which this plea can apply, at least that I cannot affirm that there is without inquiry. It is said that their position will be different because the arrestments will be prescribed. But if they attach nothing, which seems to be a condition of the pursuer's success, it matters nothing whether they are prescribed or not.

"On the whole, I am not prepared to throw out this action on these special grounds, particularly as they are, in my opinion, not covered by the defenders' pleas. I hesitate certainly to send such a confused record to proof; but I think the pursuer has stated a case which he is entitled to try.

"I am of opinion that the first plea should be repelled, and a proof should be allowed to both parties under reservation of all the other pleas."

The defenders reclaimed, and argued—This was not a case of mutual essential error. The pursuer had received the decree and arrestment which he had contracted for. There was further no error as to the nature of the contract. There was no doubt an opinion expressed in the letter that the subject of arrestment was worth so much. But an opinion did not constitute a guarantee. A mere representation of opinion was not a representation of fact. No expression of opinion would ever found a case for reduction. The case of *Hamilton* v. *The Western Bank*, *supra*, was clearly distinguished from the present, as in that case there was no *consensus in idem* as to the subject sold. The case of *Cooper* v. *Phibbs*, *supra*, and the other English cases quoted by the Lord Ordinary in his note, were also quite distinct, as they all related to errors with regard to the subject of the contract. There were further no facts stated on record to support the plea of misrepresentation. The law of Scotland on the subject of essential error and misrepresentation had been accurately summed up by Lord Kyllachy in his opinion in *Woods* v. *Tulloch*, March 7, 1893, 20 R. 479, 30 S.L.R. 497. Further, there was no statement on record that the pursuer had tried to put the decree in force. The arrestments were merely ancillary to the decree. Until the pursuer put the decree in force it was premature for him to come against the defenders.

Argued for the pursuer and respondent—The case was relevant. There was here mutual essential error as regards what

Lord Watson called "The quality of the thing engaged for"—*Stewart* v. *Kennedy*, March 10, 1890, 17 R. (H.L.) 28, 27 S.L.R. 469, 471. The only thing on which the pursuer relied in order to get back his money was that the arrestments had attached about £300 of Mrs Mackay's estate. That was the only consideration he received for his money, and the arrestments were placed in his hands in order that he might get this share. It now turned out that so far as concerned the arrested fund the subject purported to be assigned was non-existent. The case therefore fell within the scope of the decisions of *Hamilton* v. *The Western Bank*, *supra*, and *Cooper* v. *Phibbs*, *supra*. If there was not mutual error there was here at least essential error on the part of the pursuer induced by misrepresentation on the part of the defenders. The pursuer's error was induced by the statements made on behalf of the defenders. The defenders stated as a fact that a share of Mrs Mackay's estate fell to be paid to the two ladies. They stated as their opinion that that share amounted to a certain sum. It turned out that there was no such share in existence. There was thus misrepresentation *in essentialibus* by the defenders. It would not do for the defenders to say, "You have got the decree and arrestment." The decree and the arrestment were the subject of the contract only in so far as they attached the shares of Mrs Mackay's estate mentioned in the letter—*Adam* v. *Newbigging*, 1888, 13 A.C. 308.

At advising—

Lord Justice-Clerk—The pursuer in this case desires to have an assignation in his favour reduced. It is not a case in which the party seeking to set aside the deed can allege that either as regards the character of the transaction or the subject-matter of it he was in any way misled. The facts are that he advanced a sum of money on receiving an assignation to two sums of £150 each, which it was expected would become payable to two ladies—Mrs Musgrave and Mrs Sutherland. It is the case that all parties connected with the transaction believed that these ladies had right to about £150 each out of the estate of a Mrs Mackay. It is, I think, unnecessary to go into the matter in detail, as the representation on which the pursuer acted is contained in a letter written by the agents on Mrs Mackay's estate, and is as follows:—"As agents for the trustees on the trust-estate of the late Mrs Marjory Wares or Mackay we think a sum of about £150, more or less, will fall to be paid to each of Mrs Alexander Sutherland . . . and Mrs Edgar Musgrave as their shares of said estate." And they accordingly agreed in the letter that upon the pursuer paying a sum of £244, 7s., being the sum contained in an extract decree against these two ladies, with £2 of expenses of extract, and interest, and a further sum of expenses, to assign the decree against them to him.

It is unnecessary to go into the other parts of the letter, which are subsidiary to the general matter above referred to.

Following that letter the assignation in question was granted, in which the pursuer received no guarantee, the only clause of warrandice being from fact and deed only.

Now, as I read this letter it was an expression of belief only, and in no way imported a guarantee. It might be possible to extract another meaning from it, but that is I think the natural meaning. In any case it was only an expression of opinion and not an assurance. If it were doubtful, or if the pursuer desired to make sure what his rights would be, he could have inquired into the matter for himself—could, if he chose, have asked to see the deed founded on, and could have formed his own judgment or taken further legal advice in regard to it. If he did not choose to do so *sibi imputet*. I am unable to see that he has set forth any relevant ground upon which he can ask that the assignation can be set aside on the plea of error or on misrepresentation said to be made in the letter.

But the pursuer further endeavours to make a case of fraudulent misrepresentation against Andrew Bremner as Mrs Mackay's trustee. In my opinion he has not set forth any circumstances relevant to infer that fraud was committed. It appears quite clear from his own statement that all parties were under the belief that the two ladies had right to the sums in question, and that it was only when a third party who was transacting as a purchaser of the heritage of Mrs Mackay's estate raised questions about title and counsel were consulted that the true state of parties' rights was ascertained.

I have upon the whole matter come to the conclusion that the pursuer has stated no relevant case, and that the action should be dismissed.

Lord Young—I do not think it necessary to say more than that in my opinion the action is quite irrelevant.

Lord Trayner—The pursuer seeks in this case a decree reducing an assignation granted by the defenders in his favour, or otherwise for decree ordaining the defenders to pay him a certain sum of money, being the consideration in respect of which the assignation was granted. The case presents the somewhat novel feature of a pursuer seeking to set aside a writ which confers on him a right, without any averment on his part that the reduction is necessary to enable him to vindicate some other or higher right in the vindication of which the existing deed is an obstacle. The reductive conclusions of the summons do not appear to me to be necessary to the petitory conclusion, for the latter might have been insisted on, on a relevant statement, without any reduction at all. In the view which I take of the case, however, it is not necessary to pronounce any opinion upon the defenders' plea of incompetency. I have come to the conclusion that the pursuer has not set forth a relevant case against the defenders, and that therefore it ought to be dismissed. I take the case as if the pursuer sought to reduce the trans-

action under which the assignation was granted, he being willing to grant the defenders a retrocession. The grounds of reduction are (1) mutual error, and (2) misrepresentation by the defenders. With regard to the first ground, we were referred to Professor Bell's enumeration of the cases in which mutual error may infer reduction. They are stated by Mr Bell as being five in number, but the whole of them may be included in two. These two are mutual error in regard to the (1) character of the contract sought to be reduced, or (2) the subject of the contract. If one party thinks he is entering into a contract of lease and the other thinks he is entering into a contract of sale there is mutual error in regard to the character of the contract, and in such circumstances there is no contract binding upon either. Again, if one party thinks he is buying corn and the other thinks he is selling wheat they are not agreed as to the subject of the contract and again there is no contract binding either. In the present case the parties were quite at one with regard to both character and subject of their bargain. Its character was a sale and transfer for an agreed on consideration of a certain decree and diligence thereon. The particular decree and diligence in question were duly transferred. As regards both character and subject of the contract there was no difference between the parties, and therefore nothing of the kind of mutual error which can be founded on as a ground for setting the contract aside. The second ground of reduction—misrepresentation by the defenders—appears to me to be also without foundation. The pursuer avers that the misrepresentation on which he relies is set forth in the letter printed in cond. 6. That letter, so far as material, states that the writers of it (who were acting for the defenders) "think" a sum of £150 would fall to be paid to each of Mrs Sutherland and Mrs Musgrave on the realisation of certain trust property. Mrs Sutherland and Mrs Musgrave were the debtors in the decree assigned, and the pursuer's case is that he was induced to pay some £246 or thereabouts for the assignation in question on a representation that the debtors in the decree were beneficiaries under a certain trust to the extent of about £300, whereas it has turned out that these ladies are entitled to nothing at all under that trust, or at all events much less than £300. Now, the letter above referred to contains no representation that Mrs Sutherland and Mrs Musgrave were entitled to £300 under the trust deed. The writers of the letter certainly believed this (as did all concerned) until it was ascertained in the course of the realisation of the trust property, by the opinion of counsel, that on a just construction of the trust deed Mrs Sutherland's and Mrs Musgrave's rights under it were considerably less than had been supposed. But the writers of the letter made no representation that Mrs Sutherland and Mrs Musgrave were as matter of fact entitled to anything. They represented merely what was their opinion, and that opinion was honestly entertained by them. Besides, the pursuer was as able to form an opinion as to the rights of the persons he was taking to be his debtors under the trust deed as the defenders were. He could have seen the trust deed and the trust accounts and formed his own judgment, and a prudent man would have done so. The pursuer, I daresay, was less careful in this transaction when acting on his own account than he would have been if acting for a client, and he was desirous by taking over the debt and decree to save his brother's wife from appearing in the list of bankrupts. Without going into further detail it appears to me that the case comes to this: The pursuer made a bad bargain, but he was not induced to make it either by misrepresentation or undue concealment on the part of the defenders. I think the pursuer must now abide by his bargain. In my opinion he has failed to set forth any relevant ground for reduction as concluded for, and equally no relevant ground on which he can claim repayment of the consideration money paid for the assignation. I am therefore for recalling the interlocutor of the Lord Ordinary, sustaining the second plea for the defenders and dismissing the action.

LORD MONCREIFF—I may say at the outset that I doubt whether in any view the pursuer's averments are relevant. In April 1899 the pursuer, from entirely creditable motives, entered into a complicated family transaction which involved various questions and payments of money on both sides. He now desires to have that transaction set aside in part, to the effect of enabling him to recover money which he has paid under it, and to leave the rest of the transaction standing. He does not propose to restore the defenders *in integrum* against all that they did in implement of the transaction.

But apart from this preliminary objection I am of opinion that no relevant grounds are stated. The grounds relied on are mutual essential error, and alternatively that the error on the pursuer's part was induced by misrepresentation on the part of the defenders or those for whom they are responsible.

Pure cases of mutual or common error in essentials are rare. The only cases in which the plea is sustained are those in which the error goes to the root of and destroys the contract—such as mistake as to the identity of the subject sold—*Hamilton* v. *Western Bank*, 23 D. 1033; or as to the seller's or lessee's title to and property in the subject sold or leased—*Cooper* v. *Phibbs*, 2 L.R, H.L. (E. & I.), 149.

But here there was no such error. The pursuer got the assignation to the decree and diligence which he bargained for. He took the risk of the validity and efficacy of the arrestments. It lay with him to satisfy himself of that, and he had as good means of doing so as the defenders. But he chose to assume that Mrs Musgrave and Mrs Sutherland had certain rights under Mrs

Mackay's will, and all he wished to know was the probable amount. There was on that assumption no misrepresentation. The defenders stated truthfully what they expected the amount would be on that footing. At most, even if the defenders are held to have represented that Mrs Musgrave and Mrs Sutherland were legally entitled to the shares in question, that was no more than an expression of opinion, of the soundness of which the pursuer had as good means of judging.

Lastly, the transaction was acted on, and after two years the pursuer asks to have it set aside because he now finds out what he should have discovered sooner, namely, that the arrestments attached nothing.

On the whole matter I agree that the action should be dismissed as irrelevant.

The Court recalled the interlocutor reclaimed against, and dismissed the action.

Counsel for the Pursuer and Respondent —Jameson, K.C. — M'Lennan. Agent — S. F. Sutherland, S.S.C.

Counsel for the Defenders and Reclaimers —Campbell, K.C.—Laing. Agents—Laing & Harley, W.S.

Wednesday, January 28.

SECOND DIVISION.

COATS' TRUSTEES *v.* COATS.

Succession—Vesting—Direction to Divide on Death of Widow—Annuity to Widow made a First Charge on Estate—Vesting of Estate in Excess of Sum Required to Secure Annuity—Ineffectual Postponement of Payment.

A testator by his will directed his trustees to pay an annuity to his widow, and directed that the balance of the income of his estate should be divided equally among his children, and that on the death of his widow his estate should be equally divided among them. The testator's moveable estate was valued at £469,900, and a sum not exceeding £150,000 was sufficient to secure the widow's annuity. *Held* that the right to the capital of the trust estate vested in the children *a morte testatoris;* that the postponement of payment of the capital, except in so far as necessary to secure the widow's annuity, was ineffectual, and that the trustees, subject to that exception, were bound now to distribute the capital among the children.

Miller's Trustees v. *Miller*, December 19, 1890, 18 R. 301, 28 S.L.R. 236, and *Yuill's Trustees* v. *Thomson*, May 29, 1902, 4 F. 815, 39 S.L.R. 668, *applied.*

Succession — Trust — Option of Buying Heritable Estate at the Death of a Liferentrix — Option of Buying Heritable Estate not Subject to Liferent—Period at which Options Exercisable.

A testator by his trust-disposition and settlement provided, 6th, that his estate of S should be liferented by his widow, and 7th, "at the death of my wife" that his children in order should have the option of buying S "as it then stands" at a specified price, and failing his children that it should be sold and the price added to his general estate; and 9th, that the estate of L should be offered to his children in turn, also at a specified price, and failing his children he made the same provision as in the case of S. *Held* (1) that the option of buying S could not be exercised immediately, but was limited to the testator's children alive at his widow's death; and (2) that the words "at the death of my wife," with which the seventh purpose opened, did not govern the ninth purpose, and that accordingly the option of buying L fell to be exercised immediately.

George Coats, of Staneley, Paisley, died on 9th October 1901, survived by his widow and by two sons, both major, Peter Herbert Coats and Ernest Symington Coats, and two daughters, one married and the other a minor.

Mr Coats died possessed of (1) the estate of Staneley, Paisley; (2) a field adjoining the Staneley estate, purchased by the truster in 1896 from Mr John A. Brown, starch manufacturer, Paisley; (3) the estate of Lounsdale, Paisley; (4) one-half *pro indiviso* of a dwelling-douse at Innellan, called Lilybank; and (5) moveable estate of the net value of £469,900.

On 16th September 1901 Mr Coats, who was ill for some months before his death, executed a trust-disposition and settlement whereby, having in the first place given directions for securing a marriage-contract provision of an annuity of £300 to his wife, he directed his trustees as follows:—"(*Second*) Besides the above, my trustees are to pay my wife four thousand pounds a-year as long as she lives, and this is to be a first charge on the balance of my estate. (*Third*) The balance of the income of my estate to be divided equally among my children. (*Fourth*) On the death of my wife my estate to be equally divided among my four children. (*Fifth*) In the event of the death of any of my children (being married) without leaving any family, the widow or widower to be liferented in their portion. (*Sixth*) My wife to be liferented in my house Staneley, and also in Lilybank, Innellan, in so far as it belongs to me. (*Seventh*) At the death of my wife my son Peter Herbert, or failing him my son Ernest Symington, to have the option of buying Staneley as it then stands, including silver-plate and everything else, for the sum of fifteen thousand pounds, and my share of Lilybank, Innellan, for the sum of fifteen hundred pounds; failing them my daughters to have the same option; and failing them the properties to be sold and the money put into my general estate; my brother Peter, of course, to have first option of buying Lilybank. (*Eighth*) The field last bought from John A. Brown between Staneley and Lounsdale to form part of Staneley, and to be