jurisdiction, I am of opinion we should exercise it. The other question involves opening up the executry accounts. Now, the executry estate is in England, and to some extent subject to the Court of Chancery. Mr Martin's demand—a very reasonable one, as it seems to me—is to a limited effect only, viz., that he shall be enabled to see the accounts and vouchers which are in the executor's hands, in order to secure, as judicial factor under the marriage-contract trust, that the arrangement made with Mr Stopford Blair is properly carried out. This demand infers production of the executry accounts. Now, as Lord Deas has observed, the executry estate is mainly in England, and is administered there, and the convenient and proper Court for this purpose is the Court of Chancery. Mr Martin's request is a strictly limited one, and I hope the executors will not find it necessary to require judicial proceedings even in England, but will reconsider the matter. It is one which would be much better settled by arrangement than by litigation, but if there must be litigation in reference to the accounts it should be the Court of Chancery. On these grounds I agree with the judgment proposed by your Lordships.

The Court repelled the defenders' second plea, and the first also as regarded the Penninghame rents, and *quoad ultra* sustained it and remitted to the Lord Ordinary.

Counsel for Pursuer (Respondent)—Kinnear—Low. Agents—Carment, Wedderburn, & Watson, W.S.

Counsel for Defenders (Reclaimers)—Mackintosh—Murray. Agents—Tods, Murray, & Jamieson, W.S.

Friday, December 5.

FIRST DIVISION.

[Lord Young, Ordinary.

GRAY *v.* BINNY (GRAY'S TRUSTEE).

(*Ante*, May 24, 1878, vol. xv. p. 571, 5 R. 820.)

Entail — Disentail — Reduction — "Undue Influence" as a Ground of Reduction.

Where a son who had given his consent to a disentail on considerations admittedly far below the true value of his interest, pleaded as grounds for reducing the proceedings that he had been "unduly influenced" by his mother and the family solicitor, the former of whom had benefitted largely by the transaction, while he had had no independent legal advice—*held* that in the circumstances he was entitled to reduction as craved.

Opinion (*per* Lord President) that the pursuer in such a case might prove not only inadequacy of consideration and his own ignorance of the full circumstances of the case, but also some fraud or deceit on the part of the defender, the amount of such fraud or deceit necessary for reduction being to be measured by the nature of the relations subsisting between the parties in each case.

Opinion (*per* Lord Shand) that "undue influence" may be instructed as a sufficient ground of reduction without inferring "fraud" in the full sense, where the parties stand in a relation of mutual confidence, and one of them has a natural dominance or ascendancy over the other.

Observations (*per* Lords Deas and Shand) on the form of issue under which such a case might appropriately have been tried before a jury.

This case has been reported in a previous stage, of date May 24, 1878, vol. xv. p. 571, 5 R. 820. The action was at the instance of Charles William Gray, and was brought against the trustees under the trust-disposition and settlement of his mother Mrs Carsina Gray, heiress of the estate of Carse Gray, in Forfarshire, viz., Mr Graham Binny, W.S., and Mr James Webster, S.S.C. It concluded for reduction (1) of a deed of consent to the disentail of the estate of Carse Gray, granted by the trustees on 18th August 1875; and (2) of a trust-disposition and settlement by Mrs Gray, which, *inter alia*, conveyed the disentailed lands to her trustees. Mr Binny was now the sole surviving trustee.

The other circumstances of the case will be found in the previous report, vol. xv. p. 571. The Lord Ordinary then held that a plea stated by the defenders to the effect that the destination in the original entail had been evacuated by the trust-disposition fell to be given effect to, and to that extent the Lord Ordinary had assoilzied the defenders. The Court had affirmed that judgment, and the case was then remitted to the Lord Ordinary for further procedure and the disposal of the remaining pleas-in-law. These were, for the pursuer—"(1) The pursuer having been induced to execute the said deed of consent by fraudulent misrepresentations and concealment, and *separatim*, having executed it under essential error caused as aforesaid, the said deed and all that has followed thereon ought to be reduced. (2) The said deed ought to be reduced in respect that the transaction which it embodied was exorbitant and unconscionable, and *separatim*, it was a catching bargain with an expectant heir. (3) The said deed ought to be reduced in respect that it was impetrated and obtained by parental influence unduly used by the pursuer's mother for her own benefit and to the pursuer's lesion."

The defenders pleaded—"(2) The pursuer cannot insist in the action in respect that he has homologated the said deed of consent. (3) The action cannot be maintained in respect the arrangement, of which the deed of consent was a part, has been carried into effect, and matters cannot be restored to the position in which they were prior to the granting of the said deed. (3) The averments of the pursuer are not relevant to support the conclusions of the summons or any of them. (7) The averments of the pursuer being unfounded in fact, the defenders are entitled to absolvitor."

A proof was led, the general result of which, including the whole material facts of the case, are fully stated in the Lord Ordinary's judgment and in the opinion of the Lord President.

On 16th April 1879 the Lord Ordinary (YOUNG) pronounced an interlocutor repelling the defences, sustaining the reasons of reduction in so far as not already disposed of by previous interlocutors, and reducing, decerning, and declaring in terms of the conclusions of the summons.

The following judgment was annexed :—

"On 18th August 1875 the pursuer executed a deed of consent to the disentail of the estate of Carse, of which his mother was then in possession, he being the heir next in succession. He now asks reduction of that deed, and of the disentail that followed on it. The reasons of reduction are—1st, Misrepresentation and undue concealment; 2d, Abuse of the confidence which he reposed in his mother, and unconscionable advantage taken to his prejudice and her gain of the influence and dominion which she had over him.

"The material facts are these :—The pursuer was born 28th October 1851, and was the eldest son and heir of Mrs Gray, the heiress in possession of Carse, an estate worth about £4000 a-year net rental. His father died in 1861, and in 1865 his mother married Captain Hunter, her deceased husband's brother, by whom she had several children. In 1869 the pursuer, then eighteen years of age, entered the army, and having no regular allowance made to him by his mother between that time and 1875, contracted improvident debts to money-lenders to the amount of about £2000. It is alleged on record that 'all regular allowance was withheld from the pursuer by his mother and Captain Hunter, with the object and intention of involving him in pecuniary difficulties and getting him into their power, and forcing him to consent to a disentail.' I decline to attribute this or any other base motive, and only take notice of the fact that the pursuer had no such regular allowance as his parent might, from prudential as well as affectionate considerations, have been expected to afford to him, and observe that it to some extent palliates as well as accounts for his conduct in resorting to money-lenders. His transgressions in this way were not in a great scale, although sufficient to involve him in debts which he could not pay, and so to increase his dependence on his mother, and consequently her power over him.

"It seems to be the fact, although it is not specially accounted for, that Mrs Gray was unable to live within her income, and incurred considerable debt, including one of about £8000, to her solicitor Mr Binny. The fact is not, as far as I can see, accounted for to any extent by the extravagance of her eldest son, or any undue liberality to him, although it was frequently represented to him as a reason for compassionating the position of his mother and uncle and their family, and keeping to the resolution in which he had been brought up of consenting to a disentail when he was of age to do so. I refer to the correspondence and to the following passage in the pursuer's evidence:—'(Q) Before you went into the army had your mother spoken to you about agreeing to disentail the estate?—(A) Yes, it was a foregone conclusion that when I was of age to cut off the entail it was to be done. (Q) How had the conclusion been arrived at?—(A) It seemed to be a matter of course that I would help her to cut off the entail and make up her pecuniary position. That subject was not often talked about between us, but every now and then. Neither she nor anyone else explained to me what I would be entitled to for consenting. She spoke to me on the subject once or twice after I joined the army.' And again—'It had sometimes been talked about to sell parts of the estate, but the whole thing was very indefinite. I got a letter from Mr Binny, dated in August 1875, asking me to come to Edinburgh. So soon as I got leave I came, and arrived in Edinburgh on Monday 16th August late at night. After breakfast next morning I went down to Hart Street to Mr Binny's house, and met Mr Binny and my mother there. I cannot remember anything exactly that was said; but they talked about the disentailing and about my having to sign the disentail. It was a foregone conclusion that I should sign the disentail.'

"'*By the Court.*—(Q) Do you mean that you had agreed to it before?—(A) No; I had not exactly agreed. It was understood I should sign it; I had never made objection to signing it.

"'*Examination continued.*—(Q) Was it in consequence of what your mother said that you expressed your willingness to sign it?—(A) Yes.

"'*By the Court.*—It was because she wanted it; it was done to please her.'

"Prior to the Entail Act of 1875 the pursuer could not validly have consented to a disentail till he was twenty-five years of age. By that Act he was enabled, being in his twenty-fourth year, to consent at once, and certainly no time was lost in calling upon him to fulfil the 'foregone conclusion.' That his own legitimate interests in the matter were of considerable magnitude, and that it would be unreasonable to ask him to sacrifice them absolutely, unconditionally, and at the same time gratuitously, must, one would think, have occurred to Mrs Gray as well as her solicitor Mr Binny. That this occurred to Mr Binny appears from his letters, although I regret to say that I find no expressions in them signifying that he took a right view of his duty as a family solicitor advising a mother regarding a delicate transaction with her son. In his letter to his client of 20th July 1875 he says—'One point alone is to be thought of at present, and even that must be deferred for a fortnight, by which time we will know for certain whether the Bill passes the House of Lords. The point which will then arise for consideration is the price at which the Borderer will be asked to give his consent. He must be gently handled on the subject, for without his consent nothing can be done; and after I have obtained your views I am not sure but it would be the best course for me to send for him to come across for a day to discuss the matter with him outwith your presence.' Again, in his letter of 24th July he says—'The keeping of the Borderer (the pursuer) sweet, and up to what he promised, is all that in the meantime requires attention.' In the same spirit he writes on 5th August—'I suppose you have had no further correspondence with the Borderer on the subject? He wrote me once that he was quite willing to give his consent; but *then* he was without the power. It ought not to be different now; but still it may be, for his necessities may be greater than they were. It is a matter of the greatest moment to you, and one which will require some adroitness in the management. I wish I had an opportunity of explaining my views and receiving yours.' So, also, on 6th August he writes—'And I am so glad to hear that the Borderer continues sweet. I will write him an official letter, such as he can produce in his application for leave. The question is, when could you most conveniently take a run down? for I would like to arrange so as to see

you first. Parliament is expected to rise on the 13th, and very possibly the Act will not be dated sooner. The 16th is Monday—could you come then, or when after? so as to give time for my writing to Charles, whose address please give. I would ask him to come the day after. To have the consent in black and white is of great moment, as the disentailing process, of which that is only the first step, is a tedious affair rather, in which no progress whatever can be made until the consent is signed.' Lastly, on 9th August 1875 he writes to his client thus—'I am perfectly alive to the difficulty of the card you have to play in Charles' case; at the same time you must not forget how much you are at his mercy. Provision for payment of his debts (if at all within the mark) will be a point to be conceded. How much beyond (if anything), and in what shape, are the great questions for consideration at the proposed meeting. My expectation is that he will come to the meeting with high hopes. Of course I'll do my utmost to keep him down. It is vain for us to make any attempts at defining terms until we see how the wind blows. The *cardinal* point is to get the consent at the cheapest possible price, and it won't do to be *very* higgling about terms, for an actuary would probably annex a larger figure to the Borderer's expectations than he himself would think of. The terms of the consent being fixed, other arrangements must be comparatively easy, because they will then be entirely in your own hands. At present it is useless to speculate on the subject. If our meeting ends satisfactorily I will then cheerfully explain my views.'

"If Mr Binny wrote these letters to Mrs Gray as her solicitor, aiding her to act adversely to her son as to a stranger with whom she had business to transact, and without any reference to his interests, which he was left to protect for himself as he best might, I should not condemn them. But was that his position? Or was it the position which he intended the pursuer to understand, and believed that he did understand, that he occupied? I think very clearly not. It is, in my opinion, the result of the whole correspondence and of the whole evidence that the pursuer was invited to place confidence in his mother and in Mr Binny as persons attached to him and his proper interests, who knew the subject in hand much better than he did, and would require of him nothing which it was not right that he should do, and which it would not be unbecoming on his part to refuse. That the pursuer responded to this invitation I have no doubt, and that Mrs Gray and Mr Binny both knew that he reposed confidence in them accordingly I regard as proved, and proceed upon as a fact in the case. If both or either meant to decline the confidence, and to put the pursuer to protect his own interests, and that as against them acting adversely towards him, they were bound to inform him, and this neither of them did. I think they concurred in inviting and encouraging the pursuer's confidence, and succeeded in winning and maintaining it to the end. That they abused this confidence is another proposition, but that it was given to their knowledge and not repudiated by them I must hold to be established.

"The pursuer was called suddenly from Ireland, where he was stationed with his regiment, and arrived in Edinburgh on 16th August. He was certainly aware of the nature of the business, and knew that it was serious, although I think his knowledge was general and vague. It occurred to him that he ought to have independent legal advice, and he made the suggestion timidly to his mother. 'I said I thought, strictly speaking, I ought to have a legal adviser of my own, and my mother said that if I did not trust in her—and left the rest to be imagined. I imagined that it vexed her, and I did not press it. That was said going up Albany Street to meet Mr Binny. It was never suggested to me by anyone that I should have a separate agent or advice in connection with this matter.' This most reasonable thought of his was thus stifled by his mother's influence, and without further resistance he yielded to her and Mr Binny by gratuitously and unconditionally renouncing his birthright and inheritance. When he signed the deed, which was all ready for his signature, he said to Mr Binny—'I suppose this is all right.' He said, 'Of course it is; you are your mother's boy.' He thus, without any consideration or condition for the protection of his interest to any extent renounced his assured succession to an estate of £4000 a-year, which was of the present market value to him of £41,000. His mother and Mr Binny seem to have concurred in thinking that he ought to have something for this sacrifice which he had made 'without any stipulation,' and in anticipation of their success in inducing him to make it had framed the letter of 18th August, whereby his mother agreed—1st, to make him an allowance of £200 a-year; 2d, to repay a Miss Child and Mr Binny £594, 17s. 4d. which they had advanced to pay his debts; 3d, to pay him a further sum of £1500 to meet his unpaid debts; and 4th, to leave him a legacy of £4000. This letter was handed to the pursuer after he had executed the deed of consent. It bears to be quite gratuitous, and although it may therefore be doubtful whether it ought to be taken account of in estimating the character of the transaction, I am not indisposed to consider the case on the footing that for the considerations promised in it the pursuer was persuaded to consent to the disentail. Mr Jamieson says that the present value in 1875 of these considerations was £6277, 17s. 3½d. With respect to the allowance of £200 a-year, it will probably occur to most people that this was a moderate allowance to an eldest son in the army being heir to an estate of £4000 a year, irrespective of the purchase of his consent to a disentail, and with respect to the payment of his debts, extending over a period of seven years, during which he had no allowance, I am unable to think that £2094 was a great sum considering the terms on which he was obliged to borrow. The legacy of £4000 instead of an estate of that annual rental was a mockery, and except this the pursuer had indeed nothing beyond what any eldest son in the army and with his prospects might reasonably have expected even from a parsimonious parent without thought of purchasing a renunciation of his legal right of succession.

"I must therefore say that in my opinion the pursuer was hardly and unconscionably dealt with, and in a manner that would not have been proposed or thought of had his legitimate interests been protected by a sensible and honourable man of

business. It was proper and becoming that he should aid his mother so far as necessary to enable her to pay off Mr Binny and any other creditors that were pressing her, and also, I shall assume, to enable her to make a suitable provision for her children by Captain Hunter, of whose illegitimacy he was properly indisposed to take any advantage, but beyond this I think there was no just claim upon his filial piety. A disentail to such extent as might be necessary to effect these purposes by selling or borrowing, while the succession to the residue of the estate was secured to him, would have been a simple matter, and is, I think, what a man of business charged with the pursuer's interest would have recommended. I suggested for the consideration of the parties whether what was, I think unfortunately and improperly done might not by arrangement and consent be reformed so as to effect only what good sense and right feeling dictated, and which would probably or certainly have been done had an honourable and experienced man of business been charged with the pursuer's interests. The parties took a long time to consider the suggestion, but came in the result to the conclusion that the interests of minors being involved they could not act upon it.

"I have thus to consider the case as it stands, and my opinion is that the transaction ought not to be upheld.

"There is some evidence of misrepresentation. Thus the pursuer says that when he said to his mother on one occasion that perhaps he would not consent to cut off the entail, 'she said in that case she would burden the estate, so that it would not be of any good to me, and leave farms to each of my brothers and sisters.' But I attach little weight to this otherwise than as bearing on the fact, which I think clear, that the pursuer never exactly realised his position as having an indefeasible right of succession, or the magnitude of the sacrifice which he made by executing the deed of consent to disentail. I think it is proved that he did not; but I venture to say, that looking to the whole circumstances of the transaction it is sufficient that there is no reasonable ground of assurance that he did. The transaction is on the face of it so inequitable and unjust as to suggest unfair advantage taken of simplicity and ignorance. On the one side there was age and experience, assisted by a solicitor who had himself, as it happened, a personal interest to serve. On the other there was youth and inexperience and ignorance of business. On the one side there was the dominion of a mother's not illegitimate influence over her son and the confidence commanded by a family solicitor. On the other there was the son subject to the influence and reposing the confidence. It was so obviously the duty of Mrs Gray and her solicitor to see that the pursuer had the protection of independent legal advice in transacting business of such serious importance to him, that I find it impossible to account for their neglect of it if they meant to deal fairly by him. Instead of this, Mr Binny suggests that 'he must be gently handled on the subject'—that he must be 'kept sweet, and up to what he promised'—that the matter is one 'which will require some adroitness in the management'—that 'the cardinal point is to get the consent at the cheapest possible price, and it wont do to be very higgling about terms, for an actuary would probably annex a larger figure to the Borderer's expectations than he himself would think of.' These expressions show that Mr Binny at least had no thought, and did not imagine, that his client to whom he wrote so frankly had any thought of dealing fairly by the pursuer. The object of both was to win his confidence—to prevent him from resorting to any other for enlightenment and advice—and then to take an unfair and unconscionable advantage of him. This, in my judgment, is what they did, and I am accordingly of opinion that the pursuer is entitled to the relief which he asks.

"What I have said explains, I hope sufficiently, my view of the law applicable to the case. It belongs to a class of which our practice affords few examples, and which is much more extensively and variously illustrated by English decisions. I was favoured by counsel with a copious reference to Chancery cases and the *dicta* of Equity Judges, and also to, I believe, all the Scotch cases in this department of the law. Our own decisions were familiar to me, and I was not ignorant of the leading Chancery cases—cited in Tudor's Leading Cases under *Huguenin* v. *Baseley*, 2 Tudor's Leading Cases in Equity, 547.

"I have considered all the authorities to which I was referred, and the decision at which I have arrived is, I believe, according to the principle which pervades them, applied to the facts with which I have to deal. The principle is that where a relation subsists which imports influence, together with confidence reposed, on the one side, and subjection to the influence and the giving of the confidence on the other, the Court will examine into the circumstances of any 'transaction of bounty' (to use Sir S. Romilly's expression) between parties so related, whereby the stronger party (using the term for brevity) greatly benefits at the cost of the weaker, and will give relief if it appears to have been the result of influence abused or confidence betrayed. I do not represent this as a complete and exhaustive statement of the principle, which is very general and applicable to an infinite variety of cases, and only submit it as sufficient for the case I am now dealing with. That a person *sui juris* may be as liberal as he pleases and to whom he pleases is a truism, and assuredly no bounty is more natural or commendable than that of a son to his mother. The facts of particular cases are nevertheless to be considered, and when it appears that the bountiful party has not been fairly dealt by, relief may, at least in many cases, be given. What shall be accounted unfair dealing towards a party from whom a benefit is taken may be a question of more or less difficulty, and there are, no doubt, cases in which the Court will decline to interfere on any ground short of fraud of a character which would taint any ordinary transaction. It is here that the doctrine of the cases applicable to relations importing influence and confidence reposed on the one side, and subjection to that influence and the giving of that confidence on the other, is of practical importance. The doctrine limits a class of cases which the Court may investigate and decide by rules which, while importing no interference with liberty, are promotive of justice and public utility. That a party has obtained from a dependent what appears *prima facie* to be an undue advantage, is not, in general (subject to some exceptions), conclusive,

for the dependent, in the full knowledge of what he was doing, may have meant to give it him. In such a case a Court will only suspect some abuse of influence and confidence, and therefore investigate the circumstances of the transaction. One very general rule of the Court (I do not put it more strongly) is that in a transaction such as is generally accomplished with professional assistance, the party from whom any considerable benefit is taken by one standing to him in a relation of influence and confidence ought to have the protection of independent professional advice, and that there is a presumption (which it will be at least hard to overcome) of unfair dealing if he had not. The present case, in the view I take of it, is a peculiarly strong one for the application of this rule. There was not only professional advice and assistance on the one side and none on the other, but the case is, so far as I know, unique in this respect, that the family solicitor, in whose integrity and justice every member of it naturally confided, aided the mother to strip her son of his inheritance—conspiring with her beforehand to manage the son dexterously to that end, and carrying through the transaction on terms which must be pronounced unconscionable in the knowledge that the son was confiding in him as a friend who would not permit him to be wronged. I have already said that I find no ground for a reasonable assurance that the pursuer knew the absolute and indefeasible nature of the right he was renouncing, and my belief is that he did not. It is reasonably certain that he was not made aware of the whole state of the case, and in particular was not informed that there was any alternative between refusing to afford any reasonable and efficient aid to his mother and signing away his inheritance altogether. He was thus kept ignorant of the very first and most important fact which a man of business charged with his interest would have represented to him, and of the course certainly open to him, and the most obviously proper for him to adopt."

The defender reclaimed, and argued.—1. On the evidence the pursuer had acted of his own will, and the transaction must stand. He was not of an age to be "unduly influenced" at will, and admitting that the result was to his prejudice, he consented, not with a view to pecuniary advantage, but from filial affection. He knew that his rights were valuable, and that they were indefeasible, and further that Mr Binny was a family creditor, and so not merely an impartial friend. Even if he had had the fullest knowledge of his position and the advantage of independent legal advice, he would have acted as he did. No complaint of any kind was made by him till after his mother's death. 2. The pursuer's case in order to succeed must be brought up to one of fraud or circumvention, such as might have been tried before a jury under an issue of fraudulent misrepresentation or concealment, or of facility or circumvention. "Undue influences" or "dexterous management" had never been recognised, in Scotch law at least, as a ground of reduction. No case of "fraud" had here been made out, and the transaction therefore could not be reduced.

The pursuer (respondent) replied—1. On the evidence the scheme for disentail had originated in Mr Binny's desire to secure payment of his debt, and the pursuer had been purposely brought up by his mother and Mr Binny to the idea of disentailing. He had been induced to enter into the transaction without the advantage of independent advice and assistance, and without full and adequate knowledge of his position and circumstances. Undue influence had been brought to bear—he had not acted as a free agent, and this was enough to prevent the transaction from standing. 2. In law it was unnecessary to bring the facts up to a case of "fraud." Abuse of influence in any of the confidental relations of life (*e.g.*, parent and child, agent and client, priest and parishioner or penitent), where one of the parties had a natural ascendancy over the other, though subtler and less coarse than fraud, had been held to be equally a ground of reduction in many English and some Scotch cases. No fixed criterion or definite standard was necessary—the circumstances in each case afforded the measure for reduction. The transaction here having been manifestly to the pursuer's prejudice, the *onus* lay on the defender (reclaimer) to show that the pursuer had acted with full knowledge and perfect freedom, and that the bargain was not unconscionably exorbitant, and this they had failed to show.

Authorities cited—*Agent and Client—Hughenin* v. *Baseley*, 1807, 2 White and Tudor (Eq.) 547; *Gibson* v. *Jeyes*, 1801, 6 Ves. 266; *Harris* v. *Robertson*, Feb. 16, 1864, 2 Macph. 664; *Grieve* v. *Cunningham and Others*, Dec. 17, 1869, 8 Macph. 317; *Anstruther* v. *Wilkie*, Jan. 31, 1856, 18 D. 405; *M'Pherson's Trustees* v. *Watt*, Mar. 2, 1877, 4 R. 601—Dec. 3, 1877, 5 R. (H. of L.) 9. *Parent and Child—Grahame* v. *Ewen's Trustees*, Feb. 5, 1828, 6 S. 47—Nov. 17, 1830, 4 W. & S. 346; *Smith Cunninghame* v. *Anstruther's Trustees*, and *Mercer* v. *Anstruther's Trustees*, April 25, 1872, 10 Macph. (H. of L.) 39; *Tennent* v. *Tennent's Trustees*, May 27, 1868, 6 Macph. 840—Mar. 15, 1870, 8 Macph. (H. of L.) 10; *Archer* v. *Hudson*, 1844, 7 Beavan 551. *Family Settlement Cases—Stapilton* v. *Stapilton*, 1739, 2 White and Tudor (Eq.) 836; *Kempson* v. *Ashbee*, 1874, 10 L.R. (Chan.) 15; *Hoghton* v. *Hoghton*, 1852, 15 Beavan 278; *Turner* v. *Collins*, 1871, 7 L.R. (Chan.) 329; *Wardlaw* v. *Mackenzie*, June 10, 1859, 21 D. 940. *Priest and Penitent—Munro* v. *Strain*, Feb. 14, 1874, 1 R. 522. *Cases as to Form of Issue—Marianski* v. *Henderson*, June 17, 1841, 3 D. 1036; *Clunie* v. *Stirling*, Nov. 14, 1854, 17 D. 15; *Mann* v. *Smith*, Feb. 2, 1861, 23 D. 435.

At advising—

LORD PRESIDENT—I am of opinion with the Lord Ordinary that the pursuer is entitled to decree in terms of the conclusions of the summons as restricted, and I am prepared to adopt the reasons stated in support of that opinion in the very able judgment of his Lordship. I am therefore somewhat reluctant to enter upon a full and detailed exposition of the views which have led me to this conclusion. But the case is of such interest to the parties, and it involves principles at once so important and often so delicate in their application, that I shall endeavour to set out in a concise form the inferences in fact and law which appear to me to be fairly deducible from the evidence.

The late Mrs Gray succeeded as heiress of entail to the estate of Carse Gray in 1848, and two years afterwards she married her cousin Lieutenant

William Hunter. He died in 1861 leaving six children of the marriage, of whom the pursuer is the eldest, born in 1851, and so just 10 years of age at his father's death.

The rental of the estate at the term of Mrs Gray's succession was only a little over £2000 a year, but it was at least doubled at the date of the transaction brought into question in these proceedings.

In 1865 Mrs Gray formed a connection with the brother of her deceased husband, and went through a ceremony of marriage with him. There are four children the produce of their connection.

In 1875, when the disentail was carried through, Mrs Gray was 44 years of age, and apparently in robust health. She was a woman, judging from her evidence, and particularly from the correspondence, of acute intellect and a strong will, capable as a mother of entertaining and inspiring in her children keen feelings of affection, through which she exercised a considerable influence over them, and particularly over the pursuer.

She seems to have had very extravagant habits, for though the estate to which she succeeded in 1848 was unencumbered except to the extent of £5000 of family provisions, she had by the year 1875 contracted debt to the amount of about £29,000, and she was consequently for several years prior to that date in a state of great embarrassment, having borrowed money on the disadvantageous terms required in the case of a debtor who has no security to offer but a life interest in a landed estate.

Mr Graham Binny, the family solicitor, was at once the intimate friend and the law adviser of Mrs Gray, enjoying her full confidence, and much mixed up with her affairs, being himself her creditor in a debt of £8000 imperfectly secured.

The pursuer had no training or education to qualify him to understand or transact business. He entered the army in 1869, and beyond his pay he received no regular allowance. He says he got £60 from his mother the first year of his service, and £60 or £80 the second—"perhaps not so much, and never more except when debts were paid." In these circumstances it was not wonderful that he should fall into the hands of money-lenders, which he very soon did, with the knowledge of his mother and Mr Binny. "His transgressions in this way," as the Lord Ordinary observes, "were not on a great scale, although sufficient to involve him in debts which he could not pay."

With a mother and son so situated it was not unnatural that a disentail, total or partial, of the estate of Carse should be looked to as the readiest and perhaps the only available means of obtaining relief from their embarrassments; and Mrs Gray could hardly be blamed if she pressed this course on her son, provided the transaction were carried through under good advice, with full knowledge on both sides, and with a careful and impartial attention to the rights and interests of both mother and son.

It was only recently that the pursuer had come to have any personal need to resort to such a measure; but with Mrs Gray the case was very different. She had been long an embarrassed woman, and had been looking forward with eagerness to the time when her son would be of age to consent to a disentail. She had not only her heavy debt to provide for, but she had also four children the illegitimacy of whose birth prevented her from securing to them any provision out of the estate so long as it remained entailed. Accordingly it appears both from the correspondence and from the evidence of the pursuer that the notion of a disentail had been suggested to his mind by his mother at a very early age. He says—"It was a foregone conclusion that when I was of age to cut off the entail it was to be done." . . . . . "It seemed to her a matter of course that I would help her to cut off the entail and make up her pecuniary position."

In order to judge satisfactorily of the conduct of the parties in the negotiations which took place, and of the justice of the pursuer's complaint that he was over-reached and his interests sacrificed, it is desirable to ascertain precisely how the rights and interests of the mother and son stood prior to the disentail.

Without her son's consent and aid Mrs Gray could do absolutely nothing to relieve her embarrassments out of the entailed estate. At the same time it must be observed that to relieve her entirely from debts, and also to enable her to make a provision on her second family equal to what had been made on her first, it was not at all necessary to disentail her entire estate; for the estimated value of the estate after deducting the only debt secured on it was £125,000.

The pursuer, on the other hand, was the heir next entitled to succeed after his mother, and at her death the estate would have come to him almost unencumbered, and when it was once vested in him he would have the power, being an heir born after August 1, 1848, to convert it into a fee-simple estate in his own person by executing and recording an instrument of disentail under the provisions of the Entail Amendment Act 1848. No doubt he was under immediate pressure of debt to the extent of £2000, but if by economy and borrowing on his expectancy he could continue to maintain himself in the meantime, he would in the ordinary course of nature become fee-simple proprietor of the estate.

That Mrs Gray and her legal adviser Mr Binny entered on the negotiations with a full knowledge and understanding of the situation cannot admit of dispute. The parties are not agreed as to the amount of the pursuer's knowledge or ignorance, but the fair result of the evidence appears to me to be that the pursuer's knowledge, so far as it went, was of the most fragmentary and confused character, and that he certainly had no just appreciation of the nature and extent of his own rights and interests. No more convincing proof of this could be conceived than is to be found in the statements which Mr Binny says the pursuer made at the time the arrangement was completed —"He always expressed himself to the effect that it was all found money getting anything, as he had no chance of surviving his mother." "He again repeated that he was well satisfied, and even went the length of thanking me for assisting him to so good terms as he was pleased to call them."

If the pursuer had had the benefit of a legal adviser, which he most certainly ought to have had, and which as certainly he had not, he would not only have learned what were his prospects of becoming the fee-simple proprietor of Carse, and

the absence of any necessity to disentail the whole estate in order to release his mother, but he would have been informed further that the present value in 1875 of his reversionary interest was £41,000, and that he was not only legally, but on every principle of moral propriety and fair dealing, entitled to have that sum secured to him as the condition of his consenting to a total disentail. In the absence of this information and advice he gave away his whole prospects for provisions of the present value of £6277, 17s.

The pursuer has thus been stripped of his inheritance for a grossly inadequate consideration, and the other party to the transaction has to a corresponding extent been gratuitously benefited and enriched. The pursuer says now that if he had understood what his rights were he would not have thus thrown them away. The defender says that it is not proved that he would not have done the same thing even if he had been fully informed. I cannot accept this suggestion in the face of all natural presumptions and probabilities. But even to make such a suggestion involves an admission that the late Mrs Gray must have exercised over the mind of her son an influence of very unusual character and strength.

It is not enough, however, for the pursuer of such an action as this to prove that he has given away valuable rights for a grossly inadequate consideration, and that he has been betrayed into the transaction by his own ignorance of his rights, without proving deceit or unfair dealing on the part of those who take benefit by his loss. But in order to determine what kind and amount of deceit or unfair practices will be sufficient to entitle the injured party to redress, regard must always be had to the relation in which the transacting parties stand to one another. If they are strangers to each other, and dealing at arm's length, each is not only entitled to make the best bargain he can, but to assume that the other fully understands and is the best judge of his own interests. If, on the other hand, the relation of the parties is such as to beget mutual trust and confidence, each owes to the other a duty which has no place as between strangers. But if the trust and confidence instead of being mutual are all given on one side and not reciprocated, the party trusted and confided in is bound by the most obvious principles of fair dealing and honesty not to abuse the power thus put in his hands.

The facts as bearing on this part of the case are of a very striking and remarkable character.

It was not anticipated that the disentail though long looked forward to could be carried through till the pursuer attained the age of twenty-five in the year 1875. But an Act having been passed in the Session of Parliament of 1875 to enable an heir of entail to consent to disentail as soon as he attained the age of 21, Mrs Gray and her agent Mr Binny lost no time in calling on the pursuer to take that step for which his mind had been long prepared.

It is not necessary to examine the correspondence between Mrs Gray and Mr Binny minutely or in detail. It is sufficient to state its import. The object of both writers is plainly and expressly stated to be to obtain the consent of the pursuer at the lowest possible price without any regard to the real value of his rights. To accomplish the object for which they are thus working together they hold it to be indispensable that he should not consult an actuary, or anyone who could give him the advice which they knew he so greatly needed. For the purpose they arrange to invite and secure by all means his confidence in them, and to make everything smooth and pleasant to him.

In accordance with this preconcerted plan I think it is proved that they did invite his confidence, and induced him to rely upon them as his advisers in the matter, as being better informed than himself, and having such a regard for him and his interests that they would ask him to do nothing that he ought not to do.

The pursuer was thus entirely without advice or protection. Mrs Gray, on the other hand, was assisted by an able and experienced man of business, entirely devoted to her interests, although made to wear a different aspect in the eyes of the pursuer, partly from his position as the family solicitor, and partly by acting throughout in so ambiguous a way as to seem to be acting for both, when in truth he had regard only to the interests of one.

On one occasion when the pursuer hinted to his mother that he ought to have a legal adviser, the suggestion was met by such an answer, more implied than expressed, as to show that any insistence in such a proposal would produce a rupture between mother and son.

On another occasion when the pursuer stated the possible alternative of his not consenting to cut off the entail, Mrs Gray said in that case she would burden the estate, so that it would be of no good to the pursuer, and that she would leave farms to each of his brothers and sisters. This she well knew she could not do, and whether or not she induced the pursuer to believe that she could (which is doubtful on the evidence), the incident is at least another proof of the determined way in which she laboured and succeeded in repressing all independent action or thought on the part of her son in connection with the transaction of disentail.

That the pursuer was sincerely attached to his mother, and willing to make a sacrifice in order to relieve her from her pecuniary embarrassments, is very clear on the evidence, and I think it is also proved that she with the assistance of Mr Binny took advantage of this aimiable desire and purpose on his part, and of his ignorance of his rights and incapacity to judge of their nature and value, to lead him into a transaction quite unnecessary for the accomplishment of the object of paying Mrs Gray's debts, and in the last degree unjust and disastrous to the pursuer.

Lord Shand—From the time of becoming acquainted with the undisputed facts of this case I have entertained no doubt that the pursuer is entitled to have the transaction of which he complains set aside. If there be any difficulty in the case—and I do not say there is—it arises not on the question whether the pursuer is entitled to the remedy he asks, but with reference only to the particular ground in law on which his right to redress should be rested.

It is not disputed that on executing the deed of consent to the disentail of the estate of Carse Gray the pursuer parted with an interest of the value of about £41,000, receiving in return a con-

sideration of the value of about £6000—the difference of £37,000 being the gratuitous benefit or advantage which his mother Mrs Gray obtained by the transaction. The question raised is, whether this very large benefit was obtained in such circumstances as entitle Mrs Gray's representatives to retain it, which they can only do if the transaction between Mrs Gray and her son should be held valid?

The correspondence and other evidence in the case show that the pursuer and his mother lived on terms of affectionate intercourse. Mrs Gray had evidently a good knowledge of business, and was a lady of considerable strength of will. Her letters to her agent Mr Binny prove that she took an active, intelligent, and even independent part in the management of the estate of Carse Gray, and that she frequently acted on her own judgment, giving such weight only as she thought fit to her agent's suggestions with relation to her estate, and also as to the arrangements to be made in providing for the expenditure of her son while he was a lieutenant in the army. In support of this observation I may refer to two incidents among others that might be noticed, the one being the fact that she refrained, evidently with a purpose, from communicating to her son the draft of a proposed minute of agreement between herself and him sent to her by Mr Binny on 23d March 1874, which contained a proposal to disentail a part only of the entailed estate; and the other, that she prepared the draft of the letter of 24th June of the same year by her son to Mr Binny, in which in order to prevent her income being diminished he offered to become security for the debt due by her to Mr Binny, and which he copied over, as he states, merely "altering some words."

The pursuer, again, who was born in October 1851, and was therefore in his 24th year when in August 1875 he entered into the transaction complained of, had been always dependent on his mother for his maintenance, and having gone directly from school or from Sandhurst into the army he had received no business education or training of any kind. The only business transactions to which he had been a party previous to that now in question were with money-lenders, and his dealings with them for advances bearing interest at the rate of sixty per cent., in place of making an application through a respectable solicitor to obtain an advance on reasonable terms on the security of his expectant right as next heir-of-entail of Carse Gray, strongly support the other evidence in the case of his entire want of knowledge of business. That the pursuer was in a peculiar degree liable to the influence of his mother, and to some extent also of her agent Mr Binny, with whom he was on terms of friendship, is abundantly clear. His father died when he was about 10 years of age, and he had continued to live on the most affectionate terms with his mother till the time of her death, as his letters show. It is indeed a circumstance on which the defenders rely that this was so, for to his feeling of filial affection they attribute his act of conferring the great advantage he did on his mother by granting the deed now sought to be set aside. Having this feeling, and being in a position of dependence on his mother, it is also clear that he placed in her the utmost trust and confidence. Though he yielded to the temptation of advances offered at usurious rates, it was with regret for the pain he caused her, and in everything else he exhibited a constant anxiety to comply with any wish she might express.

In these circumstances, and looking to the influence which his mother had over him, it was obviously not a matter of any difficulty to obtain his signature to the deed of consent to the disentail of the estate. He explains that it had been spoken of for years before. From his boyhood it had been what he called "a foregone conclusion that when he was of age to cut off the entail it was to be done." On 9th August 1875, two days before the passing of the Act which made his consent before attaining the age of 25 effectual, Mr Binny with Mrs Gray's approval wrote to Ireland to ask him to obtain leave and come to Edinburgh with reference to some important alterations which had just been made on the law of entail, and "in the view of taking such joint action in the matter as may be deemed most advisable in the circumstances." Within ten days afterwards the deed was executed, the terms proposed having been stated to him on the 17th of August and then accepted, and the deed executed on the following day. There appears to be no material difference between the parties as to the general object which the pursuer had in view in coming to the meeting in Edinburgh, or as to the extent of his knowledge or information when he signed the deed of consent. His mother had contracted debts of considerable amount, partly in family expenditure and to a considerable extent on permanent improvements on the estate, on which not only interest but large sums by way of premiums on policies of insurance had to be paid annually, so that her income had become insufficient for her family expenditure. It was desirable to have these debts provided for, so as to save keeping up the insurances, and to give Mrs Gray a larger income from the estate. The pursuer, besides, being desirous to have an allowance of fixed amount on which he could rely, was also in some embarrassment owing to his transactions with the Jews, the amount of his debts being estimated at about £1500. He came to Edinburgh with the view and intention of providing for his mother's necessities, and in the hope of having some provision made for his own more limited wants; and after he came there, and before he executed the deed of consent, the only information that was apparently laid before him was that these objects would be gained by his consenting to the disentail of the estate—a proceeding the nature and effect of which was explained to him by Mr Binny.

The transaction was entered into "on terms" proposed to the pursuer by his mother, as Mr Binny explains, and not on the footing that he was giving up his rights as next heir gratuitously or without a consideration. These terms were arranged by Mrs Gray and Mr Binny before the pursuer arrived in Edinburgh, and embodied in a letter prepared by Mr Binny. The consideration given for the consent is represented in that letter to be a gratuitous concession by Mrs Gray, but it is impossible so to take it, for the terms were explained to the pursuer as an inducement to him to sign the deed; and there is no reason for saying that without some such consideration he would have entered into the transaction. The pursuer had no explanations or information given to him on any of

the following matters:—(1st) He was not informed that the general objects he had in view of relieving his mother and himself from present necessities could be obtained by his consenting to burden the estates with a fixed amount of debt, thus rendering the keeping up of insurance policies unnecessary, or by a disentail of part of the estate only, either in the view of selling that part, or it might be of retaining it, subject to burdens. Such explanations would have shown him that the objects he wished to serve could be attained consistently with his retaining his right of succession to the greater part of the estate—a fact of which in his ignorance of business I think he was not aware. (2d) He was not informed, and was not aware, of the large value of his interest in the property, and consequently of the pecuniary value of the consent he was about to grant; nor of the fact that having been born after 1848, in the event of his surviving his mother he could at once acquire the estate in fee-simple by himself executing an instrument of disentail. (3d) He appears to have had no very distinct idea of the precise nature of his right to the property, for in a conversation with his mother in the end of 1874 or beginning of 1875, when he spoke of perhaps not consenting to cut off the entail, she replied that in that case she would burden the estate, so that it would not be of any good to him, and leave farms to each of his brothers and sisters; and whether this was said seriously or not, he does not appear to have realised that such steps were beyond her power. At the meeting in Edinburgh he was not informed that his right to the estate as next heir of entail was indefeasible. In ignorance on these important matters, having had no one to give him independent advice, having full trust and confidence in his mother, and placing reliance on Mr Binny—as that gentleman candidly states he believed the pursuer from his long intercourse with him must have done—it was only what might have been expected that he at once yielded to the influence of his mother and Mr Binny, and acceded to their request that he should sign the deed of consent on the terms which they had proposed and offered him.

It appears to me to be very clear that a deed so prejudicial to the granter, and obtained in such circumstances, cannot when challenged be allowed to stand.

The defenders have maintained that the deed can only be set aside by a judgment which shall expressly affirm that it was obtained by fraud. They plead that there are two forms of issues, and two only, in the law of this country applicable to such a case, in both of which fraud must be established, the first being the ordinary issue of whether the deed was obtained through fraudulent representations or fraudulent concealment; and the second, whether the pursuer was weak and facile in his mind and easily imposed on, and whether the pursuer's mother, taking advantage of his weakness and facility, did by fraud or circumvention procure the deed to his lesion.

In coming to the conclusion that the pursuer is entitled to have the deed set aside I have not thought it necessary either to affirm the existence of fraud or to put the question for decision in either of the forms suggested; for I agree with what I understand to be the view of the Lord Ordinary, that the case belongs to a class in which a remedy will be given by the law on grounds which do not necessarily involve the conclusion that the party who obtained the deed was actuated by a corrupt motive or was guilty of deceit. The case is one in which confidence was invited and given, and parental influence unduly used by the pursuer's mother, with the assistance of her agent, in procuring a deed to her own great advantage, and to the corresponding disadvantage of her son; and a deed so obtained is, I think, liable to be set aside without affirming that it was procured through fraud. The letters from Mrs Gray to her son and to Mr Binny show that she regarded her son with much affection, and was anxiously solicitous about his welfare; and there are also letters from Mr Binny to the pursuer which satisfy me that he had a feeling of sincere friendship towards the pursuer and felt a warm interest in him. I am not satisfied that either Mrs Gray or Mr Binny realised at all to its full extent the value of the concession which the pursuer was making, for there had been no calculation made by an actuary or otherwise, such as we have in evidence now, as to the value of the pursuer's interest in the estate; while all the parties seem to have thought that at least it was questionable whether Mrs Gray's prospects of life were not even better than those of her son. And while it is impossible to regard Mr Binny's conduct except with much disapproval, for he ought certainly to have seen that the pursuer had independent advice and assistance—yet the considerations I have now mentioned are of no small weight against the view that the transaction is to be traced to a corrupt motive, or to deceit or fraudulent conduct on the part of those who procured the deed.

Again, I am unable to affirm that the pursuer was weak and facile in mind, and that advantage was taken of such weakness and facility. I cannot regard it as weakness and facility on the part of a son that should be induced by filial affection to help his mother out of pecuniary difficulties, and to place so much trust and confidence in her as to execute a deed dealing with rights of his own, which he knows to be of value, in terms of her request, and in a form approved of by her agent, and that without thinking it necessary to resort to independent professional advice as a means of protection for himself. Indeed, I believe that the great majority of young men—certainly the majority of young men who had been brought up without business training, as the pursuer had been—would have acted precisely as he did, and in so doing would have exhibited only natural affection and trust — not mental weakness or facility.

But although all this be so, there was nevertheless a gratuitous benefit of large amount obtained, and the deed was procured from one who yielded to parental influence unduly exercised, and who so yielded from the confidence which it was known he placed in those with whom he transacted; and in these circumstances there is enough to render the deed voidable when it is challenged.

It is said that the exercise of parental influence is quite legitimate, and most frequently salutary and beneficial to the person who yields to it. The observation is undoubtedly just. The same thing may be truly said of the influence which arises from the relations of agent and client, physician and patient, and clergyman and parishioner or penitent—these being the most common of the more intimate relations in life from which

a dominant or ascendant influence is known to arise, although not necessarily an exhaustive enumeration of such relations. But the law looks with great jealousy on all gratuitous benefits obtained by the exercise of influence arising from these relations.

It is further said that there is no fixed criterion or standard to which you can appeal, and by which you may test whether a particular act has been the result of such influence, legitimate in itself but unduly exercised, and that for this reason the law should reject the uncertain test of undue influence, or influence unduly exercised, and require proof of fraudulent representation or concealment, or weakness and facility and circumvention, as the condition of setting aside such deeds as that now in question. The result of sustaining this view would, I think, be great injustice in many cases. It would lead, on the one hand, to transactions obviously unjust, entered into by one of the parties in the position of not being truly an entirely free agent, being nevertheless held valid, because it could not be shown that the deed was procured by deceit; or, on the other hand, to the particular facts and circumstances of cases in which gratuitous benefits have been gained through such influence as I have referred to being held as amounting to fraud or deceit only by taking a strained and exaggerated view of them, and with the result in many instances of unnecessarily and unjustly affixing a stigma of fraud on persons not guilty of it. The case of *Clunie* v. *Stirling*, 17 D. 15, is I think, a very good illustration of the difficulties now pointed out, which arise from rigidly adhering to the form of issues on fraud, or facility and circumvention, when a legal remedy may be given on other grounds not necessarily involving such charges. I am not moved by the consideration that there is no fixed criterion or defined standard to which an appeal can be made in ascertaining whether undue influence has been used. That is a question of circumstances in each case, just as it is a question of circumstances in every case in which circumvention is alleged whether circumvention has been employed. I know of no fixed criterion or definite standard to which an appeal can be made as to what amounts to circumvention used in the case of a person who labours under weakness or facility of mind. In the case of *Clunie* it was held expressly that fraud was not proved, but that in the circumstances circumvention had been made out. The opinions of the Court in the case of *Mann* v. *Smith*, 23 D. 437, also indicate a recognised distinction between fraud and circumvention.

The circumstances which establish a case of undue influence are, in the first place, the existence of a relation between the granter and grantee of the deed which creates a dominant or ascendant influence, the fact that confidence and trust arose from that relation, the fact that a material and gratuitous benefit was given to the prejudice of the granter, and the circumstance that the granter entered into the transaction without the benefit of independent advice or assistance. In such circumstances the Court is warranted in holding that undue influence has been exercised; but cases will often occur—and I think the present is clearly one of that class—in which over and above all this, and beyond what I hold to be necessary, it is proved that pressure was actually used, and that the granter of the deed was in ignorance of facts the knowledge of which was material with reference to the act he performed. In such a case the right to be restored against the act is of course made all the more clear.

As to the circumstances of the case, I have only to add to what I have already said, that I think the evidence shows that the pursuer was peculiarly liable to the influence under which he acted, both by his having been taught from boyhood that the giving his consent to disentail would be a duty to his mother to be performed as soon as he reached the age at which he could do so, and by his having been latterly prepared for this at his interviews with his mother at Bath, and also in Edinburgh, so that, to use the expression of Mr Binny, "he went to the meeting there in a prepared state of feeling." Again there is evidence of influence directly used, for when the pursuer suggested that strictly speaking he ought to have a legal adviser of his own, his mother replied, to quote his evidence, "that 'if I could not trust in her,' and left the rest to be imagined;" and he adds, "I imagined it vexed her, and I did not press it." While again, in reply to an inquiry put to Mr Binny as to the disentail, in the words, "I suppose this is all right?" the answer was, "Of course it is; you are your mother's boy"—which the pursuer took to mean that as her favourite he would be all right, that the property would be left to him, and that the cutting off of the entail would not prejudice his chance of succeeding to it. There was the absence of information to the pursuer or knowledge on his part of the important matters already mentioned, and finally there was not only the absence of independent advice and assistance, but, as Mr Binny explains, he believes the pursuer must have relied on him, as having known him all his life, while he was obviously acting in the capacity of agent for Mrs Gray only, and with a direct personal interest to have the transaction carried through as she wished it.

In answer to these facts, which lead, I think, to the irresistible conclusion that the pursuer is entitled to redress, two observations were made by the defender's counsel. The first was that the pursuer did know that he was dealing with a very valuable right, because he had been treating with certain of the money-lenders on the footing that he might get an advance of £10,000 on his expectant rights, and the second, that it was no question of money with him — he would have given his consent all the same even if he had possessed the fullest knowledge of everything, so that the absence of independent advice was of no materiality.

It is true that there had been some proposals to the pursuer to open negotiations for a loan of a sum mentioned as £10,000 on his expectant rights; but this sum falls far short of the actuarial value of these rights, which was about £42,000. He states he did not know their value, and I am satisfied this is the fact. Indeed, as I have already said, I do not think either Mrs Gray or Mr Binny realised that he was parting with a right of so great value, though they must have known it was much more valuable than the return given. But there is no answer to the fact that knowledge on this subject was essential to the pursuer as an element in judging what he ought to do; and it must be added that Mr Binny's view was that

knowledge on that subject might make him difficult to deal with, for in his letter to Mrs Gray of 9th August 1875, after making the observation that provision for the pursuer's debts will be a point to be conceded—that how much beyond (if anything), and in what shape, are the great questions for consideration at the proposed meeting—he adds:—"The cardinal point is to get the consent at the cheapest possible price, and it wont do to be very higgling about terms, for an actuary would probably annex a larger figure to the Borderer's expectations than he himself would think of."

The absence of information or knowledge as to the value of the right he was renouncing is, in my opinion, in the circumstances fatal to the transaction. But I must add, that even if it had been shown that information had been given on that point it would not have altered my judgment in the case, for even with such information in the absence of any protection by independent advice I should still have held that the deed was in the circumstances the result of influence unduly used. The same consideration—I mean the taking of a deed so greatly to his prejudice from the pursuer in the absence of the protection of an independent adviser or agent—is a complete answer to the argument that it was no question of terms with him, and that in any case he would have granted the deed. That certainly cannot be assumed. The assumption to the contrary must be made. It is against all ordinary experience to suppose that if a business man or any independent adviser had presented the transaction to the pursuer in the light of what was reasonable from his point of view, allowing for the fullest desire on his part to relieve his mother from present difficulties and help her for the future, that a transaction so prejudicial to himself would have followed. It would have been pointed out to him that such a sacrifice as it was proposed he should make was quite unnecessary to secure all he had in view, and that the assistance he desired to give and to get could easily be obtained consistently with his preserving substantially his right of succession to the estate.

In conclusion I have only to observe that I hold there is no ground for the defender's argument that undue influence, however used to the prejudice of the granter of a deed, gives no remedy in the law of this country unless fraud be proved and found by the decree of Court. The law would, I think, be lamentably defective if it were so. It is true, as the Lord Ordinary observes, that cases of the class to which the present belongs have been of much more frequent occurrence in England than in this country. The principles by which they are to be determined have consequently been more frequently and maturely considered and more authoritatively announced in England than by our Courts. These principles, however, are based on reason and justice, and indeed it has been said on public policy, and are of universal application, and as occasion has occurred they have been approved of and acted on in decisions of our Courts. In the case of *Cunninghame* v. *Anstruther*, 2 Macq. 227, the Lord Chancellor, with reference to a case of parent and child, stated the law as to undue influence exercised by a parent in terms which directly apply to the present case in the view on which my judgment proceeds, while in the case of *Tennent*, in the same volume, p. 10, the judgment of Lord Westbury appears to me to proceed on the footing that the law as to family agreements, such as the one here in question, is the same in both countries. In cases between agent and client again, which, as I have already observed, is only one of the various known relations of life in which influence arises from confidence given, the undue influence which an agent may exercise to his own advantage has been repeatedly recognised in the opinions of eminent Judges as a ground to set aside a deed or gift in the agent's favour—*Anstruther* v. *Wilkie*, 18 D. 405; *Harris* v. *Robertson*, 2 Macph. 664; *Grieve* v. *Cunninghame*, 8 Macph. 317; and *Cleland* v. *Morrison*, 6 R. 156. In one of these cases—that of *Harris* v. *Robertson*—a separate issue was given expressly to try a case stated as one of the exercise of undue influence. In the case, again, of *Munro and Others* v. *Strain*, in which the actings of a clergyman in procuring the execution of a settlement were complained of, an issue founded on the use of undue influence was refused, not because the Court had any doubt that undue influence was a relevant ground of reduction, but because the case did not appear to be relevantly stated as one of that class at all.

I should not have felt any serious difficulty as to the true ground of judgment in this case as I have stated it even without previous authority in our law, for, as I have said, the legal question involved is one of general principle founded on reason and good sense; but any possible difficulty in the application of the general principle to the circumstances of this case is removed by the *dicta* and judgments in the cases to which I have referred.

Lord Deas—This is an important and in some respects a painful case. I have listened with great attention to the able arguments from the bar, and read with care and attention the evidence adduced, but having been aware that we had all arrived at the same result, and that your Lordship in the chair and Lord Shand had prepared full written opinions, and having before me at the same time the Lord Ordinary's full and able note, I have not thought it necessary or useful for me to prepare or deliver the same detailed opinion I should otherwise have done.

In the first place, if it were necessary to go so far, I should be constrained to concur generally in the views expressed by the Lord Ordinary, and almost wholly in the observations made by your Lordship. My brother Lord Shand has added some detail of the facts proved which appears to me to be quite accurate. He has at the same time made some observations on what might have been the form of issues under which this case might have been tried had it gone to a jury. These observations are in no point of view vital to the case. If, however, the case had been to go to a jury, it has all along appeared to me that it might have been quite well tried under our ordinary and well-established issue of facility coupled with fraud or circumvention to the lesion of the granter of the deed. A verdict affirmative of that issue has always been regarded as importing an imputation on character somewhat short of a verdict on our equally well-known issue of fraud, because circumvention of a person easily persuaded is considered a less daring species of fraud than a verdict on the direct issue of fraud imports.

Weakness or facility of mind in the sense in

which we use the words in the first of these forms of issue may arise from many different causes, temporary or permanent—for instance, from old age, exciteability, timidity, sickness, or as in this case from affection. The cases which have been mentioned—those of *Clunie*, *Mann*, and *Marianski* (which last I very well remember to have been a case of timidity) all illustrate how great the variation may be in that which in practice we hold may constitute weakness or facility of mind.

It seems to me, in short, that the two classes of issues under which cases of reduction similar to the present have been tried in our practice, sufficiently comprehend the various cases of undue influence, &c., which Lord Shand has spoken of as good grounds of action in England.

I have expressed my opinion that this case might have been tried under the first form of issue I have mentioned, in order to say that the judgment we are to pronounce, which comes in place of the verdict of a jury, may fairly be held to affirm only that secondary or lower species of fraud which in our law is known as circumvention. I think, however, it is an advantage that such cases can now be tried before a Lord Ordinary, subject to review, because in that way the necessity may sometimes be advantageously avoided of using a hard and fast term which may either fall short of or exceed the appropriate degree of reproach attaching to the general character of parties implicated. In no point of view, however, can I doubt that the deed of disentail executed in this case falls to be set aside.

It is not surprising that the mother should have expressed herself desirous to obtain some deed of disentail, nor that the son should have been willing to comply with such a request. There were several children alive of her first marriage, and four of the second. There was nothing in the second marriage contrary to the law of nature, and the fact that by the law of the land as it at present exists the children of that marriage were regarded as illegitimate, and could to no extent be provided for out of the entailed estate, was not such as to diminish affection for them either on the part of their mother or of the pursuer, and was rather in favour than otherwise of the execution of a disentail. The second husband, it is right to say, seems with propriety to have stood aloof, for we have no trace of his finger in the transaction from beginning to end. I confess, however, that I am surprised that a man of business of Mr Binny's intelligence and experience, however he might think that there should be a disentail, did not consider it his duty, standing as he did in the position of family agent, to advise the pursuer to employ a neutral agent of his own, which would have been the proper course in the circumstances, or at all events to furnish him with every possible information, including an actuary's report, and call his special attention to the large sacrifice he would be making by consenting to the disentail. Nothing of the kind was done, and this of itself seems to me a sufficient ground for setting aside the transaction without the necessity of imputing wilful misrepresentation or fraudulent concealment either to the pursuer's mother or to Mr Binny. I think it not improbable that although everything had been brought under the notice of the pursuer he would have done what he did. I am not prepared to say that under similar circumstances I might not have done as the pursuer did, but it would be hazardous to go upon grounds of that kind, and judicially I cannot do so. We have no right to take for granted what the pursuer would have been advised to have done, and would actually have done, if all the facts and their probable consequences had been developed and brought before him. He had not the opportunity which he ought to have had of forming his own deliberate opinion, and taking, as I have done, the most modified view of the case which the facts admit of, I can come to no other conclusion than that the Lord Ordinary's interlocutor ought to be adhered to.

LORD MURE was absent.

The Court adhered.

Counsel for Pursuer (Respondent) — Lord Advocate (Watson) — Balfour — Mackintosh. Agents—Mackenzie & Black, W.S.

Counsel for Defender (Reclaimer)—Asher—J. P. B. Robertson—Begg. Agents—Morton, Neilson, & Smart, W.S.

Saturday, December 6.

FIRST DIVISION.

MARTIN *v.* SCOTTISH SAVINGS INVESTMENT AND BUILDING SOCIETY.

Public Company—Benefit Building Society—Winding-up—Companies Act 1862 (25 *and* 26 *Vict. c.* 89), *sec.* 199, *subsecs.* 3 *and* 4—"*Just and Equitable that Company should be Wound-up.*"

One of the rules of a benefit building society was that members "may withdraw the whole or any portion of their shares at any time after 12 months from the date of entry by giving one month's notice, when the whole instalments on the shares withdrawn shall be repaid with interest . . . Members withdrawing shall be paid out in the order of their application, and as the funds permit." One of the shareholders of the society, which was unregistered in the sense of the Companies Act 1862, having unsuccessfully demanded payment of the sums due to him in respect of his shares, thereafter presented a petition under the 199th section of the Companies Act 1862 for a winding-up order in his capacity of creditor in respect of the failure to pay. The large majority of the shareholders—about 200 of whom appeared by minute to oppose the petition—were against the winding-up, and a committee had reported favourably as to the ultimate solvency of the society. *Held* (1) that the petitioner was not a proper creditor, his debt not being presently due, but only payable in order of application; and (2) that in the circumstances the Court could not hold it "just and equitable that the company should be wound up," and petition *refused* accordingly.

The Scottish Savings Investment and Building Society was instituted in 1856, having for its objects "(1) to provide a mode of investing the savings of its members securely and profitably; (2) to advance funds on heritable security, and