and it has been recorded and acted on for fifteen years. And what is the argument on which in these circumstances we are asked to go outside the deed? It is this, that if it be assumed to proceed on a true construction of the antecedent agreement, we must make up our minds to accept the proposition that the late Sir James gratuitously agreed to gratify his father by benefitting himself—the alternative which we are asked to prefer being that he stipulated for a further benefit to himself at the cost of his younger brothers, who were also parties to the agreement. It is not apparently thought unreasonable to suppose that the younger brothers gratuitously concurred in the disentail, and even agreed to make a sacrifice of their provision as younger children to induce their elder brother to join them and their father in preferring the females of his own family to stranger males.

It was not suggested that Sir George had expressly renounced or limited his right to provide for his children to the extent of three years' rent, or that there were any words which *prima facie* implied such renunciation or limitation. The argument was of this sort—that having agreed to burden the estate immediately with £20,000 as the maximum marriage-contract provision to the younger children of James, he thereby consented that this burden should be taken account of in estimating the rental at his own death, on which the amount of the authorised provisions to his children should be estimated. But it is certain that the £20,000—let the estate be burdened with it never so clearly—was not to be payable or to bear interest till James died. In other words, James' younger children could take nothing till their father's death, and they were the only creditors in the burden. How such a burden could affect the free rental at Sir George's death was not explained. It existed as a contingent security, but was otherwise inoperative while James lived, and he might have survived his father half-a-century and then died without leaving any younger children. As it happened, he survived his father only six months, and he left a family—and he died without having paid off the provisions of his sisters and younger brothers. His son, who has succeeded to the family estate in infancy, has thus to pay at once two sets of provisions, the payments of which are usually separated by a generation. But the pursuers are not to be prejudiced by James' premature death and his infant son's early succession. Their right arose and vested on their father's death on 19th June 1878, and is to have three years' free rent of the estate estimated as at that date. James could not have urged the contingent burden in favour of his children (if he should have any) as a diminution of the rental, which was not in fact thereby diminished while he lived, and the matter is in no way affected by his early death and the consequent necessity of his son to pay two sets of provisions at once. James' younger children also will have their right, which is that they shall be paid £20,000 if three years' free rental at their father's death amounts to so much, as it probably does, seeing it amounted to £27,000 in the preceding June. There is a temporary hardship to the infant heir, against which is to be set the advantage in a money view—although it may be in that only—of an early succession.

LORD JUSTICE-CLERK—I concur in the result at which your Lordships have arrived, and to a large extent for the same reasons, but the ground on which I wish to place my opinion is the following—This question has arisen on the deed of agreement between Sir George Grant Suttie and his three elder sons; that deed of agreement stipulated for the execution of a new deed of entail, to be revised by a learned person named, and it was so revised, and was afterwards executed and recorded. Therefore I imagine that so far as the terms of that deed of entail are concerned, they constitute an interpretation or glossary by all the parties of any ambiguity in the agreement itself. Now, reading that deed of entail, which is the title of the defender, the heir in possession, I can find no ground for supporting the argument on which his contention proceeded. I think those terms are clear, and in this process and in this demand it is, in my opinion, first, impossible to get behind the terms of the deed of entail; and second, I think that we must accept the deed of entail as a statement by all parties of the true meaning and intention of the deed of agreement. On that ground I entirely concur in the judgment proposed.

MACKAY for pursuers pointed out that the Lord Ordinary had allowed interest only at the rate of 4 per cent., and asked that it be increased to 5 per cent. as ordinary legal interest in such cases.

LORD YOUNG—I recollect that when I was reporter in the First Division the same demand was made, and that Lord Mackenzie said, "Four per cent. is just as legal as five."

The Court adhered.

Counsel for Pursuers—Asher—Mackay. Agents—Lindsay, Howe, Tytler, & Co., W.S.

Counsel for Defenders—Solicitor-General (Balfour, Q.C.)—W. J. Mure. Agents—Mackenzie, Innes, & Logan, W.S.

Wednesday, October 27.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

DICKISON *v.* THE SCOTTISH PROVINCIAL ASSURANCE COMPANY.

Fraud—Agent and Client—Reduction.

In 1870 D., through his law-agent R., borrowed £1000 from M., on bond and disposition in security over house-property belonging to him. In 1876 R. fraudulently represented that M. desired payment of his money, and under a general authority from D. borrowed £1000 on bond and disposition in security over the same subjects from an Assurance Company, acting as agent for both parties in the transaction. R. thereafter did not pay the money to M., whose bond over D.'s property was not discharged till 1878, when a bond and disposition was granted to him by R.'s partner on the security of his own estate. R.'s firm having become bankrupt, their trustee

brought a reduction of the bond granted by R.'s partner to M., and of the relative discharge of the bond over D.'s property; this action was compromised on the footing, *inter alia*, of D. paying £450. D. then brought a reduction of the bond granted by him to the company, and sought to recover the £450 from them. *Held* that D. having paid the £450 at his own hand, and having given no intimation to the company of the trustee's action or the compromise thereof, had no claim against the company for recovery.

In 1870 Alexander Dickison borrowed £1000, through his agent James Renton jun., of Renton & Gray, S.S.C., from W. Munro, and granted a bond and disposition for the said sum over certain house property belonging to him in Edinburgh. In 1876 Renton falsely informed Dickison that the creditor desired payment of his money, and advised the raising of a new loan on the same security in order to meet his demand. He then, having received a general authority to raise the money, borrowed £1000 from the Scottish Provincial Assurance Company, and procured Dickison's signature to a bond and disposition in security in their favour for that sum over the same subjects, acting in the matter as agent for the company as well as for the borrower. Renton did not, however, at this time pay the money to Munro, or obtain discharge from him of the previous bond. The company regularly received interest on their bond from Renton, and after Martinmas 1878 from Dickison himself. In October 1878 Munro's bond was discharged, and the discharge duly recorded, Mr Gray, Renton's partner, having granted him a bond for £1000 over his own estate. Shortly afterwards Messrs Renton & Gray became bankrupt, and Mr Renton absconded from the country. The trustee on the bankrupt estate brought a reduction of the bond granted by Mr Gray, and of the discharge of the bond granted by Dickison which Munro had executed in 1878. To this action Dickison was a defender; and it was finally compromised on the footing, *inter alia*, of his paying a sum of £450.

The present action, which was raised by Dickison, concluded in form for the reduction of the bond granted by him to the Scottish Provincial Assurance Company; but it was explained that in doing so he was only desirous of recovering from them the £450 which he had to pay, as he alleged, through the fraud of Renton and the fault of the company.

The pursuer pleaded—"(1) The sum in the said bond not having been advanced, the pursuer is entitled to decree. (2) The execution of the bond having been obtained by the fraud of the agent of the defenders, and without consideration, they cannot insist in the same."

The defenders pleaded—"(1) The averments of the pursuer are irrelevant and insufficient to support the conclusions of the action. (2) The averments of the pursuer being, so far as material, unfounded in fact, and in particular the pursuer having, by himself or his agent, duly received the proceeds of the said bond, the defenders are entitled to absolvitor. (3) The pursuer's action is, in any view, barred by the discharge of 22d October, and by the settlement of the said action of reduction."

The Lord Ordinary (Rutherfurd Clark), after proof led, assoilzied the defenders.

The pursuer reclaimed.

Authorities—*Molleson (Renton & Gray's Trustee)* v. *Smith's Trustees*, June 15, 1880, 17 Scot. Law Rep. 648, 7 R. 951; *Rose* v. *Spaven*, May 27, 1880, 17 Scot. Law Rep. 583, 7 R. 925; *Mair* v. *Thom's Trustees*, Feb. 20, 1850, 12 D. 748.

At advising—

Lord President—This is a question which arises out of one of the numerous frauds committed by Mr Renton previous to his bankruptcy and absconding from this country; and it has an appearance of complication and difficulty at first sight which disappears when we ascertain the precise state of the facts.

The pursuer Mr Dickison was a client of Renton's, and had a great many transactions with him. He was engaged in certain building speculations, and was in the way of granting bonds over the houses, these transactions being conducted for him by Renton. There was a distinct understanding also between client and agent that when money was received by Renton for his client, it first remained in his hands till it was wanted, and that sort of business transactions continued between them for a number of years. It appears that prior to 1876 there was a sum of £1000 borrowed on the security of house property belonging to Mr Dickison; and in 1876—about July or August—Renton represented to him that the creditor in that bond wanted payment of his money, and told him also that he should procure money from another lender. That this was done to enable Renton to get the £1000 into his own hands is plain enough. Renton was not acting in good faith, but fraudulently. What he did was this—he procured a loan of £1000 from the Scottish Provincial Assurance Company, and procured a bond for that amount to be signed by his client, and delivered the bond to the Assurance Company. In this transaction he appears to have acted for both borrower and lender; the company had no other agent in the matter, and to that extent he acted for them as well as for the borrower. But the borrower was his constant client, and no doubt in going to the company he was acting as the agent of the present pursuer. It is said that the money was advanced by the company a month or two before the bond was delivered to them, and in so doing the company relied on Renton's honesty; but what they relied on was this, that having obtained the money as an advance on the bond, he was to deliver them the bond afterwards; therefore Renton acted honestly enough to them, and they suffered nothing by their trust in him. Having got the money into his hands, Renton put it to the credit of his own bank account, and there it remained, and no steps were taken to procure a discharge of the previous bond, in which he had falsely represented the creditor as demanding payment. But in 1878 Renton procured a discharge of this previous bond from the creditor, and in so doing gave the pursuer the full consideration which the pursuer had stipulated and intended he should receive as consideration for granting the bond to the defenders. The way that the discharge was obtained was this—Renton's partner gave a security to the granter over his estate for a like sum

of £1000, and though that was not to apply the £1000 in discharge of the previous bond, it was equivalent to it, for the discharge so obtained was as effectual. There could be no objection; the creditor was satisfied with the other security, and discharged the bond. Now, after that there was but one bond—that in favour of the defenders—and it was granted for a full consideration. The pursuer was then debtor to the Assurance Company, and to them only. But then Gray and Renton both having become bankrupt, their trustee raised a reduction of the bond which Gray granted to the first bondholder in consideration of the discharge which that holder granted to the pursuer, and a reduction also of the discharge so granted. At first sight it seems somewhat extraordinary on the part of the trustee to propose to reduce a discharge with which he had nothing to do; yet the present pursuer was so frightened by the challenge that he paid £450 to get rid of the matter, and now in effect he demands that the Assurance Company should relieve him of that £450. The simple answer is this—that he committed an act of egregious folly in paying it at all. The discharge was a good one; and even if it had been subject to challenge, I think he is precluded from his present claim by the fact that he made no intimation to the company of the challenge of the discharge or of the compromise which he had effected. I think this is a complete answer to his claim; and I am of opinion that the Lord Ordinary's interlocutor is well founded.

Lord Deas concurred.

Lord Mure—I concur in the result. I think the ground your Lordships have assumed with reference to this discharge—a separate ground from the case of *Rose* v. *Spaven*, and on which the Lord Ordinary went in disposing of the case—is well founded, and that the pursuer is precluded from recovering the £450 by having come to an agreement without taking the Assurance Company with him.

As to the other matter, it was argued that the case of *Rose* v. *Spaven* did not apply to this case. There are certain distinctions in matters of fact between the two cases, but substantially it appears to me that this was a thing done by Renton on the same lines as in *Rose* v. *Spaven*, and the evidence on which the Court proceeded being very much the same as here, I think the defenders are entitled to prevail. I think the evidence of Dickison just shows this, that he speculated with Renton in other matters, and that he put his whole affairs into his hands, signed the bond, and allowed Renton without inquiry to apply the money in any way he thought fit. He thus placed Renton in a position to do as he did, and therefore I am quite satisfied that the pursuer has no case against the defenders.

Lord Shand—Though this action concludes for reduction of a security for £1000, it has been explained that it is insisted in only for the purpose of recovering £450; for admittedly the pursuer received the benefit of a security for the £1000 he advanced, and would have had the benefit of the security for the entire sum had he not become involved in another action relating to it, and paid £450 for a settlement. But taking it so, I think there are three grounds of defence, each of which separately forms a sufficient answer to the claim.

In the first place, it is, I think, proved that Renton had the authority of the pursuer to borrow £1000 from the company, and as the money was lent, the pursuer must bear the consequences. There was a meeting at which the pursuer expressly told Renton he might borrow £1000 from a lender. The authority was quite general, and having got general authority, Renton applied to the defenders and got the money from them. Now, I am of opinion that if Renton afterwards embezzled the money, it was the pursuer's money he embezzled. It is true that the pursuer gave Renton the authority on a false representation by him, but that was unknown to the company and cannot affect them. Renton cheated the pursuer, but the pursuer gave him the authority on which he and the company acted. Even if there had been no discharge, I should have held that the company were safe in the advance made. It is also clear that for considerably more than two years their fund remained as a standing advance, and interest on it was paid by Renton, and subsequently by the pursuer himself, in the full knowledge of what had taken place.

But, in the second place, the pursuer says he agreed to borrow £1000 only on condition of getting a discharge. He got the discharge, however, not at the time, it is true, but two years afterwards. The condition he desired was fully implemented; it is so stated now on the record; and as in point of fact he got the security he stipulated for, his action fails.

But there is yet a third answer to this claim. The discharge having been challenged, the pursuer compromised the action. It is clear enough that had he defended it he must have been successful. From the reported case of *Molleson*, decided after the compromise, it is plain that he had a good defence; but he paid a sum of money and made an arrangement by which the discharge should be allowed to stand. I do not say he was foolish in coming to a settlement. I think counsel are often well advised in such cases, particularly when questions of some difficulty are raised, in recommending that each party should put in a sum and make a settlement, all suffering abatement. But then he could only do so on the footing of abandoning any claim against the Assurance Company. He should either have maintained his defence or taken the company with him in the arrangement—at least to the effect of reserving with their consent all claims against them. But he seems to have done neither, and I think it is impossible now to make the company liable.

On these three separate grounds I am of opinion that the defenders in this action are entitled to succeed.

Lord President—I think it right to say, in consequence of what has fallen from Lord Mure and Lord Shand, that if the facts in *Rose* v. *Spaven* had been the same as we have here, or at all like them, I should have concurred in the judgment of the majority of the Court in that case.

The Court adhered.

Counsel for Pursuer (Reclaimer)—Wallace. Agents—Welsh & Forbes, S.S.C.

Counsel for Defenders (Respondents)—Guthrie. Agents—Boyd, Macdonald, & Co., S.S.C.

Saturday, October 23.

SECOND DIVISION.

SPECIAL CASE—LENNOCK'S TRUSTEES AND OTHERS.

Trust—Power of Appointment among Children—Partial Exercise of Power—Appointment to a Life Interest where Power given to Appoint to Capital.

A father by *mortis causa* deed placed a sum of money in the hands of trustees for behoof of his son in liferent and his grandchildren in fee, giving his son a power of appointment among his children. The son by last will and testament conveyed the sum to other trustees, and gave each of his sons an absolute right to a certain provision on attaining majority, but limited his daughters' interest in the sums provided for them to their separate use for life with power to divide among their children. *Held* that this was a good exercise of the power of appointment.

Admiral George Gustavus Lennock of Broomrigg, Dumfriesshire, died on 12th May 1866 leaving a deed of appointment and trust-disposition and settlement dated in October 1856, and along with five codicils annexed to it recorded in May 1866. He left a son George James, and a daughter, the wife of Colonel Walker of Crawfordton, Dumfriesshire. His wife had predeceased him. By his deed of apportionment and trust-settlement Admiral Lennock, on the narrative of certain provisions in his marriage-contract, appointed that of the sum of £20,000 which he had power under his marriage-contract to apportion among the children of his marriage, his marriage-contract trustees should pay to his son George James Lennock a sum of £5000 as his share, and that the balance of £15,000 should be paid to Mrs Walker. The deed went on to convey to trustees—who were the first parties to this case—the whole estate, heritable and moveable, of which he should die possessed, and directed them to pay the proceeds to the testator's son George James Lennock as an alimentary provision, upon his own receipt alone, and at such times as the trustees should consider expedient, declaring that the interests or profits should not be assignable by him, and should not be subject to the diligence of his creditors. George James Lennock was then unmarried. Referring to the contingency of his being married, the deed provided as follows:—"And in the event of the said George James Lennock contracting a marriage, I hereby authorise and empower him to settle and secure to his wife, by marriage-contract or other deed, an annuity out of the said interest, dividends, or other annual produce, payable to her quarterly or half-yearly after his death, as he may direct; the balance, if any, of the said interest, dividends, or other annual produce, being paid to or applied for the maintenance and education of the children of the marriage, if any, in such manner as my said trustees or trustee may direct; declaring as it is hereby expressly provided and declared, that upon the death of the said George James Lennock, or in the event of his marriage upon the death of the surviving spouse, the said free residue of my estate so liferented by him shall belong and be paid to the child or children of the marriage, at such periods and in such proportions and under such limitations, conditions, and restrictions as he the said George James Lennock may have directed by any deed or writing under his hand, failing which, equally amongst them, share and share alike, upon their severally attaining majority; failing all which, to my daughter, the said Anne Murray Lennock otherwise Walker, or her heirs or assignees." Shortly after the date of his father's deed of apportionment and trust-disposition and settlement, George James Lennock married Miss Elizabeth Leigh Bloxam, the third party to this case.

In February 1862, after his son's marriage, Admiral Lennock added a codicil to the deed above mentioned, by which he authorised his "trustees to pay over the said interest, dividends, or other annual produce as an alimentary allowance, and in such sums as they shall think proper, either to my said son or to his wife, as they, my trustees, shall consider expedient; or in the event of my trustees considering it more expedient, I hereby authorise and empower them to apply the same for their behoof, or for behoof of their children; and in the event of my said son George James Lennock predeceasing his wife without having secured her an annuity after his death out of the said interest, dividends, or other annual produce, I hereby authorise and empower my trustees to pay to his wife during her widowhood such portion, or even the whole, of the said interest, dividends, or other annual produce, as they shall from time to time consider necessary or proper." This deed was ratified by George James Lennock in November 1866. After the death of Admiral Lennock the trustees paid to George James Lennock the sum of £5000 apportioned to him, and continued to hold the free residue for the purposes above specified. That residue amounted to about £14,000. George James Lennock died in 1871 survived by his wife, the third party to this case, and by five children—three sons and two daughters. He left two deeds—(1) a deed of apportionment dated 9th July 1870, whereby, on the narrative of the powers conferred upon him in his father's deed of apportionment and settlement and codicils thereto annexed, he directed his father's trustees after his death to pay to his wife (the third party) should she survive him, so long as she should continue unmarried, an annuity of £200 as an alimentary allowance, and to pay the balance to his wife for the maintenance of the children. He directed that the income after the decease or marriage of his widow should be applied by his father's trustees for behoof of his children, and as to the capital he directed that it should be divided equally among the children who should attain twenty-three years of age. (2) In October 1871 Mr Lennock executed in English form, he being at the time resident in England, a last will and settlement, whereby, on the narrative of his powers of apportionment under his father's deed to a sum amounting in all to £14,200 among