[3d *June* 1839.]

(Appeal from the Court of Session, Scotland.)

Mrs. MARIA CAMPBELL STEWART[1], Appellant.— *Pemberton — Sir William Follett.* (No. 12.)

FERDINAND S. C. STEWART, and Attorney and Mandatory, Respondents. — *Dr. Lushington — James Russell.*

Agent and Client — Transaction. —Where a deed of agreement of compromise of their respective claims to the succession of a deceased relation had been settled and executed by three parties, one of whom afterwards brought an action of reduction of the agreement on the ground of lesion, through erroneous advice of her law agent, who was agent also of the two other parties, as to her legal rights, of which she was ignorant:—Held (affirming the decision of the Court of Session) that, upon the facts and written evidence of the transaction, the party had failed to establish relevant grounds for disturbing the agreement.

2D DIVISION.
Lord Ordinary Cockburn.
Statement.

FREDERICK CAMPBELL STEWART, a native of America, now deceased, succeeded in 1815 as heir of entail to the estates of Ascog and Whitebarony. Having been advised to sell the lands, Mr. Stewart instituted proceedings in the Court of Session to ascertain his powers under the entail; and the Court found, that although he was not effectually prohibited from selling the lands, he was bound, if he did sell, to rein-

[1] Rep. 15 D., B., & M., 112.

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vest the price in the purchase of other lands to be settled on the same series of heirs.[1] Mr. Stewart appealed to the House of Lords against the finding as to reinvesting the price of the lands; and while the fate of that appeal was still uncertain Mr. Stewart, in 1826 and 1827, executed various deeds, providing for the event either of a reversal or affirmance, in favour of Mrs. Stewart his wife, of his two daughters, of his brother Professor Ferdinand Stewart, and of his sister Mrs. Anna Stewart. Mr. Stewart and his daughters soon afterwards died in France. In 1830 the House of Lords, reversing the decision in the Ascog Cause[2], found that Mr. Stewart was under no obligation to reinvest the price in the purchase of other lands. Mr. Wardlaw, the law agent in Edinburgh of Mr. Stewart's widow and nearest of kin, entertaining doubts as to their respective rights, obtained the opinion of counsel[3] upon a memorial for the trust disponees of Mr. Stewart.

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[1] F. C., and 5 S. & D. 418.

[2] 4 W. & S. 196.

[3] " Opinion by Francis Jeffrey, Esq., and Andrew Rutherfurd, Esq., " upon Memorial and Queries for the Trust Disponees of Frede- " rick Campbell Stewart, Esq., of Ascog.

" 1, 2, 3, 4. In the event of its being decided in the House of Lords, " reversing the judgment of the Court of Session, that the price drawn " by Mr. Campbell Stewart is not subject to reinvestment as a surrogatum " for the entailed estate, there can be no doubt that the price, along with " the other moveable funds vested in the memorialists, must be held to " have been the personal property of their constituent, and must be dealt " with accordingly.

" The domicile of Mr. Stewart is of importance chiefly, it appears to " us, as regulating the domicile of his daughters, who died before they " had obtained any domicile of their own independently of his. The only " question here is between the American and the Scotch domicile; for " we see no ground whatever upon which it can plausibly be argued that " he obtained any domicile on the continent of Europe. The claims of " the Scotch domicile, and of the Scotch law in virtue of it, to regulate " the moveable succession of Mr. Stewart and his children, is certainly " attended with a great deal of difficulty, principally because of the fact, " that he had unquestionably an American domicile before he came to

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The parties having been advised by counsel to settle by compromise questions which appeared to be of a

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" this country; that it is a rule very general, in reference to intestate " succession, though not, perhaps, without exception, that there can be " only one domicile, and that a domicile once established cannot be lost, " except by actual acquisition of another domicile; and that there is an " absence of any proper residence or abode in Scotland. At the same " time, there are many strong circumstances on the other side; and we " are certainly not prepared to say that this is a case in which the Scotch " law, which must be appealed to in the first instance, will feel itself to be " controlled by the American domicile, and constrained to surrender the " property within its jurisdiction to the distribution of a foreign law. " We may add, too, that considering the property as in bonis of the " children, the difficulty of the case appears to be somewhat increased, in " consequence of the father's deed vesting the funds in the hands of " Scotch trustees, and appointing them, at the same time, to be tutors " and curators to his children.

" With respect to Mr. Campbell Stewart himself, we are of opinion " that he must be held to have died testate, although, at the same time, " it is not quite free of question, whether, under the particular provisions " of this deed, the shares which are declared to be payable to the children " or survivors on majority or marriage, vested in the children by the mere " survivance of the father, or lapsed in consequence of their predecease " before marriage or majority; and on the supposition of their lapsing, " the whole funds must be held to be still in bonis of Mr. Campbell " Stewart, and to be distributable as his intestate succession, seeing the " trust deed makes no destination of his property, beyond his children " and their issue. If, however, as we rather hold, the shares vested in " each child upon survivance, then the funds must be distributed as the " intestate succession of the children; and we are inclined to think that, " in their case, there are some circumstances which strengthen the right " of those whose interest it is to claim under the Scotch law.

" We have chosen rather to state where we conceive the difficulties " to lie, than give any direct opinion upon the questions which suggest " themselves; because, before forming a satisfactory opinion, some farther " information may be necessary as to the facts; and because, in so far as " regards the memorialists, or any practical advice they may require, we " can have no doubt, in the first place, that the rights of the competing " parties must be determined in the Scotch courts, leaving each party to " make effectual his claim as he can, under the law on which he founds; " and, in the second place, that nothing but a judgment of the court will " effectually exonerate the trustees, except, indeed, a compromise between " all the parties, who, in any view of the case, can make a plausible claim " under either the American or the Scotch law. We think such a mode " of settlement would be very advisable in a case presenting so many " difficulties, and threatening a very tedious and expensive litigation; " but even if a compromise were gone into, it ought to be done judicially,

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difficult nature, a deed of agreement was entered into between Mrs. Stewart the widow, and Ferdinand Stewart and his sister Anna Stewart, which, after setting forth the particulars as to the succession and the uncertainty of the rights of parties connected therewith, contained a stipulation that the three parties, "with a view to avoid litigation, and being mutually "disposed to an amicable arrangement," consented and agreed that the free proceeds of the whole estate and effects other than the entailed estate should be divided equally among them.

Mrs. Stewart subsequently brought an action of reduction for the purpose of setting aside this agree-

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"and the trustees, at all events, should bring an action of multiple-"poinding, in which the several parties interested may lodge claims, and "afterwards assent to judgment, in terms of any compromise they may "agree to.

"5. Assuming that the succession is distributable by the law of Scot-"land, on which supposition it would have been vested, under the deed "or otherwise, in the child last deceasing, we are of opinion that "Mr. Stewart, and his sister Mrs. Tennent, must succeed equally as "next of kin; that his act of naturalization gives him no exclusive "right, and that she, as an alien, is not prevented from taking moveable "succession.

"6. On the supposition of the law of Scotland regulating the succes-"sion of Mr. Stewart and his children, in which view only this question "is of importance, we are of opinion that the widow has no right what-"ever to any part of the funds, except in so far as she claims her share "of the goods in communion, or under Mr. Stewart's trust deed.

"7. In the event that the House of Lords shall affirm the judgment "of the Court of Session, and that the price must be reinvested, we are "of opinion that the bonds of provision executed under Lord Aberdeen's "Act, in favour of the daughters, must be considered as moveable, and "must, along with the residue of the trust funds, be distributable accord-"ing to the law which shall be held to regulate the daughters moveable "succession. These bonds are in no respect different from other per-"sonal bonds, except in this, that they are effectual against the heirs of "entail, and that the rents of the entailed estate may be attached in "payment of them.

(Signed) "F. JEFFREY.

"Edinburgh, 3d April 1830. "AND. RUTHERFURD."

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ment, and in support of her action pleaded:—1. That the agreement had been brought about by undue concealment and misrepresentation of her rights, and her apparent consent obtained to a deed, the real meaning and import of which, as affecting her legal rights, she did not understand. 2. The agreement had been entered into when she and the other parties thereto were ignorant of the rights conferred upon her by the last will and testament of Mr. Stewart, and when they had in view only the deeds referred to and specified in the said agreement; she also pleaded that upon the said agreement being reduced she would be entitled, independently of the said will or testament, to claim as at the death of her husband, both by the law of Scotland and by the law of Virginia, which was that of his domicile, the full third share of all his personal estate and effects; and also to claim during her life, by the law of Scotland, the third part of the rents of any heritable property in Scotland in which her husband was infeft at the time of his death, as well as certain other benefits from which she had been excluded by the agreement.

It was pleaded in defence,—1. The grounds of reduction were not relevant, or sufficient in law to support the conclusions of the action. 2. The pursuer was not ignorant, but cognizant of her rights, and of the deeds by which the same were regulated, when she executed the agreement sought to be reduced. 3. That she had homologated the agreement and transaction.

After closing the record and hearing parties Lord Cockburn, Ordinary, pronounced the following interlocutor:—"The Lord Ordinary having considered "the closed record and productions, and heard parties,

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" both of whom have renounced farther probation,
" finds, that the pursuer has not established any suffi-
" cient ground for setting aside the agreement brought
" under reduction; sustains this defence, assoilzies the
" defender, and decerns: finds the pursuer liable in
" expenses, appoints an account thereof to be given in,
" and, when lodged, remits the same to the auditor to
" tax and report.

" (Signed) H. COCKBURN."

" *Note.*—The pursuer wishes to reduce a contract
" by which a portion of her deceased husband's property
" was divided into three parts, of which she got one,
" and his brother and sister two, on the ground that
" she was thereby materially injured, and was led into
" the bargain from ignorance of her legal rights.

" The fact of her being materially injured, if the
" whole risks be taken into view, is not proved. The
" subject of the arrangement was complicated and
" difficult, as the consultations with counsel shew; and
" the doubtful and expensive disputes which might
" possibly have arisen, would have been among persons
" closely united by relationship and friendship. Con-
" tingencies had therefore to be considered, and peace
" to be obtained by concession, as is declared in the
" agreement, and transpires through all the corre-
" spondence. If the possible consequences of litigation
" and dissension are brought into the calculation, the
" reality of her lesion is at the least doubtful.

" The exact nature and extent of her ignorance is
" equally uncertain. That she did not know the whole
" law of her case, or cases, is probably true; as it is of
" most parties. But the certainty and the degree of
" her ignorance is by no means clear. Her evidence

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" of it consists entirely of letters which passed between
" her and her agent; but it is proved that she had
" personal interviews with him; and the points on
" which she now says that she was in the dark were
" ones on which it is very improbable that no commu-
" nication then passed between them. Accordingly,
" she herself acknowledges in several letters that she
" always meant to make a sacrifice, and on grounds
" which shew that she knew more of her true legal
" position than is now admitted. For example, one of
" the principal averments on which this action rests is,
" that, in sharing the property with her brother and
" sister-in-law, she was not aware that the law of
" Scotland gave her more than a third, or rather than
" a life-rent of the third. Yet in her important letter
" of the 29th December 1831 to her sister-in-law, in
" which she explains what her inducements to enter
" into the contract had been, she says, 'I was quite
" 'aware that if I had recourse to a lawsuit the whole
" 'would probably be mine.' There are other letters
" with similar avowals.

" But assuming both injury and ignorance; she was
" confessedly misled solely by her own professional
" adviser;—a gentleman against whose intelligence
" or character nothing is said. It is alleged that he
" was also the agent of the opposite parties. But this
" was known to her, and it is not averred on the record
" that he betrayed the one client to the other; nor is
" there in any other respect the slightest fraud imputed
" to him. He honestly thought it best for her that
" she should enter into this arrangement, and she took
" his advice. She wrote to him, saying she thought
" the bargain better for her brother and sister-in-law

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" than for her, 'but I submit all these matters to your
" 'better judgment.' (Letter, 26th April 1830).
" Eight months after this, she repeats the objection in
" very explicit terms. 'I do not think the chances
" 'equal.' (Letter, 2d December 1830.) Neverthe-
" less, after another pause of above two months, and
" more explanation from her agent, she signs the con-
" tract, which sets forth various deeds, judicial pro-
" ceedings, professional consultations, and 'conflicting
" 'opinions, by different eminent counsel at the
" 'Scottish bar,' and declares, that the compromise is
" gone into 'with a view to avoid litigation, and being
" 'mutually disposed to an amicable arrangement.'

" It was found in the case of M'Allister (26th June
" 1827), that the circumstance of a party losing a
" judgment by being kept in ignorance by his agent,
" formed no ground for disturbing the party who had
" obtained it. On the same principle, whatever claim
" the pursuer may have against her agent, it does not
" appear to the Lord Ordinary that the ignorance or
" inadvertence of the legal adviser, by whom she chose
" to be guided, can, in a case free from all fraud, be
" made to affect third parties, who are not said to have
" been accessory to her being misled.

" The Lord Ordinary has not decided upon homo-
" logation as a separate defence, because he conceives
" it to be superseded hoc statu, by the failure of the
" pursuer to establish her own case. But undoubtedly,
" the acts from which homologation is inferred do
" throw a strong light on the real state of her mind
" and views, in reference to her own grounds of action.
" For they amount to this: that, at a period when it is
" nearly impossible to believe that she was in any

"ignorance of her rights, she deliberately enforced "what she held to be the meaning of this very con- "tract, and gained materially, at the expense of the "defender, by doing so. H. C."

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Mrs. Stewart reclaimed, but the Court (22 Nov. 1836) adhered, and of new found expenses due by the pursuer.

Judgment of Court, 22d Nov. 1836.

Mrs. Stewart appealed.

Appellant's Argument.

Appellant.—The real question at issue is, whether a deed or contract can be supported against a party who has subscribed it, though it should turn out that the party never truly consented to any such deed? In cases of fraud or deception, a deed is set aside solely because it is not the deed of the party, and because the apparent consent given by the act of subscription infers no true consent by the party so subscribing. And this principle, it will be found, applies as strongly to the present case as it can to any case where a deed has been executed under the influence of fraud or deception.

Upon the circumstances admitted or proved it was clear, that, by some unaccountable mistake, which has never been explained, the appellant, a stranger to the law of Scotland, was entirely misled and deceived as to her rights, even under that law. By the law of Scotland, a widow is entitled, on the death of her husband, leaving children, to claim, as her right, the third part of his personal estate, not the liferent of this third, as erroneously held out by Mr. Wardlaw, and also the terce, or third part of the rents, of any heritable property in which her husband has died infeft.

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Appellant's Argument.

It is not necessary to prove actual fraud, if it be an act which no person of sound mind, and not under delusion, could either have proposed or consented to under the agreement in question; she got nothing whatever for compromising her rights; the compromise gave her nothing to which she was not otherwise legally entitled. Relief is granted in such cases solely because the confidence of the party having been taken in by the fraud, her consent was never truly given to the transaction, notwithstanding any subscription, or other act, by which she might appear to have consented. In order to form a contract or transaction[1], there must, as the civilians define it, be "duorum pluriumve consensus, in idem placitum;" that is to say, there must be a true and genuine consent to the contract or transaction. The appellant is far from maintaining that where the nature of the contract has been correctly explained, it is necessary that the parties should be fully aware of all its consequences, or even of all its legal effects. It is quite conceivable that two parties may enter into a transaction or agreement in utter ignorance of their rights, and upon this very footing; and in that case the transaction or agreement may be binding upon both, whatever knowledge they may afterwards come to acquire. But suppose the one party, while he affected ignorance of the facts, was perfectly aware how they stood, will it be maintained that the other party, upon discovering this, and ascertaining how much he had been imposed upon, would be bound by the agreement? The concealment in this case might be held equivalent to fraud; but, in truth, the only

[1] Dig. lib. 2. tit. 14.

legal ground for setting aside such an agreement is, that both parties did not stand upon an equal footing. The principle is the same, if, by any misrepresentation or concealment, the consent of the party is obtained to an agreement to which he would not otherwise have assented. In such cases, it is immaterial whether the misrepresentation has originated from fraud or from gross error. It is, in this sense, that the maxim of the civil law, "culpa lata dolo equiparatur," is to be understood.[1] It is the same in its consequences or effects. It equally takes in the confidence of the party who is imposed upon, and produces an apparent consent to an act to which no true consent is given.

It was not because the appellant did not foresee all the consequences and results of this agreement that she now sought to set it aside, but it was because it is altogether a different agreement from what it was represented to be; and an agreement of course to which she never gave her consent. She consented to enter into this agreement upon receiving what was represented to be at least the double of what she could have claimed by the law of Scotland, as the widow of her late husband, but it now appears that this was a gross misrepresentation, and that she gets less by the agreement than she was entitled to claim by the law of Scotland in her own right as the widow of Mr. Stewart.

The Court treated the agreement in question as a transaction which, however unfair or unreasonable, could not be opened up, entirely overlooking that it was a transaction to which the appellant had never truly given her consent. In England relief has been given

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[1] Respecting the maxim "Culpa lata," &c. see Bell's Digest, voce Culpa lata, and authorities there cited.

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Appellant's Argument.

in circumstances which seemed far less to require it. Thus, in Gordon v. Gordon[1], it was held by Lord Eldon[2] that a party was entitled to relief against an agreement, "on the principle that, though family agreements are "to be supported where there is no fraud or mistake "on either side, or none to which the other party is "accessory, yet where there is mistake, though inno-"cent, and the other party is accessory to it, this "Court will interpose." And in the case of Murray v. Palmer[3], Lord Redesdale set aside a "conveyance "obtained from a woman in ignorance of her rights, "and upon misrepresentation of the circumstances of "the property, although she was of full age, and "acquiesced in the sale, and received the interest of "the purchase money for twelve years, and although "she consulted with her friends and had their assent, "they being in equal ignorance with herself." It had been said, that in the present case there is no actual fraud alleged, however gross and inexcusable the misrepresentation might be, under which the appellant was made to act. This perhaps might admit of doubt, if fraud, as Lord Hardwicke[4] has said, may not only "be actual, arising from facts and circumstances "of imposition, which is the plainest case," but also may be "apparent from the intrinsic nature and sub-"ject of the bargain itself, such as no man in his "senses and not under delusion would make, on the "one hand, and as no honest and fair man would "accept on the other." Besides, upon the face of the agreement in question, and independently of all the written evidence by which the misrepresentation and

[1] 3 Swanston, 400. [2] Ibid. 467. [3] 2 Schoale and Lefroy, 474.
[4] Earl of Chesterfield v Janseen, 2 Vesey sen. 155.

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concealment practised upon the appellant are established, the deed bears such plain and intrinsic proofs of imposition, as to shew that it could not have been entered into, except under the influence of delusion, or by a person not capable of understanding her rights.

Respondents
Argument.

Respondents.—The averment of the appellant, that she entered into the agreement in question in ignorance of the fact now averred for setting it aside is not supported, but is, on the contrary, refuted by the evidence, while the error alleged to have been committed in point of law in arranging the terms of the agreement, is neither manifest, nor, although it were, is it a reason for disturbing the agreement, without evidence that it was caused by the fraud or fault of the respondent. Dixon[1] v. Monkland Canal Company, 17 Sept. 1831. The evidence in the cause establishes her knowledge of her husband's will.

If the contract or agreement be viewed as a "transaction," by which each gave up to the other part of what the law might have given them had they resorted to it, the appellant's grounds of reduction are still more untenable. The deed of agreement set forth the doubts and conflicting opinions entertained "by different eminent counsel at the Scottish bar"—that "a trial at law of the very intricate questions arising thereon must be attended with very great delay, expense, and uncertainty. Therefore (it proceeds), and with a view to avoid litigation, and being mutually disposedto an amicable arrangement, we, the parties above named, the widow and next kin of the said

[1] 5 W. & S. App. 445.

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"F. C. Stewart, have mutually consented, resolved, and "agreed," &c. It might be proper to state the general result of the agreement as it affected the rights of parties involved in the different questions which it compromised and set at rest. On the one hand, the respondent gave up, 1st, his claim under the original agreement made with his brother, the appellant's husband, in July 1815, whereby the respondent was entitled to one fourth part of the rents or profits of the whole estates during his brother's possession; 2dly, his claim under the bond of provision made in his favour by his brother in May 1827; 3dly, his right to challenge, on the head of deathbed, the sale to Mr. Malcolm of the entailed lands of Kilmichael, at the price of 36,365*l.*, which had been sold by his brother's commissioners within sixty days of his death; and, 4thly, any right which he might have had to challenge the previous sale, which had been made while his brother was an alien, before he obtained his act of naturalization. On the other hand, the appellant gave up the provisions in her favour, contained in the bonds or trust-deed of settlement executed by her husband; as also all claim to dower, jointure, annuity, terce of lands, third or half of moveables, through the decease of her husband, or his daughters, or either of them; but she did not give up her right to the estate of her husband, situated in America, under his will in her favour.

The principles of law applicable to such a transaction are very clearly laid down in Stair's Institute.[1]

It was held in the case of M'Allister[2], by the House of Lords (affirming the judgment of the Court of Ses-

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[1] B. i. tit. 7. sec. 9.; and b. i. tit. 17. s. 2.

[2] M'Allister v. M'Allister, June 23, 1830; 4 Wilson and Shaw, 142.

Respondents Argument.

sion), "that a decree pronounced in reference to a "question of English law, on the motion of the party "challenging it, constituted res judicata; although he "alleged he had acted under erroneous information as "to the law of England." In that case there was what there is wanting here, clear and indisputable evidence that the party was misinformed as to the law, and did, upon the information thus given him, and upon it alone, give up a valuable succession. Still he was held bound by the contraction or transaction he had made. The Lord Chancellor observed, "If you choose to act upon "the opinion of your agent, and not to examine evidence, "you cannot say, after the judgment is pronounced, "that you have now got evidence which you did not "formerly produce." The mere circumstance in this case that the party who was her confidential agent and friend, and upon whose information the appellant says she relied, had acted as agent for the respondent in making up his titles, &c., does not appear at all to affect the decision in the above case as applicable to the present. The appellant knew that Mr. Wardlaw had so acted, and if she had had any suspicion that he would from that cause betray her interest, she might, if she did not actually do so, have taken other advice, as Mr. Wardlaw recommended. But she had no reason to distrust him. He had ever manifested a very strong and sincere regard for the interest of the appellant and her family. The respondent might, under the circumstances, have been excused had he entertained some suspicion that Mr. Wardlaw might incline to favour, if he could, the appellant in the transaction, considering that he had, in maintaining Mr. Stewart's rights to sell the

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estates, acted in direct hostility to the interests of the respondent; and that the respondent was, in truth, confiding in the appellant's agent as his adviser, when, on being invited to join in the agreement, as proposed by him, and as its terms were arranged by him, he consented to do so.

The case of Hope v. Dickson, (17th December 1833, 12 S., D., & B., 222.) founded on by the appellant, does not apply, as there were special circumstances which do not exist here.

There is evidence that the appellant, before concluding the agreement in question, was aware of all the facts now averred by her for setting it aside, and therefore there is no ground for questioning it, so far as depending on ignorance of fact; and in so far as it is attempted to disturb the agreement, on the ground of ignorantia juris, while it is by no means obvious that she ever had the rights which she says were unduly compromised by the agreement, it is submitted that the ground is insufficient, without evidence that the respondent misinformed her of her rights, or, by other unfair means, induced her to enter into the agreement, of which there is no evidence, or even an averment.

Ld. Chancellor's Speech.

LORD CHANCELLOR: — The object of this suit was to reduce and set aside a deed or agreement signed by the pursuer on the 12th February 1831 by which she and the defender, the brother, and Mrs. Tennent, the sister of the pursuer's late husband, entered into an arrangement as to various matters of dispute which had arisen between them respecting the property of the pursuer's late husband.

A new arrangement having been made between the pursuer and Mrs. Tennent, the present contest is only with Ferdinand, her late husband's brother.

The summons states three grounds for the relief prayed; first, an objection in form, which has not been relied upon; secondly, that she was induced to sign the agreement in ignorance of her rights, being misled by the person who acted at the same time as her agent and as agent for the other parties; thirdly, that she was at the time ignorant of the existence of a will executed by the husband by which he gave to her all his personal property, or at least that the effect of the will was overlooked by her, and that the deed or agreement proceeded upon the footing that no such will existed.

It is important to examine the facts recited in the deed in question, and then, by comparing them with the facts proved, to consider how far they were, by misrepresentation or omission, inconsistent with the truth. The deed states the succession in 1815 of Frederick, the appellant's husband, to certain entailed estates in Scotland, and that it being uncertain whether he (then residing in and a native of the United States) or his uncle or the defender were entitled, they had agreed that the party in possession should pay to each of the others one fourth of the income during his own life, and during such time as his widow might receive dower: that Frederick, who possessed the estates, had not paid any thing to the defender under their agreement: that Frederick, being advised that the entail was not effectual, instituted a suit in the Court of Session against the heirs of entail, and in 1827 obtained an interlocutor declaring that he might sell the estates, but that he was bound to reinvest the purchase money: that he appealed to the House of Lords, but died

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before the appeal was determined: that Frederick in 1824 sold part of the estates, and in 1827 the other part, and died on the 26th May 1827, and that an action had been brought by the purchaser of part of the estate to have his title confirmed or for repayment of the purchase money, which was still depending, and that it had been determined by the House of Lords that there was no obligation to reinvest the purchase money of the estates, and consequently that the price must be considered as falling under a certain trust deed of settlement before recited; namely, the deeds recited being first a mortis causâ deed by Frederick, securing under the powers of the entail 1,000*l.* to Mary, his only child by his first marriage; secondly, heritable bonds securing to the appellant 100*l.* per annum, but which are stated to have been renounced by her; thirdly, a bond of provision securing to his children with the former provision all he could by law charge upon the estate,—that is, for one child, one year's rent, to three or more, three years rent; fourthly, a bond of annuity and provision securing to his wife 800*l.* per annum; fifthly, making certain provisions for his mother and sister in the event of his being found to have dominion over the purchase money; and lastly, a trust deed of settlement, whereby he gave and disposed his whole heritable estate and effects in Great Britain to trustees, of whom Mr. Wardlaw was one, and whom he appointed his executor upon trust to pay his debts and legacies, and then one third of the income to his wife for life, the other annuity to be taken in part, and to pay over and divide the residue amongst his children, to be paid at twenty-one or on marriage; that he left only two children, Mary by his first marriage, who died in 1827, and Letitia by the appellant, who died 6th August

1829; and that it was uncertain, owing to various circumstances, upon whom had devolved the right of succession to the prices of the said lands so far as unconsumed, and to the other personal estate left by him and his daughters; and that conflicting opinions were entertained on the point by different eminent counsel at the Scottish bar; and that a trial at law of the very intricate questions arising thereon must be attended with very great delay, expense, and uncertainty.

Therefore, the parties agree that the free proceeds of the whole estate and effects left by Frederick and his daughters in Great Britain or elsewhere in Europe, other than the entailed estates, should be equally divided between the appellant the widow, the respondent the brother, and Mrs. Tennent the sister; but it was agreed that this arrangement should not extend to any part of the entailed estates unsold or ineffectually disposed of at the time of Frederick's death, nor to any estate, property, or effects of him or of his daughters in America, the appellant taking such one third in full of all other demands in right of her husband or of his daughters, and the respondent taking his one third in full of his claim under the agreement with Frederick in America, and all declaring that any testament which Frederick had executed, if any such there be, in reference to his property in America, should take effect without being affected by the agreement.

It is to be observed that there is no inaccuracy, in point of fact, in the statement in this deed which could have misled the pursuer, of the two points relied upon by the pursuer, namely, the will of Frederick disposing of his personal estate, and the widow's title to the jus relictæ. The existence of a will is referred to as affecting property in America, and the share of the widow

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under the agreement is expressed to be in full of dower, jointure, annuity, terce of lands, third of half or moveables, and every thing else which she could ask or claim through the decease of her husband or his said daughters, or either of them, in any manner of way.

It is, however, contended that the pursuer entered into this arrangement in ignorance of her rights upon both these grounds, which rights, it is said, were such that if they had been understood by her would have prevented her from acceding to the terms, as she only had secured to her what she was at all events entitled to, and that she thereby simply renounced all chance of a favourable decision in her favour upon the points really in doubt.

It is necessary to examine accurately the evidence in the cause as to these two points before the application of the principles of law to the case can be usefully considered.

In the first place it is to be observed, that there is not the slightest ground for imputing any fraud, procurement, or misrepresentation on the part of Professor Stewart, the other party to the negotiation. Indeed no attempt was made to rest the pursuer's case upon any conduct of his. Mr. Wardlaw must, I think, be considered as acting for both parties as he corresponded with both upon the proposed compromise, and before it was concluded, was in fact agent for both, and it is upon his conduct that the pursuer principally relies. After carefully examining all the documents in evidence I have no difficulty in concurring in the opinion expressed by all the Judges below that there is no ground for imputing any improper motive to Mr. Wardlaw, or of any intention to favour the respondent at the expense of the appellant. There are indeed but two circum-

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stances upon which any argument in support of such a supposition can be founded. The first is his letter of 2d October 1830 observed upon by Lord Medwyn [1], and the other is the fact that Professor Stewart consulted other counsel before he signed the agreement by which it is inferred that he had obtained information upon the rights of the parties which the appellant had not. As to the latter, I do not find it in evidence what this advice was; and as the appellant had seen the opinion of Mr. (now Lord) Jeffrey and of Mr. Rutherfurd, now Lord Advocate, upon the whole case, in which the will is brought under notice, I cannot think the fact of another opinion having been taken by Professor Stewart of any importance. As to the expression in the letter of 2d October 1830, "Mrs. C. Stewart has never written "to me withdrawing her consent, although the decision "in the House of Peers has given the case a better "aspect in her favour;" it does not appear why that decision should have induced her to withdraw her consent. If indeed the decision had been the other way, there would not have been any thing upon which the agreement could operate; but as the proposition was made in contemplation of such a decision, there seems no reason why either party should upon its taking place wish to withdraw from it.

I must therefore assume, because such I think to be the result of the evidence, that Mr. Wardlaw acted fairly, honestly, and to the best of his judgment in concluding the arrangement complained of, and that the pursuer's case must stand upon an imputed error in law of the common agent of all parties [2].

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[1] See Appendix to appellant's case, p. 63.

[2] *Lord Glenlee.*—"It was a very poor compliment to the agent to say "he had acted blamelessly. I have read the papers with a desire, if

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Of the principal question which existed between the parties it is not necessary to say much; I mean that of the domicile of Frederick, the appellant's husband. The circumstances created a serious difficulty. The facts were honestly and I think fairly stated for the opinion of two very eminent lawyers in Scotland. They thought the case doubtful, and recommended a compromise [1]; and if the provision of the property had taken place upon the principle of the chances of success being equal to both parties, upon that question there could have been no pretence for impeaching the arrangement.

Upon the question of the will I have felt no difficulty. No doubt the terms used are general enough taken by themselves to pass personal property of every description, but it is equally clear that such was not the testator's intention. By his bonds of provision in favour of his wife and children, and by the trust disposition, he had disposed of all he could dispose of in Great Britain. He then made the will, giving his personal estate to his wife, but referring to no subject matter except what was American; and next executed bonds in favour of his brother and sister burdening his Scotch estates, and by a holograph writ found by his widow with the trust disposition and will, he directs the will to be sent to America, and mentions the trust disposition as disposing of the property in Scotland. This will the appellant had during the whole negotiation in her possession, and it does not appear that Mr. Wardlaw had any knowledge of it; indeed the appellant's

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"possible, to discover a fault, but so far have I been from doing so "that I think it right to say that he acted a most friendly and judicious "part throughout."—*Rep. in F. C.*

[1] See opinion of counsel, antea, p. 402.

letter of 17th March 1832 admits that he had not, but the agreement of compromise refers to it as applying to American property only. On 24th December the appellant having objected to the division of the funds under the agreement, demanded 1,000*l.* more from the respondent, stating that she was desirous of completing the agreement, but that she would not complete it on any other terms; and on 21st January 1832 she gave a receipt for 1,000*l.* to the respondent, which stated that it was paid in terms of the proposal contained in her letter of 24th December, and agreed to by his letter of 20th April, although she had before that time made a claim to all the property upon the expression used in the will, as appears by her letter of 17th March 1832.

Under these circumstances, it is not matter of surprise that the appellant did not in the first instance claim the property in Scotland under this will, or that having at last set up such claim, she abandoned it, and agreed to confirm the agreement without reference to it. Clearly, after this, there can be no question of impeaching the compromise upon any supposed title of the appellant to the property in Scotland under the will.

The only question of any difficulty remains to be considered, namely, the right of the appellant upon her husband's death to repudiate the provisions he had made for her, and to claim her jus relictæ. As to this the facts, as I collect them from the very numerous documents in the case, are as follow.

At the time of the death of the appellant's husband he had sold most, but not all, his entailed estates. The Court of Session had declared that he had a right so to do, but that he was bound to reinvest the purchase monies; against which latter declaration he had ap-

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pealed to the House of Lords, which appeal was then pending. In the disposition of his property he had provided for either event. If the judgment was to be affirmed, and the property therefore was to pass to the heirs of entail, he had, to the extent of his powers, charged upon the estate provision for his wife and daughters, and by the trust disposition he had, in the event of that judgment being reversed, given to his wife a life income in one third, and the residue equally between his daughters. In the one case it is stated that the widow's income would be 600*l.* per annum, and in the other 800*l.*; but in neither, according to his disposition, would she have any power over any part of the capital.

It is quite clear that pending the appeal to the House of Lords she could not repudiate the provisions and claim the jus relictæ, because in the event of the judgment being affirmed there would be no fund upon which it could operate; and if she had been apprised of her right to elect, it is hardly to be supposed that she would have exercised it as against her own daughter, and her daughter-in-law; it appears in fact that she did take the benefit of the provisions; indeed the receipt she gave to the respondent on the 21st January 1832 was expressed to be on account of the annuity payable to her from the estate of her husband to February 1831, the date of the agreement by which she in terms renounced all the provisions made for her by her husband, the jointure, dower, terce of lands, half or third of moveables, and every thing else which she could ask or claim through the decease of her husband or his daughters, or either of them, any manner of way. But this acceptance of his provision, and this renunciation of her rights as widow, ought not, it is said, to prejudice her; but that the compromise ought to be

set aside because she was ignorant of her right to repudiate the provisions and to claim the jus relictæ; and notwithstanding some passages in her letters which were relied upon to prove the contrary, I think that the fair result of the evidence, unless she had for some reason abandoned it, is, that she was not aware of her having any such right, and that the agreement was concluded upon the supposition that her only title against her husband's property was to the provisions he had made for her. I think it equally clear that such was the impression upon Mr. Wardlaw's mind, for such were his representations both to the appellant and to the respondent. But whether this arose from any misapprehension of the rule of law, or from his knowledge of any act of hers amounting to or regulating her election, does not appear.

It is to be observed that in the memorial or case submitted to Mr. Jeffrey and Mr. Rutherfurd the facts material to raise this question are fully and fairly stated; and the sixth question put is, Whether Mr. Stewart's widow was entitled to any share of the succession? to which the answer was, "On the supposition of the laws of Scotland regulating the succession of Mrs. Stewart and her children, in which view alone this question is of importance, we are of opinion that the widow has no right whatever to any part of the funds, except in so far as she claims her share of the goods in communion or under Mr. Stewart's trust deed."

The opinion was sent to the appellant in a letter from Mr. Wardlaw, dated 6th April 1830, in which he tells her, that from the opinion she will find that if the law of Scotland is to be the rule she would get none of the money except the annuity for life; whereas, by the pro-

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posed division into three parts, she would have 20,000*l.*, which would leave an income of about 800*l.* per annum, and the capital at her disposal.

This certainly does not accurately represent the opinion it purports to explain, unless he knew of facts excluding her election; and if he did not it is to me evident that this inaccuracy was unintentional. Indeed it appears that Mr. Wardlaw submitted a draft of the agreement to the same counsel, in which Mr. Stewart, in consideration of the one third of the proceeds of the sales, renounces all other claims; and in the letter to Mr. Rutherfurd which accompanied it represents it as in conformity to the advice they had given, and desires him to approve the draft if thought applicable to the circumstances. The draft was approved, and this reference being had to this letter was not incorrectly represented in Mr. Wardlaw's letter of 3d December as a recommendation of the measure, which was much observed upon as giving a character to the approval of the draft which did not belong to it.

Now this draft stated all the facts upon which the appellant's right to claim the jus relictæ depends. The inadequacy of the consideration now relied upon, regard being had to such right was as much submitted to the consideration of those very eminent counsel as it could have been to Mr. Wardlaw; but they approved of the draft, which they were only to do if they thought it applicable to the circumstances, and thereby may be supposed to have approved of the proposed terms of compromise without again raising or suggesting the point upon which it is now sought to be set aside. In fact, beyond what is suggested in the opinion of 3d April 1830, the point does not appear to have occurred to any of the parties; and the question is,

whether a compromise and arrangement fairly and honestly entered into, in which the party now complaining acted under the advice of a professional adviser, who called to his assistance two of the most distinguished counsel of the Scotch bar, is to be set aside, because a point was overlooked in that party's case, which, if thought of at the time, might have prevented her from agreeing to the terms proposed, as it might have made a very material difference in the relative situation of the parties.

It must not, however, be assumed she only got what she must at all events have been entitled to, because had she at that time repudiated the provision made for her by her husband, and claimed the jus relictæ, the benefit she would have taken would have been subject to reduction from some of the circumstances alluded to by the respondents counsel; but to those I think it unnecessary to advert, because as the difference between what she was supposed to be entitled to, and what she might have derived, was, even after such deductions, considerable. The principle how far such an oversight will entitle a party to have the whole arrangement rescinded, may be considered without ascertaining the precise extent of the loss it may be supposed to have occasioned. If, indeed, it had appeared that the respondent had, upon the faith of this compromise, abandoned a case which otherwise he might have prosecuted against a purchaser, of setting aside the sale upon the ground of deathbed, an answer would at once have been given to the pursuer's case, as it would be impossible to restore the respondent to his original situation. The estate in question is not indeed enumerated in the exception in the agreement; but the exception applies to all other parts of the estate ineffectually disposed of,

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which it would seem must include a sale reducible upon the ground of deathbed. I do not therefore rely upon that as a material circumstance, but proceed to consider the rule of law in this country and in Scotland, with reference to the alleged error or omission in the legal advice under which the appellant was acting, when she executed the deed of compromise and arrangement; and in doing this it must be kept in mind, that the mistake is upon a point of law only, and that not of foreign but of Scotch law. All the facts raising the point of law were fully known to all the parties; and the point of law, mistaken or not, attended to was, that the pursuer was entitled to repudiate the provisions made for her by her deceased husband, and to claim the jus relictæ; whereas the negotiation and the compromise proceeded upon the supposition, that if the law of Scotland was to prevail, she could only claim the benefit of those provisions.

The English authorities (though in the result altogether they appear to me to establish a sufficiently clear principle,) are not all consistent. One of the earliest is Frank v. Frank in 1 Chancery Cases, 84. It must be assumed that the fraud there alleged was not proved; but there being no proof of the recovery, the eldest brother had given up the freehold lands to the younger without consideration, upon a misapprehension of fact. But yet the Court denied him any relief, upon the ground that modus et conventio vincunt legem. Cann v. Cann, in 1 Peere Williams, 723, though often quoted upon this subject, and though valuable as recognizing the doctrine, is not for the fact of it of much importance, because the party seeking to be relieved from the agreement of compromise failed to prove that he had been injured by it.

Lansdown v. Lansdown, in Mosely[1], p. 364, and also referred to in a note in 2 Jacob and Walker, 205, from the register's book, is a very strong case of setting aside a compromise, and a conveyance in pursuance of it; but it is impossible to ascertain the facts. It appears that fraud was alleged against the younger brother, and Hughes, who had advised upon the rights of the two, was made a defendant, which could only have been upon an imputation of fraud; and in Mosely it is said, that the Lord Chancellor's decree proceeded upon the ground of the deeds "being obtained by mistake "and misrepresentation;" but Mr. Jacob's extract from the register's book, no doubt correct, states the ground to be the deeds being "obtained by a mistake "and misrepresentation of the law." It is, however, to be observed, that in Mosely the eldest son is reported to have said, that he would rather divide the estate than go to law, though he had the right; and that the Court is represented to have said, that the maxim that ignorantia juris non excusat did not hold in civil cases, which it will be seen has not been a doctrine recognized in modern cases. In Stapilton v. Stapilton, 1 Atkyns, p. 2, Henry, the eldest son, being illegitimate, Philip, the second son, received no consideration for the arrangement by which the estates, of which Philip was tenant in tail, subject to his father's life, were divided between them; but Lord Hardwicke[2] approving the doctrine of Lord Macclesfield[3] in Cann v. Cann, that "an "agreement, entered into upon a supposition of a right "or of a doubtful right, though it after comes out that "the right was on the other side, shall be binding; "and the right shall not prevail against the agreement

[1] Case 190. [2] 1 Atky. 10. [3] 1 P. Wms. 727.

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" of the parties, for the right must always be on one " side or the other; and therefore the compromise of " a doubtful right is a sufficient foundation for an " agreement," and he therefore maintained the arrangement, and decreed a performance of what remained to be done to carry it into effect.

In Pullen v. Ready, 2 Atkyns, p. 587, there was an agreement to divide property between brothers and sisters, upon the assumption that all were entitled under a will; and the fact that one of them had married without consent, which was by the will made a ground of forfeiture, did not appear to have been adverted to. Lord Hardwicke enforced the agreement, and, with reference to the argument, that although the marriage having been without consent must have been known to all the parties, yet that the consequences in law might not, observed[1], " If parties are entering into an agree- " ment, and the very will out of which the forfeiture " arose is lying before them and their counsel, while " the drafts are preparing, the parties shall be sup- " posed to be acquainted with the consequences of law " as to this point, and not be relieved under a pretence " of being surprised with such strong circumstances " attending it."

Bingham v. Bingham, 1 Ves. sen., 126, was not a case of compromise, but of a sale by the defendant to the plaintiff of an estate which was already his, and a return of the purchase money was decreed at the rolls, upon the ground of mistake. This case does not bear, therefore, directly upon the present. If it were necessary to consider the principle of that decree, it might not be easy to distinguish that case from any other pur-

[1] 2 Atky. 591.

chase in which the vendor turns out to have had no title. In both there is mistake, and the effect of it in both is, that the vendor receives, and purchaser pays money, without the intended equivalent. In Gibbons v. Caunt, 4 Vesey, 839, Lord Alvanley, speaking of agreements of compromise, says [1], " If parties will, with " full knowledge" "of the doubts and difficulties" " as " to their rights," act upon them, though it turns out " that one gains a great advantage, if the agreement was " fair and reasonable at the time, it shall be binding. " There was a case before the Lord Chancellor, who " spoke to me upon it, in which it was held that the " Court will enforce such an agreement, though it " turns out that the parties were mistaken in point of " law, even supposing counsel's opinion was wrong."

Bilbie v. Lumley, 2. East, p. 469, is directly opposed to the doctrine upon which Lansdowne v. Lansdowne is stated in Mosely to have been decided, for it was held that money paid by one, with full knowledge or the means of knowledge in his hands of all the circumstances, cannot be recovered back again on account of such payment having been made under an ignorance of the law.

In Leonard v. Leonard, 2 Ball and Beattie, p. 171, Lord Manners, and, in Stockley v. Stockley [2], Lord Eldon, recognized the rule of equity as to agreements by way of compromise, particularly in family arrangements. In Dunnage v. White, 1 Swanston, p. 137, Sir Thomas Plumer refused to carry into effect an arrangement by way of compromise, but the circumstances were very peculiar. The parties had dealt with property which had belonged to the children, and over

[1] 4 Ves. p. 848. [2] 1 Ves. & Bea. 23.

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which they had no power, and the state of mind of one of the parties was relied upon in the judgment.

Gordon v. Gordon, in 3 Swanston, p. 477, proceeded upon a fraudulent suppression; but Lord Eldon fully recognized the rule, holding, that where there is good faith, honest intention, and full disclosure, if the members of a family will arrange their rights amongst themselves, their agreement will not be disturbed; because it is founded upon a supposition which imputes the character of legitimacy to the illegitimate, or illegitimacy to the legitimate.

In the third volume of Mr. Burge's excellent work[1], Commentaries on Colonial and Foreign Laws, p. 742, the authorities quoted from the civil law prove the recognition by that law of a similar principle. He draws this conclusion from them. Hence it is no ground for recalling the payment made under the compromise, that there was no cause for the compromise, and that nothing was owing. And again, the inadequacy of the benefit which the party may receive from the compromise, even though it should amount to læsio enormis, would not afford a ground for setting it aside, unless there had been fraud. It has indeed been said in some of the English cases, and particularly by Lord Alvanley, in Gibbons v. Caunt, 4 Vesey, 849, that the parties must be aware of the claims which are to be the subject of the compromise, and that they must act with full knowledge of all the doubts and difficulties that arise.

It is not necessary for the purposes of this case to inquire how far that exception to the general rule can

[1] Commentaries on Colonial and Foreign Laws generally, and in their Conflict with each other, and with the Law of England, by W. Burge, Esq., Q. C., 4 vols. Lond. 1838.

be supported, or how it is reconcilable with the principle, that mistake as to the law will not invalidate a compromise, because the claim of the widow to her share of the goods in communion is expressly pointed out to her, in the opinion of Mr. Jeffrey and Mr. Rutherfurd; and although it may well be supposed that she had not herself sufficient knowledge of the law of Scotland to understand the meaning of the terms used, they must be supposed to have been fully understood by her legal adviser, Mr. Wardlaw. It is true that he does not in his correspondence call her attention to this claim; and, he being dead, it is now impossible to ascertain from what cause this proceeded, whether because she had before elected not to make such claim, or from inattention on his part; nor is it material, because, in the absence of all evidence of fraud on the part of the agent, the client must be bound by his acts, and affected by the information he received. If it were necessary to show knowledge in the principal, and a distinct understanding of all the rights and interests affected by the complicated arrangements which are constantly taking place in families, very few, if any, could be supported.

That the laws of Scotland adopt the same principle as the laws of England upon this subject is proved by the passages quoted from Lord Stair's Institutes, b. 1. tit. 7. s. 9., and tit. 17. s. 2., and from the cases of Macalister v. Macalister, in 1830, 4 Wilson and Shaw, 142, and Dixon v. Monkland Canal Company, 5 Wilson and Shaw, 445, to which is opposed the single case of Hope v. Dickson, 1833, in 12 Shaw and Dunlop, 222, which was a case of homologation, and not of compromise.

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These authorities, indeed, prove that the principle is the same in the law of Scotland as in the law of England, and in the civil law; but as the instances in which it has been the subject of decision are comparatively few in Scotland, and as it has so frequently been the subject of adjudication by judges of the highest authority in this country, I have thought that it might be useful to bring together the principal cases in which it has been recognized and enforced in this country. The result is, that, in my opinion, the appellant has failed to establish any case of fraud or improper conduct in her agent, and that the points of law relied upon do not entitle her to be relieved from the arrangement she has entered into.

The interlocutor appealed from must therefore be affirmed, with costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is also further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

SPOTTISWOODE and ROBERTSON—ALEXANDER DOBIE, Solicitors.