as a set-off against a claim for rent, but what difficulty there is results from leases very generally stipulating for things to be done during their currency, and the question arises whether the omission by the landlord to perform one of his obligations under the lease and the damage resulting from it can be pleaded as a counter-claim to be recovered by retention of the rent? Speaking generally, my view is that such questions under the contract of lease, whether it be constituted in writing or by verbal agreement, are to be dealt with on the same principles as are applied with regard to the rights of parties under other contracts. These are dealt with in a number of leading cases, which, though dealing with questions of mercantile law, are full of instruction as to this class of case. The general rule, if no rule is laid down on the subject by the contract, is, that the question whether the two obligations are mutual is to be determined by the written terms of the contract generally and the surrounding circumstances.

Coming to the class of cases which deal with leases, there are certain obligations of the landlords the breach of which is held to afford a claim of set-off against a claim for rent—for example, if the landlord withhold the subject or a material part of it; but I am not prepared to say that that is the only breach of obligation which can be set off against a claim for rent. In written leases it is convenient and proper that the Court should, by reading the lease and hearing argument, determine without proof, whether the two obligations mutually condition one another so as to give rise to a right of set-off the one against the other. But when the lease is not in writing it is extremely difficult to decide that, and the whole conditions must be taken into account in determining the question.

In the present case we cannot come to a decision till the whole contract is before us, and the Sheriff was, I think, right in allowing a proof before answer. After the proof it will be for the Judge who has to consider the evidence to determine, 1st, whether the obligation here set forth was part of the contract; and, 2nd, whether, taking all the circumstances into consideration, it was a condition-precedent to the right to demand rent, and having decided these points he will give his decision accordingly.

The Court refused the appeal, and remitted to the Sheriff to proceed with the case.

Counsel for the Pursuer—Low, Salvesen. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Defender and Respondent—C. S. Dickson—Craigie. Agents—Gill & Pringle, W.S.

Tuesday, June 10.

SECOND DIVISION.

[Lord Trayner, Ordinary.

MENZIES *v.* MENZIES AND OTHERS.

Reduction—Essential Error—Undue Influence — Misrepresentation and Concealment — Inadequacy of Consideration—Motion to Amend Record.

The only son of an heir of entail in possession of estates worth about £300,000, who upon his father's death would have been entitled to acquire the estates in fee-simple, brought an action against his father for reduction of an agreement entered into between them and of the deeds following thereon, whereby, in consideration of his annual income being increased from £600 to £900 a-year and his debts—amounting to £6000—being paid, the son agreed to the estates being re-settled upon trust for his father in liferent, himself in liferent allenarly, and the heir-male of his body in fee, whom failing the heir of the barony of M. in fee. The son had on several previous occasions applied to his father and received help out of pecuniary difficulties, but before this agreement was entered into his father had declined to treat with him or save him from impending bankruptcy proceedings except upon the condition of a re-settlement of the estates.

The pursuer averred that he had entered into the agreement under the undue influence of his father and of his agent, who had professed to act as his own legal adviser, and in essential error induced by that agent, who in his father's interests had misrepresented to him that this arrangement was the only alternative to ruin, had concealed from him that he could have borrowed the money from any respectable insurance company by means of a *post-obit* bond without either his father's consent or the surrender of his rights of succession, and that he had thus been led to accept a grossly inadequate consideration. *Held* that the pursuer's averments were irrelevant (*diss.* Lord Rutherfurd Clark, who thought a proof should be allowed).

Motion to Amend Record.

A motion made at the close of the third speech by the pursuer's counsel for an adjournment to enable him to consider the advisability of amending the record *refused* (*diss.* Lord Rutherfurd Clark).

Neil James Menzies, Captain in the Scots Guards, residing in London, only son of Sir Robert Menzies, Bart., of Menzies, in the county of Perth, brought an action against Fletcher Norton Menzies, secretary of the Highland and Agricultural Society, Scotland, Albert Butter, manager, Union Bank of Scotland (Limited), Perth, and James Auldjo Jamieson, W.S., Edinburgh, trustees acting under certain deeds sought to

be reduced, and also against his father the said Sir Robert Menzies, for reduction of a minute of agreement entered into between him and his father, dated 22nd November and 10th December 1886, and of the deeds following thereupon.

By said agreement the pursuer, who was next heir-of-entail to family estates worth about £300,000, and who would upon his father's death have been entitled to acquire these estates in fee-simple, agreed, in consideration of his allowance being raised from £600 to £900 per annum, and of his debts—amounting to £6000—being paid off, that the estates should be re-settled in the hands of trustees upon the defender in liferent, whom failing upon the pursuer in liferent allenarly, and the heir-male of his body in fee, whom failing upon the heir of the Menzies barony in fee.

The pursuer was born in 1855, and entered the Scots Guards in 1874. His allowance at that date was £300 a-year, raised in 1876 to £420, in 1878 to £500, and in 1881 to £600. In 1876 he had incurred debts to the extent of £1200, which his father paid. In 1880 he consented that his father, who was anxious to obtain money for certain estate improvements, should burden the entailed estates with a sum of £25,000.

In 1881 he had incurred further debts amounting to £5000. By arrangement with his father the entailed estates were burdened with an additional sum of £45,000, out of which his debts were paid, and from the same source in 1884 he obtained £6000 to pay up a sum of £5500, borrowed from the Eagle Insurance Company in 1882 upon a *post-obit* bond.

In 1885 he was again in money difficulties and threatened with bankruptcy proceedings in England, and he accordingly once more applied for help to his father, who declined to treat with him except upon the footing of a re-settlement of the estates which would limit his (the son's) right of succession to a liferent. After lengthened negotiations Captain Menzies signed the agreement and subsequent deeds sought to be reduced in this action.

The pursuer averred that he had received a letter from Mr Jamieson, his father's agent, dated 18th June 1885, "in which, while stating that, failing some arrangement about his said debt, he saw 'nothing for it but ruin' to the pursuer, and that Sir Robert declined, at present at least, to do anything; he added, 'The only suggestion which occurs to me for extricating matters from their present most painful position is, that you and he should arrange to disentail the whole estates, and put them in trust, on the footing of paying these debts, making such terms as I best can with Mr Engle for taking a reduced amount for this bill, and making arrangements for paying you a certain annual sum, to be fixed during your father and your joint lives, and after his death for paying you the free income of the estate during your life, the fee to go to your eldest son, if you have one, or to the Baronet, whoever he may be. I write this letter to you without having Sir Robert's authority for this proposal, and merely with the object of ascertaining what your own views are upon the matter. Will you be so good as consider the matter carefully, and inform me what you think and would propose, for something must be done speedily in regard to these debts, otherwise I can only see one result, a result which I feel so anxious to prevent.'" That "Mr Jamieson, though he may have had no communication with the defender Sir Robert Menzies on the subject at the particular time in question, was well aware, from the tenor of previous communications betwixt Sir Robert and himself, that the defender Sir Robert Menzies was desirous of depriving the pursuer of the prospect of acquiring the estates in fee-simple. This he did not disclose to the pursuer." That "Mr Jamieson was and had long been the confidential adviser of Sir Robert Menzies and his family, and the pursuer, in the negotiations which followed, believed that Mr Jamieson was attending as faithfully to his interests as to his father's, trusted himself implicitly to him, relied upon his advice, and in consequence of that reliance refrained from employing an independent agent or adviser. The pursuer was induced to abstain from taking independent advice by the attitude assumed towards him throughout by Mr Jamieson." That "the pursuer has had little experience in business matters, and did not fully understand or appreciate the scope of the arrangement proposed by Mr Jamieson, or its bearing upon his valuable rights as expectant heir under the entails." That upon 26th May 1886 Mr Jamieson wrote as follows:—"It is necessary you should tell me your decision at once, because Mr Engle threatened to go on with the bankruptcy proceedings on Monday. I have got him to delay for one month on the ground that I am endeavouring to arrange matters, but if you do not agree I must tell him that he may proceed, as the arrangement has fallen through, and in that case your right to succeed to the estate will be sold by the trustee in the bankruptcy for a comparatively small sum, especially in these times, and then if you survive your father you would not succeed to the estates, but the purchaser of your succession would do so, and would be able to sell them out and out, as he would then acquire the right you possessed, were you to survive your father, of acquiring his estates in fee-simple." That "(Cond. 18) Throughout the transactions the pursuer was desirous of having his debts paid at as little sacrifice as possible to himself, and to that end he placed implicit reliance in the counsel and advice of Mr Jamieson, who repeatedly assured the pursuer of his anxiety to do everything in his power for pursuer's interests. The pursuer, however, entered into and carried through said transactions under an essential error, induced by Mr Jamieson. The financial scheme of Mr Jamieson was, upon all occasions when the pursuer consulted that gentleman, represented to him as the only possible means of extrication; and was so even when pursuer suggested insurance, or invited Mr Jamieson's views as to

whether money could be raised by other means than the one suggested by him. Nevertheless, Mr Jamieson knew, or as a business man ought to have known, or to have informed himself, that, as the pursuer has recently ascertained, and now avers, the pursuer's requirements could have been much more advantageously satisfied by means of a survivorship assurance. The sum of £6000 foresaid could have been raised in this way from any respectable insurance company in consideration of a bond for £11,442 over the estates, payable only in the event of the pursuer's survivance of Sir Robert Menzies, and an annuity of £300 upon the joint lives of the pursuer and Sir Robert Menzies for the additional sum of £4250, payable on the same contingency. Thus for a bond of £15,692 or thereby, payable in the event of Sir Robert's predecease, and without requiring any consent from him, the pursuer, if he had been fully and faithfully advised, would have obtained all the benefit he did receive in the above transactions for less money, and would, in addition, have saved his fee-simple right in the estates, and even had he purchased also the annuity of £600 which Sir Robert allowed him, the cost would only have been £8500 more, making the total sum £24,192 as against the sum of £22,700, with which the estates actually were burdened under the scheme conceived and carried out by Mr Jamieson. . . . It was the duty of Mr Jamieson, who was acting throughout as Sir Robert's agent, and who knew that the pursuer had no independent advice, and was entirely relying upon him, to have disclosed these facts to him, but he failed to do so. Had these facts been disclosed to him, the pursuer would not have entered into the agreement and others of which reduction is now sought. He was thus induced to enter into the said agreement and others by the misrepresentation and improper concealment of Mr Jamieson, and under the essential error induced thereby."

The pursuer pleaded—"(1) The pursuer having been induced to execute the said agreement and deeds of consent by misrepresentation and improper concealment, and by the exercise of undue influence, upon the part of the defender Sir Robert Menzies, and his agent Mr Jamieson, decree of reduction should be pronounced as concluded for. (2) The pursuer having executed said deeds under essential error, induced by the misrepresentation and concealment of the defender Sir Robert Menzies' agent Mr Jamieson, as condescended on, decree of reduction should be pronounced as concluded for. (3) In any view, the pursuer having executed said deeds under essential error, decree of reduction should be pronounced, as concluded for. (4) The said deeds having been improperly impetrated from the pursuer, in the circumstances above set forth, for a grossly inadequate consideration, and to the pursuer's great hurt, injury, and damage, decree of reduction should be pronounced as concluded for."

The defender stated that upon 26th October 1885 the pursuer had written to Mr Jamieson—"I am advised not to agree to the conditions mentioned in your proposal;" and that Mr Jamieson had fully and fairly explained to the pursuer the position of matters in the following letter dated 28th October 1885—"I never suggested that it was a proposal which gave you compensation to the full amount, or anything like it, for your consent to such an arrangement. But it is only when the heir in possession (your father in this case) asks his son's consent to a disentail that full compensation is given. If nothing is done, you, as things stand at present, if you succeed, can sell the estates, or burden them without any consent, and this your father can do nothing to prevent. But if you come to him, as, unfortunately, you are obliged to do, and ask him for money to pay your debts, and to give you a stated annual allowance, he is entitled to say, as he does say, that he will only agree to do so on certain terms, and I quite admit, and have stated to you, that these terms are, as you say, not fair to yourself, in the sense that they are not compensation for your consent to disentail, but they are the terms which your father requires, and if you do not agree, he can say, as I presume he will, that he does not agree to do anything. Do not, therefore, for a moment suppose or refer to my proposal as one which was fair, if you were making terms for the disentail, and I certainly never advised it; therefore, if you have, as you say, been advised not to agree to my terms, I can quite understand the propriety of the advice, but you must keep in view, and will, I hope, tell your adviser that it was not a question of fair terms of compensation, but a question as to the terms on which your father could agree to do anything. The proposal you suggest as to an insurance could be very easily effected if your father were to agree, but from what he said to me he will agree to no proposal which does not include as part of it a re-settlement of the estates, and your proposal as to the insurance leaves you with the same income as before (£600) for the future, and I thought you found that insufficient, and one great object I had in view was to give you an income from a source independent altogether of your father during his life."

And he pleaded, *inter alia*—"(2) The pursuer's statements are irrelevant."

The Lord Ordinary (TRAYNER) sustained the second plea-in-law for the defenders and dismissed the action.

"*Opinion.*—The pursuer seeks to reduce a number of writs specified in the conclusions of the summons, the most important of which is an agreement entered into between him and Sir Robert Menzies (his father), dated 22nd November and 10th December 1886. By that agreement the parties agreed that the family estates then held by Sir Robert, as heir in possession under an entail, should be disentailed, and thereafter conveyed to the other defenders in trust for Sir Robert in liferent, thereafter for the pursuer in liferent allenarly, and for the heirs-male of the body of the pur-

suer, whom failing the heir of the Menzies barony in fee.

"The immediate cause of that agreement being made was that the pursuer was in pecuniary difficulties of a very pressing kind, out of which his father refused to help him upon any other condition than a re-settlement of the family estates. The grounds on which the pursuer seeks to set aside that agreement are—(1) Essential error; (2) undue influence on the part of Sir Robert; and (3) misrepresentation and concealment on the part of Sir Robert or Mr Jamieson, his agent, or both.

"I think the pursuer's averments are not relevant, or sufficient to entitle him to an issue on the ground of essential error. According to his averments there is nothing in the agreement to which he did not consent; the agreement is precisely that which he made and intended to make, and its effect that which he knew it would be. The only error which he avers he was labouring under was that his purpose could have been attained by another mode, not involving a disentail of the estates, but that that mode of relieving himself of his difficulties was not known to him at the time of the execution of the agreement. This, however, is not error in regard to the agreement. The agreement, either as regards expression or effect, is not averred to be in any respect different from that which the pursuer understood it to be.

"The pursuer's averments are equally irrelevant in regard to the undue influence said to have been used by Sir Robert. No doubt Sir Robert took up the position (in my opinion a perfectly legitimate position) that he would do nothing to help the pursuer out of his embarrassments except on condition that the pursuer consented to a disentail and a re-settlement of the estates. But he left the pursuer free to choose whether he would consent to be helped on that condition. There was not, so far as the pursuer's averments go, any effort made to influence his choice. Nor can I see any averment to the effect that Sir Robert made any misrepresentation to the pursuer, or concealed anything which he was under any duty to disclose. It is not said that Sir Robert knew of the method by which the pursuer (as he says he has now discovered) could have raised money to pay off his debts without consenting to a disentail.

"With regard to the alleged misrepresentation and concealment on the part of Mr Jamieson, the case must be looked at in two aspects. Mr Jamieson was Sir Robert's law agent, but acted towards the pursuer in such a friendly manner as to induce the pursuer to believe that he 'was attending as faithfully to his (the pursuer's) interests as to his father's,' and on this account the pursuer 'trusted himself implicitly to him (Mr Jamieson), relied upon his advice, and in consequence of that reliance refrained from employing an independent agent or adviser.' The misrepresentation said to have been made by Mr Jamieson is this—that he informed the pursuer that there was no other way out of his difficulties except that which was carried out by means of the challenged agreement; and the concealment consisted in Mr Jamieson not informing the pursuer that there was the means of doing so, in the mode afterwards discovered by the pursuer, a mode which 'Mr Jamieson knew, or as a business man ought to have known or to have informed himself about.' These averments must be looked at, as I have said, in two aspects—*First*, as misrepresentation or concealment on the part of Sir Robert's agent; and *second*, on the part of the pursuer's agent. The pursuer does not aver that Mr Jamieson ever was his agent, but I shall read his averments as if he did aver that alternatively.

"I observe, first, that the alleged misrepresentation made by Sir Robert's agent cannot affect him, and consequently cannot affect the validity of the agreement challenged. It is not said that the misrepresentation was authorised by Sir Robert or known to him—it is not said that the misrepresentation was false. As regards the alleged concealment, neither Sir Robert nor his agent was under any duty to disclose to the pursuer the means by which he could be extricated from his difficulties. Second, the alleged misrepresentation and concealment by Mr Jamieson in the character of the pursuer's agent would not affect Sir Robert or the agreement. At the most they would, if well founded, only afford an action against Mr Jamieson for the damages the pursuer had suffered through his want of attention, professional skill, or failure in professional duty. Even such an action could not, in my opinion, be relevantly laid against Mr Jamieson on the averments here made. But that I need not further consider—it is not the case with which I am dealing.

"I would only add that the pursuer's averments lead me to doubt whether he was so ignorant of the means of raising money as he represents. He had had considerable experience in such matters, and the particular mode of raising money of which he says he was ignorant, and which Mr Jamieson concealed from him (as described in Condescendence 18) bears a strong resemblance to the transaction which the pursuer had with the Eagle Insurance Company in 1882."

The pursuer reclaimed, and argued—The deeds sought to be reduced were virtually gratuitous. His father had improved his own position, having got the re-settlement he wished. He had got a paltry £6000 down in return for parting with his right in fee-simple on his father's death to estates worth £300,000. He had acted in essential error as to the alternative methods of extricating himself from his money difficulties. He had been influenced and misled by his father's agent whom he had trusted. That agent, to further his father's wishes, had concealed from him the way he had since discovered for himself of raising money by means of a *post-obit* bond, and had assured him that his father's proposal or 'ruin' were the only two alternatives. He ought either to have told him about the insurance

method or have urged him to consult another agent — *Gray* v. *Binny*, Dec. 5, 1879, 7 R. 332, where much was made of the inadequacy of the consideration, and especially of the want of an independent legal adviser. In *Tennent* v. *Tennent's Trustees*, May 27, 1868, 6 Macph. 840, and March 15, 1870, 8 Macph. (H. L.) 10, the pursuer was in full knowledge of his rights, and there was not such gross inadequacy as to entitle the Court to set aside the deed. (*See* Lord Westbury).

Argued for respondents—The reclaimer's averments were irrelevant. This transaction did not fall under the maxim of *dans causam contractui*. It was a family arrangement. There was no concealment. Mr Jamieson's letter was a most frank and fair one. He had no special knowledge as to this special method of raising money put forward by the pursuer. His information was strictly accurate, and such as he was entitled and bound to give in the interests of Sir Robert and of the estate. The pursuer was bound to inform himself as to the modes of raising money. Upon his own showing he had independent advice, and he was no novice as to money lending or as to the existence of insurance companies. The case was widely different from that of *Gray*.

At the close of the third speech—following upon a question by Lord Rutherfurd Clark—counsel for the pursuer and reclaimer asked for an adjournment to enable him to consider the advisability of amending the record. This was (Lord Rutherfurd Clark *diss.*) refused.

At advising—

Lord Young—I shall deal with the case as it was argued to us, as being really a reduction only of the agreement that was come to in 1886 and of the deed executed in pursuance of it. There are other deeds called for with reductive conclusions directed against them, but I shall exhaust the case as it was presented and argued to us by taking it as I have stated. The pursuer is the only son of Sir Robert Menzies, who is the proprietor under an entail of a considerable estate in Perthshire. In 1886 the father required to borrow money upon the estate, and the son was indebted to a money lender or money lenders to the extent of about £6000. His father had put him into the Guards, and he had there got into an extravagant way of life apparently for he had incurred considerable debts prior to that debt of £6000 which existed in the year 1886; the exact amount is not material. On previous occasions he had gone to his father and had got the help which was to be expected in that quarter in dealing with his pressing creditors. His allowance from his father was originally about £300 a-year, and I daresay that is not found perfectly satisfactory to an officer in the Guards, who is so likely to be associated with others who have a great deal more to spend. But he desired in 1886 his father's assistance to relieve him of this debt of £6000, the creditor in which was pressing and threatening bankruptcy proceedings, and he also greatly desired that his allowance, which had been increased to £600 a-year, should be further increased by £300—that is, made £900. These details are really not much to the purpose in the view which I take of the case. I regard it in this way. The only son of the proprietor in possession of an entailed estate has got into difficulties—not upon one occasion, but upon several—and these difficulties are in 1886 measured by £6000 not counting those which had been previously arranged, and he wishes his allowance from his father to be increased, and he resorts at this time, as he has done previously, to his father and his father's man of business, the family solicitor. I think no worthy son would have done otherwise. He had acted foolishly in borrowing money to meet his expenses in excess of his income—of what character I do not stop to inquire—but he had, not wisely, resorted to money-lenders for this debt of £6000, for which he was tormented in 1886 by a money-lender of the name of Engle, I think. I say again that I think no right-minded and right-feeling son in that condition would have resorted to any other than his father and his father's man of business provided always they were on good terms, and if they were not on good terms, that would be speaking ill for the one or the other or both. But they were on sufficiently good terms at least for the son in his difficulties to resort to his father—for he was the only son of his father—and to the family man of business to see how he could be helped. It happened, as I have already pointed out, that the father himself was in this position, that it would suit his convenience to have his money matters re-arranged, for he had incurred a considerable amount of debt—as is explained no doubt truly, but the exact truth is of no great importance in this case—which he had incurred in improving this family estate, and he thought it would be desirable, if any new settlement of the estate was being made, that a more convenient arrangement than that which existed should be made with respect to these debts, and accordingly the agreement which is now impeached by the pursuer was come to. It was generally of this nature, that the family estate, of which the father was in possession, and to which the son was entitled if he survived to succeed in fee-simple, should be burdened with the father's and the son's debts—both of them—but that it should be re-settled at the same time in such a way as satisfactorily to save it and protect it, as the family estate, from being further dissipated by either father or son. In what I am saying now I am not suggesting even the possibility of the estate being spent or squandered by the father. He could only have incurred debt to a certain amount for improvements, or for provisions to younger children, without the consent of his only son, who was entitled to succeed. But he was nevertheless entitled to burden it for improvements and for provisions to younger children without the son's consent,

and to any amount, of which the Court approved with his consent. But the effect of the arrangement now challenged was that the estate was protected against any further burdening than was then placed upon it, which was to the amount of £70,000, including the debt of both father and son—the son's new debt of £6000 and his previous debts—and that it should be protected against alienation either directly by the son or by his creditors. It is quite plain that if he went on as he had been doing, borrowing from such people as he had the £6000 from, and who were threatening to sell his right of succession—that is the reversion upon his father's death—the estate would disappear in whole or in part, probably in whole. It is really surprising to hear what a very large sum goes into an obligation to pay as compared with the money which is advanced by the lender for it. We are told here that the £6000, together with the small increase in the son's income during his father's lifetime, might have been obtained by a *post-obit* for £25,000. Well, that is a very large obligation as compared with what is immediately given for it, and therefore the estate, as it stood prior to that agreement and the execution of the deeds in pursuance of it, was in a position of great peril. And I think it would have occurred to any father, or to the man of business of any father, that the only right and reasonable course to be taken was one which would involve the protection of the estate for the future. I cannot doubt for a moment that the pursuer himself, then a man of thirty-one years of age, must have seen and appreciated what I am now stating. I mean that any arrangement to be made would be unsatisfactory, not fit for the purpose in view, which did not protect the estate for the family in the future. Accordingly, as I have already pointed out, the agreement which the father and his man of business, the family agent, Mr Jamieson, suggested, being of the nature which I have described, achieved that end. There is, fortunately or unfortunately, a baronetcy in the family. Families are proud of old baronetcies. There seems to be a natural instinctive feeling where you have a family and can trace its descent back some generations, and with a baronetcy in it, that the family estate, if it exists, should be preserved. And assuming that the pursuer here was a man of ordinary intelligence and ordinary feelings, and with the ordinary instincts of his class, he must have understood and appreciated what was put before him by his father and by the family man of business, that it was desirable to protect the estate against such money-lenders as Mr Engle, and to secure it to the family—to himself, if he survived his father, to begin with, and to his heirs after him if he had heirs, and if not, to the representative of the family, and bearing the family title for the time. He could not fail to understand and to appreciate that object, and that is precisely what was put before him by Sir Robert, either directly or through his man of business, or in both ways. He might have desired to get more money immediately than he did, or he might have desired to get a larger annual income during his father's life than he did, but he must have understood and appreciated the import and effect of, and the good sense and feeling which dictated, the arrangement which was submitted to him. And as it is fairly written in the agreement which he signed, and in the deeds following upon it, I cannot doubt that he—whom I take to be a gentleman of average intelligence, although he got into the folly of putting himself into the hands of people who probably plucked him to a considerable extent—understood it. I should be doing him injustice if I did not impute to him intelligence sufficient to understand what is set out in the deeds to which he put his name. Now, what does he, a man of thirty-five, say against that? He has got into more debt—at least that is stated upon record, and was mentioned more than once in the course of the discussion, and not denied. He had incurred a further debt of £10,000 before the record was closed; at least it is so stated upon record. Upon what ground does he complain of what was done? It is that his immediate necessity was £6000, and an addition of his income, so as to bring it up to £900 a-year during his father's life, and that it could have been got upon a *post-obit* for £25,000, and that the family agent, upon being consulted, should have advised him that this was the proper course, or have seen that it was the proper course, and told him so. That Mr Jamieson had the knowledge that a *post-obit* was a feasible mode of doing it, and that he should have communicated that to the pursuer, or otherwise sent him away to meet his difficulties without communication with his father or his father's man of business, and that he failed to do that, is the ground for reducing these deeds. Now, I must say that, in my humble opinion, to put that as the ground of reduction by an intelligent man of over thirty years of age, of deeds to which he set his hand, is extravagant to the extent of absurdity. There is no suggestion made that he was imposed upon or cheated, unless it amounts to imposition and cheating that Mr Jamieson knowing, or having reason to believe, that his sole object was to satisfy his mere selfish ends to get out of this immediate difficulty, should either have pointed out that mode or said, "Now, go away to another adviser, don't communicate with your father or with me, as I am your father's man of business." If that course had been taken I think the estate would have been in great jeopardy, and the pursuer would have been at this moment in imminent risk of finding himself really a pauper upon his father's death, his right of succession having been alienated or pledged, and burdened away up to the whole value of the estate before he succeeded. That was the very thing to be avoided, and it is avoided without any undue gain to anybody—without any gain to anybody that I can see except to the convenience of the father, to a certain extent, in making his money arrangements more satisfactory which I think very few sons

would not have agreed to at once without reference to any selfish ends of their own. Otherwise the succession of the estate is secured to him; he cannot put it away; he is to succeed to it as a liferenter certainly; he must live upon the income, and cannot put the estate away out of the family, and he is to succeed to the income of it, and the estate is to be kept in the family by an entail upon the heir to the baronetcy for the time. That is not a subject of course to be decided, but I think the whole object in view was intelligible, and I do not doubt the pursuer thoroughly understood it. I think it was a reasonable and proper arrangement, and was understood by all the parties to it, and that no grounds are stated for setting it aside. My opinion therefore is, that this reclaiming-note ought to be refused, and with expenses.

LORD RUTHERFURD CLARK—Before the close of the discussion the pursuer moved to be allowed to amend his record. It is true that the motion was not made till the third speech had been concluded. But in my opinion we were bound to sustain it. Your Lordships thought otherwise, and we are therefore bound to dispose of the case on the record as it stands.

The deed under challenge was executed by the pursuer without any legal advice. It deprives him of a large inheritance which was secured to him by entail. Apart from the deed he would have been, if he survived his father, the absolute fiar of estates said to be worth £300,000. Under it he is a liferenter only. For so great a sacrifice he got an immediate payment of about £6000.

It seems to me that the pursuer has surrendered a right of great value for a very inadequate consideration. It is said that the deed will tend to his benefit, because it will protect him from the consequence of future extravagance. I doubt much if speculations of this kind are of any relevancy, and even if they were, the liferent, though declared to be alimentary, will, not less than the fee, be exposed to the diligence of future creditors except to the extent of what may be necessary for mere aliment. The fact that the estate will be preserved for the future heirs of entail must to my mind be thrown entirely out of view. It is no benefit for the pursuer.

The pursuer says that the sum of which he had immediate want could have been raised at very much less cost, and that this was known to his father or to his father's agent who prepared the deed. I should have thought that this was very likely to be true; but it is sufficient that it is averred. It has been suggested that the money could not be raised in a reputable way because the pursuer could only raise it by giving a security over his *spes successionis*. I do not think that we are concerned with any such matter. The facts with which we have to do are that the pursuer has been stripped of an inheritance secured by deed of entail; that he had no legal advice; and that those who took the deed from him knew that he could procure the money at infinitely less cost.

I do not give any further opinion on the relevancy of the pursuer's averments. I think that they might have been materially improved if the Court had allowed an amendment. But taking the record as it stands, I think that before we sustain a deed so detrimental to the pecuniary interests of the pursuer, we ought to order an inquiry into the circumstances in which it was granted and taken.

LORD LEE—I assume that there are insurance companies which insure a man's life without getting any payment or any security for payment of premiums of insurance except in the shape of a *post-obit* bond over an estate which may never become his. My opinion is, even on this assumption, which I think is a somewhat different assumption, that the allegations of the pursuer are not relevant to infer against his father or his father's law agent the duty of telling him that he might raise the money he wanted upon cheaper terms by going elsewhere, and that he should therefore take the advice of a separate agent. It rather appears from the letter referred to by the pursuer in article 9 of his condescendence that he was not without separate advice. But suppose he was, I think that there is nothing on the record to suggest that he was unable to judge for himself as to the propriety and necessity of taking separate advice, and nothing on record to suggest that he was fraudulently induced by the defender or his agent to refrain from taking the assistance and advice of a separate man of business. I therefore concur in the opinion that upon the record as it stands the Lord Ordinary's judgment should be adhered to. It has been mentioned that a motion was made during the discussion for leave to amend the record. I do not think that is quite a correct mode of stating what happened, and I shall take leave to state what happened, as I humbly think the proceedings actually require to be expressed. What happened was this—that in answer to a question put from the bench at the close of the third speech as to whether the pursuer's counsel was satisfied with the record, the pursuer's counsel asked an adjournment to enable him to consider. [LORD RUTHERFURD CLARK—No, No.] To give him an opportunity of proposing an amendment. [LORD RUTHERFURD CLARK—Yes.] But that motion was a motion for an adjournment of the discussion, not with reference to any amendment specified, still less to any amendment tabled; but it was with reference to an amendment the lines of which were not even explained. It had not been suggested in the course of the two speeches of the pursuer's counsel that had been made that there was any fact which could be alleged that had not been alleged, nor was it suggested that any of the allegations which were made upon record were inaccurate or made by mistake. Under these circumstances I had no hesitation myself in stating that I agreed with the opinion which I understood to have been arrived at, that no grounds had been shown

for any adjournment, and I adhere to that opinion.

LORD JUSTICE-CLERK—I concur with the majority of your Lordships. I think that the mode in which this case is stated, while it might be suitable to another class of cases altogether, is by no means the mode in which a case like this must be stated so as to entitle the party to a proof or investigation at all. The deed or deeds which are impugned are impugned on several grounds. One ground is that they were signed by the pursuer under essential error. The essential error under which it is alleged that they were signed is an essential error, not as to the import and effect of the deeds themselves, but an essential error relating solely to the wisdom or prudence of the transaction. It is said that he might have acted better for his own interests by not signing them, and by taking some other course, and that as he did not know this he was under essential error. I think it is out of the question to treat that as a case of essential error which under any circumstances could entitle the pursuer, who was fit to conduct his own affairs, to an issue. But then it is said, further, that they were obtained by undue influence on the part of Sir Robert Menzies, the father. I see no statement of any undue influence upon the part of the father in the record, except a statement, which I take as the truth, and which doubtless was true, that Sir Robert Menzies would have no negotiation with his son for the purpose of relieving him of his pecuniary embarrassments except upon the footing of the conditions contained in those deeds. But Sir Robert exercised no influence to induce him to sign them. According to the statement, all that Sir Robert intimated through his agent was that he would not consider the matter at all except upon that footing. But surely there can be no doubt that he was perfectly entitled to do so. The considerations which obviously would influence Sir Robert Menzies' mind were not merely considerations in regard to the money that was then to pass, or the advantage that was then to be obtained by his son, but considerations also for the future, a future which every father who knew his son to be addicted to such practices as this son evidently was, would desire as much as possible to influence for the protection of the family estate from dissipation. Then, lastly, it is said that there was misrepresentation and concealment upon the part of Sir Robert Menzies or Mr Jamieson, or both. I assume that to mean either that Mr Jamieson, at the instigation of Sir Robert, or Mr Jamieson as Sir Robert's law adviser, misrepresented certain things or concealed certain things. Now, I find nothing in the record suggesting misrepresentation or concealment—but this—that it was represented that Mr Menzies could not obtain what he wanted in any other way than by submitting to Sir Robert Menzies' terms; that it was concealed from him that there was a mode which ought at least to have been known to Mr Jamieson, by which he might have effected the same thing at a much cheaper rate. But Sir Robert Menzies was not bound to make any representation at all. Nor, if he made a representation that he would not deal with his son except upon those terms, was there anything in it of the nature of a misrepresentation. Sir Robert might or might not know that other modes were possible for raising money, but Sir Robert was not prepared to have any negotiation with his son upon any other footing than the mode proposed so far as he was concerned, and no other must be accepted.

As regards Mr Jamieson, it is said that he ought to have known that there was another mode, and that he had no right to conceal it. But Mr Jamieson throughout had to consider not merely what were the pecuniary advantages which might be obtained at the moment by any particular mode in which the money might be raised. He was also, as Sir Robert's legal adviser, and as dealing with Sir Robert's son, not bound, in my opinion, to suggest to that son that there was a mode by which he could get the money, which Mr Jamieson knew perfectly well Sir Robert would consider to be disreputable, and which he would consider disreputable himself, and which would be just once more—at the suggestion, as it were, of his own father—setting this dissipated youth on the course which the father and the agent believed, if he followed it out, would ultimately lead to his ruin, and the breaking up of the estate and the family.

Upon these grounds I have come to the conclusion, with your Lordships, that no relevant case has been stated here, either of essential error, undue influence, or misrepresentation or concealment, and that the interlocutor of the Lord Ordinary ought to be affirmed.

The Court adhered.

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