

advice and consent of their respective fathers, Mr William Hope and his father bound themselves jointly and severally, and their heirs, executors and successors whomsoever, to make payment to Miss Graham, in the event of her surviving her husband, of an annuity of £400 whilst she remained unmarried. Various other provisions were made by Mr William Hope in behalf of his intended wife. Miss Graham, on her part, made a general conveyance of her whole estate, heritable and moveable, in favour of certain trustees; and her father bound himself to pay to the trustees during his lifetime the sum of £100 yearly, to be applied by them in maintaining a policy on Mr Hope's life for £5000, and that the trustees should receive £5000 at his death. This sum was stated to be his provision for his daughter, and was destined ultimately to her children. By his will he left all his personal estate and effects to his widow, and, by separate deeds, two houses in Moray Place. In December 1858 thereafter a memorandum of arrangement was entered into between Mr William Hope and his mother, as executor to his father, by which, on the narrative of some of the foregoing circumstances, it was stipulated as follows:—

"(1) After payment of all debts and claims against the executry, an annuity of £500 a year to Mrs Hope during her life shall be purchased from the English and Scottish Law Life Insurance Company. The price will be £5000.

"(2) Mrs Hope shall either be effectually discharged of all liability for the contingent annuity payable to Mrs William Hope under her marriage-contract, or sufficient funds or property for securing that annuity shall be set apart and vested in trustees for that purpose.

"(3) Mrs Hope shall retain whatever furniture, plate, wine, books, pictures, and other articles she may desire for her house in Royal Terrace, and shall also retain a sum of £200 to be placed to her credit in bank.

"(4) Mrs Hope will convey to her son the house No. 20 Moray Place, and as soon as the foregoing arrangements are carried out, will pay and make over to him for his own absolute use, but under the express burden of the payment and relief by him of all outstanding obligations or liabilities of the said deceased, the whole remaining funds and property which belonged to his deceased father; but inasmuch as the said deceased gave directions in the year 1854 to pay to his brother William the interest of £980 invested in a debenture of the Caledonian Railway Company, it has been agreed that (the said deceased's brother William having died on 3d October last) the said debenture shall be made over to trustees for behoof of his widow and her children.

"(5) Messrs Hope and Mackay are authorised by Mrs Hope and the said William Hope to get all these arrangements carried into effect as speedily as possible."

In terms of this arrangement Mrs Hope accordingly executed in May 1859 a disposition of the two houses in Moray Place in favour of her son and his heirs and assignees. On 3d June thereafter Mrs William Hope, his wife, with his consent, on the narrative of her marriage-contract provisions, her father's settlement, and this disposition by her mother, granted a discharge to her mother, as executrix of her father, of all liability for this annuity. And on the same day, on the narrative of the foregoing transactions, Mr William Hope conveyed certain heritable property to the marriage-contract

trustees of his wife for various purposes, one of which was the payment of the annuity provided to his wife, if she survived him. This conveyance, the disposition of the houses in Moray Place by Mrs Hope, and the marriage-contract, were duly registered.

In February 1870 Mr William Hope, with his wife's consent, executed a revocation of the trust-disposition granted by him on June 3d 1859. The deed of revocation was ratified by his wife; and the question arose between him and the trustees, whether such revocation could be validly executed.

PATTISON and J. GIBSON for Mr and Mrs Hope.

FRASER and MACKAY for the trustees.

The Court unanimously held that the revocation was invalid. It was purely gratuitous, but was intended to revoke the last of a series of deeds, all of which were highly onerous and closely connected. The security created by the trust-deed was just a *surrogatum* for the security created by the antenuptial contract; and if the former was destroyed, the latter would fall also. Mrs William Hope would thereby have no security for her annuity; and it was settled law that a woman could not, with her husband's consent, *stante matrimonio* discharge a security created under her antenuptial contract.

Agents for Mr and Mrs Hope—T. & R. B. Ranken, W.S.

Agents for Trustees—J. A. Campbell & Lamond, C.S.

Note.—The Court called attention to the impropriety of one counsel signing a special case for another, as a special case is a joint statement, binding both parties, and preventing the introduction of other matter.

HOUSE OF LORDS.

Tuesday, March 15.

TENNENT v. TENNENT'S TRUSTEES.

(*Ante*, v. 514.)

Agreement—Partnership—Fraud—Essential Error—Inadequacy of Consideration—Undue Influence—Trust—Proof—Reduction. G. R., a partner along with his father and brother in a mercantile firm, having incurred considerable debts, signed a deed in 1858, whereby, in respect of payment of these debts by the father, G. R. gave up his interest as a partner. The father retained power to repon G. R. If not reponed, G. R. was to receive a certain sum of money by instalments, and although he was reponed, his brother might dissolve the partnership, paying G. R. a certain other sum. G. R. sued for reduction of the deed of 1858 on the grounds of inadequacy of consideration, undue influence, and false and fraudulent misrepresentation. He also pleaded that he had been reponed; and, alternatively, that the deed of 1858 had never been acted upon. The First Division (*disc.* LORD ARDMILLAN) sustained the defences, and *repelled* the reasons of reduction. On appeal, the House of Lords *affirmed* this decision.

In this case there were two conjoined actions. The pursuer in both was Gilbert Rainy Tennent of Wellpark Brewery, Glasgow, and the defenders were the trustees of the late Hugh Tennent and

Charles Tennent of Wellpark Brewery, the father and brother of the pursuer. The object of the pursuer was to enforce the provisions of a deed of agreement executed by Hugh Tennent, and by the pursuer and his brother in 1855, and to vindicate his rights as a partner of the firm of J. & R. Tennent, and otherwise under that deed. In the first action he sought to have it found that he had right to half of the profit of the business, along with his brother Charles, since 1st September 1855, and in time coming. Charles having died soon after the first action was raised, the pursuer brought the second action, asking to have it found that he is now, in terms of the agreement, the sole partner for behoof of himself and the representatives of Charles. The original defenders were the pursuer's father and brother, but they having both died are represented by their trustees. By the deed of 1855 Hugh Tennent, who was the sole partner, made over to his two sons and the survivor, for behoof of himself and the representatives of the predeceaser, the whole business and assets of the firm, and his whole estate, with certain exceptions. The value of the whole was fixed by the deed at £214,408, 10s. 9d. The sons bound themselves to pay him the profits, deducting 20 per cent. for maintenance and enlargement of the works, and their personal expenses, till four-sixths of the sum should be paid to him. They also undertook to pay interest, and to pay one-sixth of all legacies bequeathed by their father, not including provisions to his sons and daughters then alive, or their descendants. They renounced legitim in favour of their father. Subsequently, in 1856, they were retrocessed into their right to legitim, and assigned it to him and his trustees and executors. The pursuer averred that his position as partner under this deed was very lucrative, the profits in 1856-7-8 amounting to about £14,000, £28,000, and £39,000; and also that very large profits had subsequently been realised. On 11th January 1858 a new deed of agreement was made, which the defenders said put an end to the pursuer's rights under the deed of 1855, and removed him from the position of a partner. The pursuer said this deed was the result of certain unfortunate speculations which he had entered into, and which had involved him in debts, a statement of which he laid before his father and brother. By that deed the father bound himself, out of his own proper funds, to pay the pursuer's debts; and, in consideration of this payment, which was held to be the value of the pursuer's interest in the business, he ceased to be a partner, and renounced his rights under the deed of 1855. But there was reserved to the father the assignation of legitim. All the pursuer's rights and obligations under the deed of 1855 were transferred to Charles S. Tennent, who took on himself the whole obligations which by that deed he and the pursuer had undertaken to their father. Power was given to the father, after two years, to reponne the pursuer in his former position, and the deed bears that it was the father's wish and purpose to do so if circumstances warranted him in so doing. Should the pursuer not be reponed, Charles became bound to pay him £35,000 by instalments, under certain deductions. It was to be in Charles' power, even if the pursuer were reponed, to dissolve the partnership, keeping the whole assets of the firm, but paying the pursuer £40,000 instead of £35,000. By relative memorandum, the pursuer accepted that sum as in full of his whole interest in his father's succession; and he was also to give the firm his services for a salary

of £200 a-year, having received a salary of £600 before 1855. The pursuer sought to reduce the agreement of 1858, as granted for a grossly inadequate consideration, and under undue influence used by the other parties to it, who stood in confidential relations to him. He also alleged as a ground of reduction that the deed was impetrated by false and fraudulent representations to him by his father and brother, to the effect that it was to be kept in reserve, and to be used only if necessary for the protection of the firm against interference by his creditors. The other grounds of action assumed that the deed is to stand unreduced. The pursuer pleaded that his father must be held to have exercised the powers reserved to him of reponing the pursuer into his former position; or, alternately, that the deed of 1858 not having been delivered, and not having been acted on, but having been merely deposited with Hugh Tennent for the special purpose referred to, and to meet the special event referred to, the pursuer was entitled to decree in terms of the conclusions of declarator and count and reckoning. The Lord Ordinary (BARCAPLE) sustained the pleas against the relevancy of the action except so far as the pursuer's case was founded on averments that the deed of 1858 had not been acted on, and that the previous one had been reverted to, in regard to which his Lordship reserved consideration of the pleas against the relevancy. The pursuer reclaimed. After a proof, the First Division of the Court (LORD ARDMILLAN dissenting) repelled the reasons of reduction, sustained the defences, and assolizied the defenders from the whole conclusions of the conjoined action.

The pursuer appealed.

SIR R. BAGGALAY, Q.C., DICKINSON, Q.C., MACNAUGHTON and SHAND, for him.

SIR R. PALMER, Q.C., MELLISH, Q.C., and WILKINS, for Hugh Tennent's Trustees.

LORD ADVOCATE and LORIMER for Charles Tennent's Trustees.

At advising—

LORD CHANCELLOR—In this case the pursuer commenced proceedings for the purpose of reducing a certain agreement, dated the month of January 1858, whereby, under certain circumstances which occurred, he found himself, under the clauses of that agreement, displaced from a partnership which had been founded in the year 1855. The agreement purported to be one by which he resigned his place in that partnership, but by which his father, Mr Hugh Tennent, reserved to himself the power of replacing him if he saw fit. The circumstances of the case were of an extremely painful character. The father (Mr H. Tennent) had succeeded to a well-established brewery, the income from which appeared to have been very large in 1855, when the arrangement was made, and it appeared since to have largely increased. In 1855 Mr H. Tennent was minded to make an arrangement of his affairs with reference to the whole of his property, and to make a distribution of it amongst his children. Accordingly, in 1855, he executed a deed by which he, having six children alive, disposed of his property in this manner:—The bulk of it, including the brewery, was given to his two sons, Mr G. R. Tennent, the appellant, and the deceased Mr Charles Tennent. Both the sons had been engaged for some time in the brewery, Gilbert having been invited in 1852 to give up the business of a writer, which he had been carrying on for ten years, and

enter the brewery. The scheme of the father appears to have been this:—He selected out of his family such members as he thought fit for carrying on the concern, and handed it over to them; a valuation was put upon the whole property, and that valuation became charged upon the property which he was to hand over to his sons. They were to be entitled to two-sixths of the valuation as their own, and the remaining four-sixths were to be paid over to him (Mr H. Tennent) in order that he might be able to do justice to the other members of his family. The valuation was accordingly made, and amounted to £214,000, and that would make a sum of £35,000 which Mr H. Tennent would regard due to each of his children, with the additional advantage to the two sons of being established in the brewery business. Until this £214,000 was paid off out of the property of the business, they were only to take 20 per cent. of the profits to themselves for their maintenance and the current expenses of the business. Matters went on smoothly till 1857, and the brewery was extremely prosperous. In the deed of 1855 the father had not only taken care to have some control over the property in which he had so large a stake, but he introduced provisions by which his sons were bound not to embark in another purpose or become security or cautioner for any third person. In the year 1857 Gilbert had become embarrassed in regard to a sum of money which he owed, amounting to upwards of £8000. This was at a time of great commercial panic and disaster and general distrust, and Gilbert saw no mode of raising this sum. In these circumstances, he communicated his position to his brother, Mr Charles Tennent, and on his advice communicated the matter to his father. In truth it appears quite obvious that he had no other means of extricating himself from the difficulty, because, although having an interest in this large concern, he could only at that time receive a very small share of the profits, and therefore without assistance from his father he had no means of avoiding bankruptcy and the destruction of his interest in the concern, which would have involved considerable inconvenience to both his father and his brother co-partners. That being the case, a communication took place with his father on the 23d December. On that day the father called in his solicitor Mr Lyon, and the heads of an agreement were suggested, by which Gilbert was to resign his co-equal powers as a larger partner, and his rights to be greatly reduced, but nothing was said of his retiring from the partnership. The next meeting did not take place till the 31st of December, and in the interim a change seemed to come over the mind of his father, though it was right to say that in that time neither Charles nor Mr Lyon appeared to have used any influence they might have possessed over the father to the prejudice of Gilbert. At the second interview the father told Mr Lyon that his distrust of Gilbert had increased, and that his debts were somewhat larger than he had actually stated, and that he must have some more strict measure with reference to Gilbert. The result was that the deed which was signed in January 1858 provided that Gilbert was to retire from the partnership, that his father was to pay his debt; that if he was free from debts the father might replace him in the partnership if he thought fit, that if he did not replace him then Charles was to pay him the £35,000, and that if the father wished to replace him, and if Charles objected,

then the latter was to pay him £40,000. All these facts were uncontradicted. Gilbert was undoubtedly under the pressure of debt, which he had no means of discharging except by the assistance of his father. There was no pressure exercised in the shape of persuasion, saving that the father stated the terms upon which alone he was prepared to assist him.

It was said that Charles had assisted to bring Gilbert into the difficulty by advising him to have recourse to his father, but that the assistance of his father was necessary to extricate him from the difficulties of his position, and thus he was under a pressure from which he could not escape. It was contended that the terms which were offered to him were of a harsh character, and were forced upon him; that he would not have possibly assented to them if he had had any person who could have given him advice; that a very very short time was given him to consider its purpose and effect; and that he had only a quarter of an hour to read it. Pressure, influence, the short time afforded him to consider the agreement, and the absence of advice, all these were the elements which, it was contended, showed that this person had been drawn into the execution of an instrument to which he ought not to be held bound. But were these circumstances sufficient to induce the Court to decide that this agreement should not stand? The circumstance that a man wanted money would not invalidate a mortgage or deed if the instrument itself were reasonable and proper. The circumstance that the person from whom the money might be borrowed was not present cannot well have any influence on the Court if the transaction itself is not unreasonable or improper. The fact that a man had no special legal advice upon the subject could not invalidate the instrument if he were not wanting in knowledge of the instrument, and had had an opportunity of judging of its precise effect. As a matter of fact, and as a matter of law, legal advice was not wanted in a case of title where the party was forty years of age. Was there anything flagrantly unreasonable and improper in the agreement? Some might be inclined to think that its terms were harsh; but, even in saying that, it must be remembered that the father avowed his intention, if nothing else occurred, of replacing Gilbert in the business. It was his intention, undoubtedly, to say that the whole property of £214,000 would be endangered by Gilbert continuing in the business, and that he would not allow him to have any opportunity of destroying the property by speculation. This Gilbert perfectly well knew, and he also knew that the consequences of his refusing to accept the terms would be bankruptcy and the loss of all his interest in the concern. He read the instrument effectually, he understood it perfectly, and all he said was that he was reluctant to sign it. He knew its character so well that he protested against it; and a quarter of an hour was quite sufficient to enable a man who had been brought up in a solicitor's office to master its contents. All that a solicitor could have done would have been to advise him not to sign the deed; but if he had not done that, bankruptcy would have taken place. The next point was this—Was the agreement an unrighteous agreement in itself? The father's agreement originally was that he should give each of his children £35,000. He had also placed two of his sons in the business; but he now said to Gilbert that he did not feel that he was any longer entitled to remain in the

position of a favoured son, and that he must not insist upon his being replaced in the same position as the other children. It must be remembered that a clause in the deed provided that Gilbert was to receive £35,000, and that if his brother objected to his being replaced in the partnership he was to pay him another sum of £5000. Whether or not the father was exercising harshly his prerogative powers, he must say that nothing struck him in the proceedings as so illegal or improper, or exhibiting such an undue degree of parental pressure, as to entitle the party who signed the agreement to ask that he should be relieved from it. It was also alleged that Gilbert had been advised to trust to the honour and integrity of his brother. No doubt he was obliged to trust both his father and brother, because he was absolutely in their power. He struggled hard to get his father to make an absolute engagement to repon him, but the father refused to do more than accept a discretionary engagement. There were undoubtedly some letters of Charles which required explanation as the acts of a brother, but unfortunately he was not here to explain them. In 1859 Charles was unwilling to replace his brother in the partnership, and they also found that in 1863 a change came over the father's mind. He was cruising in his yacht in the Mediterranean, and, from the correspondence which he had with Gilbert, he seemed to have spoken very harshly. There were manifestations of temper on the part of Gilbert which should not wholly be lost sight of. I did not wish to pause on these outbreaks, but it must be evident that when Gilbert pushed his father, an aged man, out of the room, that he had lost habitual control of his temper. The father was under no legal obligation, whatever may have been the moral obligation, to repon him. On the whole circumstances, I do not think the Court can set aside the interlocutor of the Court below, and I therefore move that it should be affirmed, and the appeal dismissed with costs.

LORD CHELMSFORD said that Gilbert, in the course of the negotiations preceding the deed of 1858, must all along have been aware of the main element in it, that he was to cease to be a partner; and so, though he had only a short time to peruse the actual deed itself, he cannot complain of surprise. Nor was there undue pressure, for he himself explains this part of his pleading to mean simply pressure from debts. On the question of inadequacy of consideration, he would dismiss from all consideration the evidence of Mr Guild as to the average profits, because these were calculated from subsequent years of the firm's career. It was then supposed that the profits would not pay off the debt on the business for eight or ten years. Gilbert, too, was to get £35,000 or £40,000, according to circumstances. Therefore it was impossible to say there was anything in the deed to shock the conscience, and to cause it to be reduced.

LORD WESTBURY—My Lord, I am very sorry indeed to say that, after many efforts to arrive at an opposite conclusion, I am compelled reluctantly to assent to the opinions of my noble and learned friends. I may sympathise very much with the appellant in his complaints at the bitterness of his father, and of the want of brotherly love and liberality on the part of his brother, but these are not within my province. These are feelings as to his father and brother, who have already gone to

their account. But I am obliged to say, I find nothing in their action which renders them amenable to the justice of any human tribunal. It would be quite unpardonable if I went into the facts of this case at any detail, but it may be desirable to make a few observations upon the earliest points of the argument on the part of the appellant. I regret that the case of the appellant was brought forward in the form of two inconsistent propositions. To contend that the deed of 1858 was unreal and not *ex facie* that which it expresses itself to be, and at the same time to contend that that deed was obtained by undue pressure or unfair advantages and under circumstances where the appellant had not the aid of proper advice—those two propositions are irreconcilable with one another. If I found anything in the history of the transaction to warrant the conclusion that the deed was not intended to be what it appears to be—that it was framed to be a mere shield to the father and brother against the creditors of the appellant—I should not be deterred by any argument derived from the Scotch statute of 1696 from arriving at the conclusion that it is competent to the Court on the evidence before it to declare that the deed was not a reality, was not intended to have any binding effect, that it had not ceased to be in operation, and that the appellant should be remitted to his former position. But I am convinced that there is no foundation for that representation. The history of the whole conduct of the matter, the history which the appellant gives of his own mind and impressions, and the conclusion he arrived at, forbid any other hypothesis than this, that the father required this to be done, and the brother also thought it necessary to be done, and the appellant himself acceded to that necessity. Well then, the transaction, regarding this as a real transaction, is impugned by the appellant on the ground that he parted with valuable property for an inadequate consideration. It is true that there is an equity which may be extended on gross inadequacy of consideration; but that can only be where the inadequacy is such as to involve the conclusion that the party either did not understand what he was about, or was the victim of some imposition. It is impossible to say that the inadequacy of consideration in this case amounts to anything like proof to warrant either of these conclusions. Two remarks may be made on the subject of inadequacy. The first is an obvious one—that we must deal with the transaction as the matter stood at the end of the year 1857. It would be ridiculous to regard the value of the subject in dealings of that kind by the light derived from subsequent events. The father, Mr Hugh Tennent, had called the appellant Mr Gilbert Tennent to take part in the business in 1855. I wish it had occurred to the father to consider that the appellant, at his request and upon his benefit, and that he might enjoy the repose needed by his age, gave up his business as a writer, in order that he might take active part in the management and administration of this great concern, in which the bulk of his father's property was invested. But the father made that disposition, which I think is evidence that he was an affectionate father, as far as the arrangement of his property was concerned, for his children; and it must be recollected, in looking at the deed of 1855, that in truth the father remained the *dominus* of the whole concern, when substantially he parted with a portion of it to his sons to retain the control and management of it.

They are bound to no terms. The partnership is at will; only the father could at any time interfere and require payment of the debt to him, and put an end to the whole business. The whole of the property which his sons received they received from his bounty. The father also retained an absolute power to himself, by the 5th and 6th clauses of this deed, to charge the property with legacies, to be given by his will to other persons or purposes, not including legacies to his children, which were charged on the property secured to him in the concern. The situation of the appellant, therefore, with regard to his business was an extremely precarious one. The father had the power to withdraw his whole property, and there would have been an end of the business. Well, in the year 1857, the father feels it incumbent upon him to increase his power. We were undoubtedly struck very much with the small amount of the appellant's debts, which threw the father into so much terror at that time, but we should carry back our recollections to what were the feelings of that particular period. There might be legitimate apprehensions existing at that time which we are at this time unable to appreciate. The father in that position, in effect, says to his son, "I require you for a time to retire from the business." Originally, it appears, he contemplated that the period would certainly arrive when he would restore him to his position, but he departed from that conclusion. He felt it necessary that he should have an uncontrolled discretionary power of restitution. Now, can we sit in judgment on that, and say that the father was not warranted in the conclusions he arrived at? Certainly not. Well, but was that conclusion carried out in a way to which the son has a right now to complain? If I found it carried out with one speck of imposition on the son, if anything was told him which ought not to have been represented, if anything was withheld which ought to have been communicated, if he was placed in the hands of an adviser who leant more to the father and brother than to him, I should have thought that this family arrangement, where on all sides there ought to be *uberima fides*, ought not to be upheld. But I find nothing of the kind. This discretionary power was placed in the hands of the father freely, willingly, and without undue restraint, and without falsehood. That is the account of the appellant himself. He says there was just one point of difference, whether the power of restoration should be compulsory or discretionary. He tried long and earnestly to prevail on his father to consent to an absolute power of restoration; but the father declined. The appellant submitted and clothed the latter with discretionary power of restoration. Well, that being so, there is nothing whatever that in a court of justice can be complained of by the appellant, unless indeed we find that fraudulent and unjust influence was used by the brother to induce the father not to exercise his power. I am happy to say that on examination of the whole matter I am myself unable to find anything that would fix on Charles any iniquitous dealings to poison the mind of his father, and prevent him from exercising his power of reponement. On the contrary, I think it appears from the letters of the father, written from the Mediterranean, that he himself first suggested to Charles the absolute necessity of dealing with his brother. So there is nothing, therefore, that would warrant us judicially in saying that there was any artifice on the part of

Charles to deprive the brother of the benefit he would have derived from the exercise by his father of his discretionary power of reponement. I find nothing of this kind. There is nothing to warrant the conclusion of the appellant that he was actually reponed. He was not treated as a partner, or in any way entitled to participate in the profits of the concern. There is nothing to warrant the conclusion that the deed of 1858 was not carried out to its full limits. On other grounds, therefore, I could wish that another conclusion had been arrived at, particularly when I see that it took only five short years from the date of this agreement to enable the parties to pay to the father the whole of the debt due to him of £214,000, and to realise for Charles' own behalf a sum amounting to very nearly £300,000. I could have wished that natural affection had suggested a different mode of action; yet, as I have already observed, that is not within our province; nor are we called upon to express any opinion on it. Yet, inasmuch as this is an attack on the brother who is gone, containing numerous imputations on him, and also on the memory of the father, who is also gone, I am reluctantly compelled to concur with the suggestion that the appeal should be dismissed; and, in accordance with our established rules, with costs.

LORD COLONSAY—My Lords, I do not consider it at all necessary for me to enter into any statement of the facts of this case. They have been very fully stated, and that statement embraced everything which I think important to the views I take. I shall state briefly the grounds upon which my judgment rests. The object of the action is to set aside the deed of agreement of 1858. If that agreement is to receive effect according to its terms the result would be substantially this—First, that from and after January 1858 the appellant ceased to be a partner in the concern, or to have any of the rights given to him by the deed of 1855; secondly, at the end of two years his father, if he thought proper so to do, might repon him in the condition he was in before the end of 1857; thirdly, if the father did not repon him, he was to receive the estimated value of one-sixth of the brewery concern, namely, £35,000; fourthly, if the father did repon him, Charles might displace him, and Gilbert would then be entitled to not £35,000 but £40,000; and this involved the surrender by Gilbert of nearly all he had under the deed of 1845. The father did not repon him, and the appellant brings this action for the reduction of the deed. He has brought the action for the purpose of having it found he is to be reponed into the position he had under the deed of 1855, as if the deed of 1858 had never existed, or the circumstances which led to its execution had never occurred. Now, what are the grounds on which he makes that claim? In the first place, there were various grounds stated in the original record, such as that the deed had not been delivered, and some other grounds of that kind, which are not now insisted upon; but I think there are now substantially two grounds insisted upon by the appellant. First, that his consent was obtained when he was in a state of great distress and difficulty; that advantage was taken of his difficulties; that great pressure was exercised; and that the deed was obtained for a grossly inadequate consideration. His Lordship went on to say that he did not think that the Act of 1696 applied, and also that there was no foundation for the plea of *pactum*

illicitum. Further, he did not think the circumstances warranted reduction of the deed. Gilbert had not surrendered so much as was contended; and, on the other hand, he had his debts paid, and impending bankruptcy averted, and he was also to have a chance of reponement, with an alternative of £35,000 or £40,000. Hugh and Charles had also benefited by the deed. They were to be saved from the creditors of the man who had violated the deed of 1855. It might be the conditions were somewhat hard, but he knew what they were. He wished an absolute right to be reponed, but this would have destroyed the whole object of the deed. His Lordship said that, on the whole, he could not hold that there was undue pressure in the case; and as to the statement that the deed was unreal and not acted on, it was acted on in its most important particulars, and he therefore concurred in the judgment.

Appeal dismissed with costs.

Agents for Appellant—Adam Morrison, S.S.C.; and Upton, Johnson & Upton, London.

Agents for Respondents—Maitland & Lyon, W.S., and Campbell & Smith, S.S.C.; and Grahames & Wardlaw, London.

COURT OF SESSION.

Tuesday, March 15.

FIRST DIVISION.

SPECIAL CASE—BROWN *v.* SOUTAR.

Trust—Entailer's Debt—Charges against Capital or Income—Administration of Trustee. A died leaving a trust-disposition and settlement by which he directed his trustees, "after the payment of my said debts are all clear and discharged, then and in that case my said trustee or trustees, in their order as aforesaid, shall be bound and obliged . . . to execute a strict entail of my whole property, including all lands to be acquired as aforesaid." With other heritable property he died possessed of the Theatre Royal, subject to certain burdens, including a payment of an annuity to 104 shareholders and their successors, and an obligation to keep the theatre open during six months in the year as a theatre or opera-house. The trustee increased the sum of insurance very considerably, paying the premiums out of the income of the estate, which belonged under the deed to the heir of entail. The theatre was burnt down; and with the money derived from insurance, and £2000 taken from the income of the estate, and with the consent of the heir of entail, it was rebuilt. A claim by the heir of entail for repayment out of the capital of the sums expended in premiums of insurance, and of the £2000 advanced to rebuild the theatre, as being entailer's debts, and proper charges against capital, and not against income, *repelled*, on the ground (1) that the premiums were a proper charge against income, and (2) that the heir of entail had consented to the expending of the £2000 in rebuilding the theatre.

This was a Special Case presented for the opinion and judgment of the Court in the following cir-

cumstances. John Brown of Marlee died in 1868, leaving a trust-disposition and settlement, in which he nominated several trustees, of whom Mr W. S. Soutar is the only survivor, and to them he bequeathed all his property, real and personal, in trust for certain purposes. *Inter alia*, he directed—"But declaring always that these presents are granted in trust for the uses and purposes after-mentioned, viz.:—In the first place, my said trustee or trustees, in their order, shall, from the produce of my means and estate, pay all my just and lawful debts; secondly, and in respect that I owe considerable debts, my said trustee or trustees, in their order, shall out of the produce of my said estates, and the excess of the same, as the same shall be realised, pay the said debts; and so soon as these are paid, and the balance remaining shall be ascertained, then and in that case my said trustee or trustees, in their order as aforesaid, shall be expressly bound and obliged, as by acceptation hereof he or they bind and oblige themselves and their foresaids, to purchase and acquire lands to the extent of the balance of moveable property so recovered, to purchase and acquire lands in the county of Perth, as near to my properties in the parishes of Blairgowrie and Kinloch and Lethendy as may be, and to settle and secure the lands so to be purchased, together with my whole other property held by me heritably, wherever situated; and that my said trustee or trustees, in their order as aforesaid, shall take the rights and infestments thereof, in the first place, in favour of him or them, as trustees, in their order as aforesaid: And after the payment of my said debts are all clear and discharged, then and in that case my said trustee or trustees, in their order as aforesaid, shall be bound and obliged, as he or they are hereby expressly taken bound, to execute a strict entail of my whole property, including all lands to be acquired as aforesaid, conform to the law of Scotland, containing all clauses irritand and resolute, and particularly against selling or altering the order of succession; which said entail shall be made in favour of Allan Maclaren Brown, my nearest male relation by my father's side. In the third place, declaring that my said trustee or trustees shall hold my said properties, in their order, till the whole of my said debts are cleared and paid, and until the said Allan Maclaren Brown or John Brown shall attain the full age of twenty-five years complete." After the date of this deed, and shortly before his death, Mr Brown became proprietor of the Theatre Royal, Edinburgh, subject to a number of conditions. He acquired this property from the trustees for the shareholders of the original edifice, and he became bound to pay to each of the shareholders (104 in number) a perpetual annuity of £2 per annum, and to give each free admission to all parts of the theatre except the private boxes. There were also the following conditions:—"And also providing and declaring that the said John Brown and his foresaids shall not be entitled, without the consent of the said shareholders or rentallers and their foresaids, to convert the said theatre and opera-house to any other use or purpose than a theatre and opera-house; and also providing and declaring that the said theatre and opera-house shall be kept open for performance during at least six months in each year; and in the event of the said John Brown or his foresaids letting the said theatre and opera-house to the lessee or tenant for the time being of the Theatre Royal, Edinburgh, he shall take such lessee or tenant bound, so long