

from such daughter the sums payable to her as liferentrix, until the amount of such advance, with interest, is repaid? (7.) If such advance, and all interest due thereon, or any part of such advance and interest, have not been repaid by such daughter at the time of her death, does the amount of the advance and interest, so far as the same have not been repaid, form a proper item of charge in the trust accounts? (8.) With the view of ascertaining the extent to which any advance may be made as aforesaid, are the trustees entitled to fix and determine the "estimated value" mentioned in the trust-deed, to the effect of binding all parties concerned?

At advising—

LORD COWAN—This trust-deed by the 9th purpose provides, that "upon the death of my said spouse and the youngest of my said children attaining majority, or upon the marriage of all my children," the trustees were to prepare a *vidimus* of his whole estate, and as soon as conveniently may be, to divide the whole residue into as many equal parts or shares as the number of his children then surviving, and of those who had died leaving lawful issue, and to give over the same to all his children or grandchildren in manner therein directed. He left no sons, and what is provided in the deed as to them has consequently not come into operation; but he left six daughters, two of them by his first marriage, and the other four by his second marriage. All these daughters are married. The two eldest have no children, the other four have each a family of children. Among these six daughters the residue of the estate is appointed to be divided upon the arrival of the term of payment, the trustees being directed "either themselves to hold the said shares," "or to settle the same, in such way as that the same shall be held for behoof of my said daughters in liferent for their liferent use allenarly, and for their children in fee."

On 15th January 1870, a Special Case was presented to the Court for opinion and judgment as to the effect upon the clause regulating the period of division and payment of the renunciation by the widow of her whole provisions under the deed, and her election to take her legal rights; and the Court found that the effect of this proceeding was to make it the duty of the trustees to deal with the residue of the estate in the same manner as if the widow were naturally dead. The consequence is that all the daughters being of age and married, the only condition has been purified upon which the period for division and payment is dependent, and the share of each of the daughters behoves now to be disposed of for their behoof in the manner provided by the deed.

The trust administration under the trust-settlement has come to a termination, or at least must be terminated by the trustees dealing with the shares severally given to the daughters, as they are directed and bound to do under the settlement. An option is left with the trustees either to hold the shares of the daughters or to settle the same upon them and their issue in such terms or on such a footing as shall ensure the accomplishment of the testator's will that the daughters should have the liferent for their liferent use allenarly of their several shares, and their issue the fee. There is no destination of the fee provided for in the event of any of the daughters having no issue.

The leading questions on which the opinion

of the Court is now desired relate to a special power conferred by the deed upon the trustees, "if they shall think proper, to make advances to my said children or grandchildren from my said estate, but not exceeding one-fourth of the estimated value of the share which would fall to such child or grandchildren should they survive the term of division of my estate." This power, from its very terms, contemplates the exercise of it, if the trustees think fit, at any time during the subsistence of the original trust, and before the period of division and payment. I do not think it has any application to the shares to be severally held for or settled upon the daughters and their issue. The arrival of the period of payment, and the consequent division of the estate among the daughters, make it no longer possible for the trustees legally to exercise the power conferred by the deed. Nor can it affect this result that the trustees, with regard to any one of the shares or to all of them, have exercised the option of holding the several shares for the daughters and their families, in place of settling their shares on them in liferent, for their liferent use allenarly, and their issue in fee. The power to make advances out of the estate is not conferred in such terms as to permit of its being held applicable to that state of matters. I am of opinion, therefore, that the 1st and 2d queries must be answered in the negative, subject, however, to the observation that, as regards any of the daughters who have no children or who may become childless, they may possibly have a claim to the fee of their several shares as falling to them *ab intestato*, there being no destination of it failing issue. A question of this kind seems to have occurred in the case of *Nisbet v. Kerr*, referred to at the discussion. In that case it does not appear that the fee was provided to the children of the two daughters who had the liferent under the trust-deed. In this case it is different; and, although the daughters of the first marriage have at present no issue, the trustees are bound to hold to settle their shares to provide for the possibility of their having children, their age not being such as to remove that probability from the case, so as to place these daughters in any different position *in hoc statu* from that of the four daughters who have children to whatever right the parties may afterwards be held entitled.

The other Judges concurred.

Counsel for Parties of the First Part—Black,
Agent—D. Curror, S.S.C.

Counsel for Parties of the Second Part—Lee,
Agent—H. W. Cornillon, S.S.C.

Tuesday, July 1.

SECOND DIVISION.

[Lord Mackenzie, Ordinary

A. B. v. C. D.

Adjustment of Issues—"Fraudulent Misrepresentation or Fraudulent Concealment."

Where certain legatees were stated to have induced the heirs at law of a testator to sign a deed to their prejudice by fraudulent concealment or misrepresentation.—*Held* that an

issue of fraudulent "misrepresentation or fraudulent concealment" was fitted to try the case.

The summons in this suit, at the instance of the nearest of kin and heirs-at-law of the late Dr Francis M'Cowan, against two of the legatees under his settlement, concluded for reduction of an agreement made between the pursuers and defenders under the following circumstances, as stated by the pursuers. Dr M'Cowan died on 6th October 1872 at Edinburgh. He executed a trust-disposition and settlement on 25th March 1870, and a codicil, dated 30th March 1871. Under these deeds the pursuers were entitled to the residue of the testator's estate, amounting to about £9000. To one of the defenders the testator left a legacy of £400, and to the other a legacy of £600. The pursuers, who were residing in England at the time of the testator's death, stated that they were not at the funeral of Dr M'Cowan; the notice sent to them not having reached them until the day on which the funeral took place. The defenders were present. After the funeral Dr M'Cowan's settlement was read in the presence of the defenders. The defenders, immediately after they became aware that they were only to receive the above legacies of £400 and £600, and that the pursuers would each be entitled to several thousands, formed a fraudulent scheme for the purpose of defrauding and circumventing the pursuers, and inducing them to forego their rights under the will, and to divide the estate equally with the defenders, so that, instead of the defenders getting only £400 and £600 respectively, each of them should carry off £2500 or thereby. In pursuance of this scheme one of the defenders wrote to one of the pursuers on 10th October 1872, the day after Dr M'Cowan's funeral, a letter stating, "You and your brother are not mentioned in the Dr's will, but you have a deep interest in it," and invited them to come down to Glasgow to him, and that he would go to Edinburgh with them. Accordingly, the said pursuer arrived in Glasgow on the morning of 15th October 1872. The other pursuer arrived there on the evening of that day. The pursuers remained at the house of one of the defenders all night, and came to Edinburgh with him next morning. Before reaching Edinburgh the said defender did not communicate to the pursuers any facts regarding Dr M'Cowan's will, or the amount of his estate, or inform them of what had been left to the defenders, or what interest the pursuers had under the will, or what were their rights as next of kin and heirs at law; and the pursuers had no knowledge whatever in regard to these matters. The only information given by him to the pursuers was that he and his brother were mentioned in the will, but that the pursuers were not. The said defender, in pursuance of the defenders' fraudulent scheme, spoke in most unfavourable terms of the trustees to the pursuers, without having, as the pursuers have since learned, any ground for doing so—saying that they were very bad men, bore a bad character, and were not to be trusted; that it would be important for all parties interested in the estate to get rid of them if possible. The said defender informed the pursuers that the other defender would meet them in Edinburgh. On arriving in Edinburgh he took them at once to York Place, to Dr M'Cowan's house, and on the way there they were met by the other defender, who returned

with them to the house. They were there shown into the dining-room, where David Kerr Smith, a writer, but not practising as such, and whom the pursuers had never before seen, was standing. The defenders at once began to abuse the trustees, stating that the trustees' object was to protract the winding-up of the estate, and to cause expense, and that unless the estate could be got out of their hands, it might be years before anything could be got out of it. The defenders did not inform the pursuers what the amount of the legacies left to the defenders was, but they represented to the pursuers that, as they were not named in the will, they could claim no beneficial interest in the estate; but that as they, the pursuers, were the nearest of kin, their co-operation was necessary to get the estate out of the trustee's hands. They therefore proposed that, if the pursuers would co-operate with them, they would throw their legacies into the general estate, and divide it equally with the pursuers. This they falsely and fraudulently represented would be a most beneficial arrangement for all parties, and one by which the estate could be taken out of the hands of the trustees, who were trying to hang up proceedings and fritter it away in expenses, so that no party would get any substantial benefit under it. They further proposed that the pursuers should then and there sign the following agreement:—"The parties above named and designed, being the nearest relatives of the deceased Francis da Cruz M'Cowan of 27 York Place, Edinburgh, have agreed, and do hereby agree as follows, viz.—*First*, The said parties have renounced, and do hereby renounce, their respective interests and claims on the estate of the said deceased in favour of one another. *Second*, That the said parties shall aid and assist one another to the utmost in the winding-up of the estate of the said deceased; and in order that the same be done as speedily as possible, whatever money may require to be borrowed for this purpose, each is to take his share of the responsibility. *Third*, That on all legal claims on the said deceased or his estate being satisfied and paid, whatever residue of the said deceased's estate remains is to be divided in equal portions between us, the parties hereto." The pursuers signed the said document under essential error as to the nature and effect of the trust-disposition and settlement, and as to the nature and effect of the said document, induced by the false statements of the defenders, to the effect that it would be for their interest to do so, and by the fraudulent concealment by the defenders of the true circumstances of the case. They would not have signed the said document if they had not received and believed the representations of the defenders. The pursuers executed the said agreement under essential error as to their rights as next of kin and heirs-at-law, induced by the defenders' representations foresaid. The granting of the said document was wholly gratuitous, and the pursuers received no consideration whatever for granting the same. On the contrary, the practical result of the document, as the defenders well knew at the time, was to deprive each of the pursuers of a sum of £2000 or thereby, to which sums they would have been entitled had the said document not been signed, and to make a gift of said sum to the defenders. This the pursuers did not know, and the defenders were well aware that they did not. The representations made by the defenders to the pursuers, by which

the pursuers were induced to join in such an agreement, was given in their, the defenders, own interest, and to defraud the pursuers, and defeat their interests under the will; and the defenders, by giving said advice and making said representations, circumvented the pursuers, and induced them to sign said document by fraud, to their *enorm lesion*.

The defenders stated that on the 16th October a full explanation was made to the pursuers of the effect of the settlement; that it was one of the pursuers who proposed the agreement; and that it was entered into after due consideration.

The pleas in law for the pursuers were—“(1) The said agreement ought to be reduced, in respect that the subscription of the pursuers was obtained by fraud on the part of the defenders. (2) The pursuers having signed the said deed under essential error, induced by the fraudulent representations and concealment of the defenders, it ought to be reduced. (3) The defenders having circumvented the pursuers, and induced them to sign said deed when under essential error as to the effect of the said trust-disposition and settlement, and of their rights as next of kin and heirs-at-law foresaid, the said agreement ought to be reduced. (4) The defenders having, while professing to advise the pursuers disinterestedly as to the course they should follow, fraudulently represented that it would be a benefit to the pursuers to sign the said document, and fraudulently concealed important facts relating to the succession which formed the subject of the negotiations between them and the pursuers, and the deed in question having been granted in consequence thereof, it ought to be reduced. (5) The said deed being vitiated and erased in *essentialibus*, not duly tested, and deficient in the solemnities required by law, it ought to be reduced. (6) The witnesses to the said deed not having had any knowledge at the time of signing who the parties thereto were, it is null and void, and ought to be reduced.”

The pleas in law for the defenders were—“(1) The averments in the condescendence are irrelevant, and insufficient in law to support the conclusions of the action, or any of them. (2) The agreement sought to be reduced being a valid and binding agreement, and no good objection or reason of reduction being averred or existing in fact, the defenders should be assoilzied, with expenses.”

The Lord Ordinary issued the following interlocutor:—

“20th June 1878.—The Lord Ordinary, in respect it is stated by the counsel for the pursuers, that they do not desire to lead the proof allowed by interlocutor of 11th June current, or to insist in their sixth plea in law, repels the said plea: Finds the defenders entitled to the expenses incurred by them in connection with the said proof since 11th June current: Allows an account thereof to be given in, and remits the same when lodged to the auditor to tax and report; Further, sists Mr John Boyd, farmer, Gilbertfield, Cambuslang, as mandatory for the pursuers in terms of the Minute No. 10 of process: Holds the issues No. 9 of process as amended at the bar as adjusted and settled: Approves of the same as now authenticated accordingly, and appoints the same to be the issues for the trial of the cause: On the motion of both parties, appoints the said issues to be tried by a jury within the court-room of Justiciary, upon Thursday the 10th day of July 1878, at ten o'clock forenoon,

and authorises and appoints a jury to be summoned for that purpose in common form.”

The issues approved of under this interlocutor were as follows:—“It being admitted that the writing, of which No. 6 of process is an extract, was executed by the pursuers and defenders on or about the 16th day of October 1872—(1) Whether the pursuers were induced to execute the said writing by fraudulent misrepresentations or concealment made or caused to be made by the defenders, or either of them, in regard to the pursuers' rights and interests as next of kin and heirs-at-law of the late Dr Francis da Cruz M'Cowan, of No. 27 York Place, Edinburgh? (2) Whether the pursuers executed the said writing under essential error, induced by the misrepresentation or concealment of the defenders, or either of them, as to the pursuers' rights and interests as next of kin and heirs-at-law of the deceased Dr M'Cowan?”

The defenders moved the Court to vary the said issues by substituting a single issue in the following terms:—“It being admitted that the writing, of which No. 6 of process is an extract, was executed by the pursuers and defenders on or about the 16th day of October 1872:

“Whether the pursuer executed the said writing under essential error, induced by the fraudulent misrepresentation of the defenders, or either of them, as to the pursuer's rights and interests as next of kin and heirs-at-law of the late Dr Francis da Cruz M'Cowan, of No. 27 York Place, Edinburgh; or in such other terms as your Lordships may think meet; or otherwise to alter and vary the said issues by deleting from both of them the words, ‘or concealment.’”

The chief objection stated was to the second issue, and it was contended for the defenders that as there was no obligation on their part to divulge the contents of the settlements, the pursuers were not entitled to an issue of mere concealment.

Cases cited—*Railton*, 16 D. 403; *Johnston*, 19 D. 706; *Gillespie*, 18 D. 677, 19 D. 897; *Hogg*, 2 Macph. 848; *Ritchie*, 4 Macph. 292; *Alexander*, 4 Macph. 290, White and Tudor's Leading Cases in Equity, 1, 115; *Smith*, June 6, 1871, 40 L. J., Q.B., 221; *Keats*, 20 L. J., 76; Bell's Com., i, 316 (M'Laren's ed.) note 3.

At advising—

LORD JUSTICE-CLERK.—The foundation of the argument for the defenders is that there was here no duty of making a disclosure incumbent on them. I cannot assent to that proposition. On the contrary, I think there was here the duty of making a most candid and complete disclosure. This is not the case of a sale or lease, but a special contract between parties who have met in a succession, and the proposal is that the succession is to be equalised. In such circumstances, if one party being aware of material facts, which he knows that the other contracting party is ignorant of, does not disclose them, I think he commits a fraud. The case of *Railton* applied the doctrine of obligation to disclose in a far stronger way. Here I think the question admits of no doubt. The other parties should have been made aware of their rights under the will. I think the first issue should be granted, with the addition of the word fraudulent before concealment. At the same time, I think the question could perfectly well be tried without an issue.

With regard to the second issue, I think it is undesirable to burden the case with it. If the

pursuers are wrong on the first point, I doubt if there is a case of essential error. The pursuers were not so much in error as merely ignorant. No specific error is set out on record, merely ignorance.

LORD COWAN—As to the first issue, I concur. Indeed, it seems a most clear case of fraudulent concealment of matter of fact. Taking the pursuers' case as stated, I think the first issue is one that will try the case.

On the second issue, I differ. I think the issue granted ought to be adhered to. There is enough on record to satisfy me that there was essential error, and if it was induced by misrepresentation, the issue should be granted. Essential error, induced by misrepresentation, is enough without the addition of fraudulent.

LORD BENHOLME—I concur. I object to the second issue because I do not see a statement of error. The only statement is of misrepresentation, not of what the party was induced to believe.

LORD NEAVES—I have no doubt the first issue should be granted with the addition of the word fraudulent. Without that addition it would be ambiguous. I would prefer the word "undue." I see no good ground for granting the second issue. The error which the pursuers were under is not explained. I do not understand what it was. Did they believe the other party had the whole? It is plain the other party never said they had right to the whole estate; they were only to give up the legacies. Innocent misstatement should not be covered. If the statements are fraudulent, that case is covered by the first issue.

Counsel for Pursuers—P. Fraser. Agent—W. G. Roy, S.S.C.

Counsel for Defender—C. Scott. Agent—A. K. Morison, S.S.C.

Wednesday, July 2.

SECOND DIVISION.

SPECIAL CASE FOR TRUSTEES OF ANDREW FOTHERINGHAM AND OTHERS.

Succession—Trust Settlement—Power to Sell—Conversion.

Terms of trust-settlement and codicil under which *held* (1) that the trustees were entitled to sell the estate; (2) that a share of the succession was intended to be made moveable in the event of a sale.

This Special Case was brought by the trustees of the late Andrew Fotheringham under the following circumstances:—Andrew Fotheringham died on 1st October 1861, leaving a trust-disposition and settlement and codicil in the following terms:— "In the third place, I appoint my said trustees to pay to my said wife during her lifetime, in the event of her surviving me, the rents, interest, and free yearly produce of the residue of my whole heritable and moveable property, generally and particularly above disposed, pertaining and belonging to me, after deducting the interest of money which may be borrowed, insurance, repairs, and all other necessary expenses in the execution

hereof, and shall also deliver to her, for her own use and behoof, my whole household furniture, books, plates, china, and generally my outright and insight plenishing of every description, declaring however that she is only to have the life use of the books, which after her death are to be disposed of by my trustees as after mentioned. In the fourth place, I appoint my said trustees after my death, or the death of my said wife, in case of her surviving me, to pay or allow to the said Andrew Richardson and his wife Barbara Salmond, and the survivor of them, during their, his, or her lifetime, the free yearly rent of the shop and other premises presently occupied by them under me in St John Place, after deducting the ordinary necessary repairs, public burdens, and insurance, or allow them to possess the same rent free under the burden of making these payments. In the fifth place, I appoint my said trustees to pay after my death, or the death of my said wife in case of her surviving me, to the said James Thomas, during his lifetime, the free yearly rents of my property in New Scone, purchased by me from the said Mrs Penelope White or Miller, forming part of the lands of Balgarvie, as before mentioned, after deducting public burdens, the ordinary necessary repairs and insurance, or allow him to occupy the same rent free under that burden. In the sixth place, I appoint my said trustees, upon my death, or the death of my said wife in case of her surviving me, to deliver up my whole books to the kirk-session of the Secession Congregation at Craigend, to form part of the library belonging to that congregation, never to be disposed of nor alienated in any way; but under the express condition that all persons bearing relationship to me shall have the privilege and liberty of obtaining any of these books out to read when they please, they being always bound to take good care of and return the same within a reasonable time. In the seventh place, I appoint my said trustees, after my death, or the death of my said wife, in case she survives me, and making the payments before mentioned, and also paying all repairs, insurance, and whatever other expenses may be necessary in regard to the said subjects, or for carrying these presents into execution, to devote and pay the free residue and remainder of the rents or yearly produce of the said subjects, in the first place, in extinction of whatever debts may have been left owing by me at the time of my death, or may be contracted by my trustee in the execution of this trust, and have not otherwise been discharged; and so soon as these purposes are fulfilled, to pay to the treasurer of the City and County of Perth Infirmary, for the benefit of that institution, a free year's rent of the said subjects, after deducting insurance, public burdens, and ordinary repairs and expense of management for the year. In the eighth place, after the whole purposes before mentioned are implemented and fulfilled, I direct and appoint my trustees to divide the remainder of my said heritable and moveable property into nine equal shares or divisions, and to dispose, assign, and pay over one of these to my sister, Catherine Hay, in life, and one to each of the said John Hay, my brother, Isabella Hay or Comb, Catherine Hay, and Janet Hay, my nieces, the said William Hay and David Hay, my nephews, and Rachel Corner and Elizabeth Fotheringham M'Gregor, nieces