

by express enactment that right of appeal was taken away.

At advising—

**LORD PRESIDENT**—The Debtors Act of 1880, which abolished imprisonment for civil debt, made an exception in the case of decrees for aliment, and therefore under that statute, of course, a party holding a decree for aliment could proceed to do execution in the ordinary form by charging the debtor, and then following that up by imprisonment. But then this new statute of 1882 interposed between the creditor and his debtor a provision that the creditor should not imprison his debtor unless upon an application by the creditor the Sheriff shall grant a warrant to that effect. This application, it is enacted, the Sheriff shall dispose of summarily, and without written pleadings, and the only ground for stopping the diligence of the creditor is that the debtor is unable to pay.

That is a very singular form of process. It is a statutory obstruction to the diligence of the creditor; there is to be no judgment by the Sheriff, but the statute just vests in the Sheriff a discretionary power of saying whether the creditor is to imprison his debtor or no. The provision of the statute is as follows:—that “the failure to pay shall be presumed to have been wilful until the contrary is proved by the debtor, but that a warrant of imprisonment shall not be granted if it is proved to the satisfaction of the Sheriff or Sheriff-Substitute that the debtor has not, since the commencement of the action in which the decree was pronounced, possessed or been able to earn the means of paying the sum or sums in respect of which he has made default, or such instalment or instalments thereof as the Sheriff or Sheriff-Substitute shall consider reasonable.” Now, in speaking of proving “to the satisfaction of the Sheriff,” taken in connection with the provision that the procedure is to be summary, it is obvious that the statute does not contemplate a regular proof, but merely that the Sheriff shall satisfy himself, by calling the parties before him, whether the debtor is able to pay the sum decreed for, or whether he is wilfully withholding funds which he has got. Under such a proceeding the Sheriff is not to pronounce any judgment or decree capable of being extracted, but is merely to grant or refuse a warrant. Just as in a criminal application for a warrant to apprehend a prisoner the magistrate merely grants or refuses a warrant, so it is the same here. There is a considerable resemblance between the two classes of cases, because imprisonment under this statute is intended to be *in pœnam*. That is made clear by subsection 6 of section 4, which provides “that the creditor, upon whose application the warrant of imprisonment is granted, shall not be liable to aliment or to contribute to the aliment of the debtor while incarcerated under such warrant; but that the incarcerated debtor shall be subject to the enactments and rules as to maintenance, work, discipline, and otherwise applicable to the class of prisoners committed for contempt of Court.” It is plain also that the imprisonment is nothing more than a penalty on the debtor from the provision in the statute that the imprisonment is not to operate as a discharge of the debt, and that though the debtor suffers imprisonment the debt is to subsist. It is also pro-

vided that after imprisonment has been suffered a new warrant may be issued at intervals of not less than six months, provided the Sheriff is satisfied that the refusal to pay on the part of the debtor is wilful.

Now, I think that the proposal to bring such a deliverance of the Sheriff here by way of appeal is incompetent. I quite assent to the observation made by Mr Dickson that the right of appeal to this Court cannot be taken away except by express enactment. But that applies only to the case of judgment, and we have no judgment here. The statute has thought fit to give a discretion to the Sheriff, and his deliverance upon the application is final as regards that application. If the party can show better grounds, then another application to the Sheriff can be made.

**LORD MURE**—This statute confers on the Sheriff or Sheriff-Substitute a discretionary power to grant imprisonment in certain circumstances, and I think the matter should not go further than the particular officer to whom the application is made. There are no written pleadings, and there is before us no evidence, nor is there any provision for a record of it being kept to enable us to say whether the Sheriff was right or wrong. It seems to me to be just like refusing an application for *cessio hoc statu*.

**LORD ADAM**—I am of the same opinion. It appears to me that all the Sheriff could competently do was to grant or refuse a warrant. He was bound to grant a warrant unless the debtor satisfied him that he had not earned anything since the date of the decree. It is left entirely to the discretion of the Sheriff to say whether that is the case or not, and the fact that no record of the proceedings is to be kept shows that it was not intended that the deliverance should be appealable. I cannot see that the refusal or granting of a warrant is a decree in any sense. I think this resembles the applications made in criminal proceedings, for the imprisonment under the statute is *in pœnam*.

**LORD SHAND** was absent.

The Court refused the appeal as incompetent.

Counsel for Appellant—Dickson. Agents—J. & A. Hastie, S.S.C.

Counsel for Respondent—Rhind. Agents—Robert Menzies, S.S.C.

Friday, June 18.

## FIRST DIVISION.

STEWART v. M'CLURE, NAISMITH, BRODIE,  
& MACFARLANE.

Agent and Client—Reparation—Culpa—Extent  
of Agent's Duty—Patent.

Held that a law-agent employed to lend money on the security of a patent is not bound to inquire into whether the patent is good in respect of being novel in subject-matter, and not anticipated by other patents or prior use, and therefore is not bound to examine the index of specifications kept under the patent laws, such inquiries not being within

the scope of his professional duty, which is to see that the assignation is itself valid and the letters-patent *ex facie* regular.

*Agent and Client—Reparation—Duty of Agent.*

A law-agent employed to lend his client's money on the security of a patent warned him of the risk of such transactions, but failed to inform him of intelligence which he (the agent) received before the transaction was concluded, and which was to the effect that with regard to the particular patent there were circumstances which made it very important that further and more complete inquiry should be made. The transaction was completed without this information being laid before the client or such inquiry being made, and the patent proved worthless, and the money was lost. *Held* that the agent's duty having been to inform the client that it had come to his knowledge that further inquiry was peculiarly necessary, and he having failed to do so, he was liable to make good to the client the money lost.

This was an action by Robert Buchanan Stewart, merchant, West George Street, Glasgow, against M'Clure, Naismith, Brodie, & Macfarlane, writers, Glasgow, for payment of £5771 in name of damages for alleged neglect of professional duty.

The action was originally raised in October 1884, and the case of the pursuer as it then stood on record was—that he had employed the defenders as men of business to prepare an effectual deed of security whereby he was to receive a right and interest in certain letters-patent for improvements in anchors in security of a loan by him of £5000 out of a total sum of £10,000 which the patentees were borrowing thereon, and that in doing so he relied on the exercise of their professional skill and care on his behalf as lender; that it was their duty to satisfy themselves of the validity of the patent sought to be assigned, to inquire whether the alleged provisions for which the letters-patent were granted had been anticipated and disclosed in previous patents and specifications, and further, to have caused a search to be made in the indexes to specifications kept for inspection in terms of the Patent Law Amendment Act 1852, with a view of discovering whether any of the specifications there enumerated anticipated or affected the validity of the patent proposed to be assigned. He averred that the defenders failed in these duties, the performance of which would have disclosed that the patent was anticipated and not valuable, and that their failure constituted negligence or want of care, professional skill, and a failure in their duty to him as his law-agents. He then set forth the failure of the subject of the security from invalidity in consequence of anticipation, and the consequent loss of the money advanced, with the interest.

The defenders admittedly acted in the matter as law-agents both for the borrowers and lenders.

They explained that they expressly set forth the risks incident to the transaction to the lenders, who, they alleged, were quite capable of forming an opinion upon the matter before they entered into the transaction. They also averred that before completing the transaction they laid the

letters-patent before a qualified patent agent in Glasgow, and that his report was submitted to the lenders, including the pursuer.

The pursuer pleaded, *inter alia*—“(2) The omission of the defenders to make, or cause to be made, any search or examination of the Register of Patents, or any inspection of the indexes of specifications, &c. of patents, or any examination of the specifications of patents appearing therein affecting the validity of the letters-patent assigned, amounted in the circumstances to gross negligence and failure of duty towards the pursuer, for the consequences of which the defenders are liable.”

The defenders pleaded, *inter alia*—“(1) The pursuer's averments are not relevant or sufficient to support the conclusions of the action. (5) The defenders having fulfilled their duty as agents, and not having been guilty of any negligence in the matters libelled, they should be assoilized.”

On 20th February 1885 the Lord Ordinary found, *inter alia*, that the facts stated did not constitute a case of neglect of professional duty on the part of the defenders, rendering them liable in damages, and assoilized them from the conclusions of the summons.

“*Note.*— . . . It is alleged that it was the duty of the defenders to inquire whether the inventions for which the letters-patent were granted had been anticipated, and for that purpose to cause a search to be made of the indexes to specifications, and that if they had done so the defenders would have found no less than nine specifications, all of which are anticipations of the invention on which the pursuer lent his money. The question then arises, whether it is part of the duty undertaken by the defenders as law-agents, employed to prepare a deed of security, that they should search for possible anticipations of the invention for which the patent, which is the subject of the security, was granted. It is not alleged that the defenders expressly and specifically undertook this duty. The ground of action is, that being employed to prepare a security it was their duty to make a search as a part of the business of preparing a security. Various objections to this view of the defenders' obligation at once occur. In the first place, the kind of search which it is said the defenders ought to have instituted is entirely different from a search for incumbrances. There is no question here of any competing assignation or deed of security in relation to the particular patent. It is the patent itself, the subject of the security, which is said to be valueless. Neither is there any analogy between the suggested inquiry and the kind of inquiry which is often made by a law-agent employed to lend money on heritable security with reference to the value of the subject. In some cases, and especially where he is acting for trustees, it may be the duty of a law-agent to employ a professional valuator (of course at the client's expense) to give an opinion as to the value of the subject of the security. I am not prepared to affirm that this is a necessary and invariable part of the duty of a lender's agent. The lender may have satisfied himself on the question of value, or the agent may have good reasons for assuming that the lender has himself undertaken that part of the business.

"But again, I observe, there is here no question as to the value of the invention as an invention. The matter so be inquired into is whether the invention was anticipated. Now, the kind of inquiry which a conveyancer undertakes is regulated by usage, which necessarily varies with the nature of the business, and varies for different parts of the United Kingdom. In England, where there is no general register of titles, the inquiry to be prosecuted by the conveyancer must be different from that which is required in Scotland where there are public registers, and a recognised system of searching those registers. But an inquiry whether a particular invention has been anticipated appears to me to be a kind of investigation not falling within any established professional usage, and which is altogether outside the scope of the duties of a law-agent and conveyancer. It is not a kind of business which he is qualified professionally to undertake. It is not an inquiry which anyone dealing in patent rights would necessarily and as of course desire to institute, and I think the client might reasonably object to pay the cost of such an investigation if he had not ordered it. How then can it be said to be a part of the agent's professional duty to make or cause to be made such a search? But further, it is evident that a search of the indexes of specifications would not be sufficient to protect the lender against the risk of avoidance of the patent by anticipation. A specification of a previous patent may be anticipation, but it is not the only kind of anticipation. It would be necessary also to examine the literature of engineering and mechanical science to ascertain whether the invention had not been made and published otherwise than through the Patent Office. No such search could possibly be complete. What is wanted in such cases is not a search, but the opinion of an expert as to the originality of the invention, and the probability of the patent standing good when exposed to the test of an action at law. No doubt such inquiries are often made by people who invest their money in patented inventions, but they are made as matter of special arrangement, and are not understood to be comprehended in the employment of a law-agent. Everyone who has to do with patents is aware that patent rights are defeasible on certain grounds. But it is also well known that many patent rights of doubtful validity pass unchallenged because individuals are unwilling to incur the expense of contesting their validity. In the present case I have no doubt that the pursuer knew very well what he was doing when he agreed to lend the money at twelve per cent. on the security of a patented invention. If he wanted the opinion of a patent-agent or professional mechanician as to the originality of the invention, he ought to have instructed his agent to obtain it, and I cannot hold the defenders responsible as for negligence or want of skill because they failed to make an inquiry which I conceive they were not entitled to make without instructions.

"It is unfortunate that in this case the defenders undertook the duty of agency for the two parties, the lender and borrower. An agent who does so exposes himself to such charges as are made in this record. I think it is much to be desired that the practice of double agency should

be discontinued, because it is in all cases difficult, and in many cases impossible, that an agent should give his best advice to either of the parties consistently with his obligation to promote the interests of the other. I trust that through the intervention of the Court or the Legislature this erroneous practice may be corrected. But I do not think that in the present case it has resulted in any actual neglect of duty on the part of the defenders."

The pursuer reclaimed.

In the course of the discussion the pursuer moved to be allowed to open up the record and to make certain amendments, which motion being granted, he averred that the defenders knew and recognised it to be their duty in his interest to see as to the existence of anticipations of the letters-patent proposed to be assigned, as he had no acquaintance with patent law, and that he left it to them to take all steps necessary for his protection, and that on 11th August 1877 they had sent the following letter to Mr Hunt, a well-known patent agent and expert in Glasgow:—  
"Edmund Hunt, Esq. Dear Sir,—It is proposed that the three patents noted on the other side should be assigned to clients of ours, but before the assignation is proceeded with we wish to ascertain, for the information and protection of our clients, that no prior assignation or other deeds affecting the patents have been granted, and that there are no other or competing patents for the same invention, or that would nullify the patents now proposed to be assigned; and it will be obliging if you will cause a search to be made in the Register of Patents with a view of ascertaining whether or not there is anything which would render it impracticable or inexpedient to proceed with the proposed assignation.—Yours faithfully, M'CLURE, NAISMITH, BRODIE, & MACFARLANE." [The letters-patent noted were those as to anchors proposed to be assigned by Martin, the borrower, and one for improvements in chain cables proposed to be assigned along with them.] "(Cond. 7) The said Edmund Hunt having made certain inquiries in pursuance of the said employment, handed or transmitted to the defenders prints of the specifications of the letters-patent referred to in the above letter, and also a print of the specification of certain other letters-patent in favour of the said Francois Martin, dated 21st October 1864, and sealed 28th February 1865; as also, a pamphlet issued by the patent office containing abridgments of anchor patents from 1796 to 1866. He also pointed out to the defenders, *inter alia*, that one of the patents proposed to be assigned, viz., that of 6th May 1864, as also the patent above mentioned of 21st October 1864, had been the subject of certain assignments which formed a bar to the assignation proposed. In these circumstances the said Edmund Hunt did not make any examination as to the novelty of the patents proposed to be assigned, but requested further instructions from the defenders before prosecuting his search. The defenders, however, although nothing had occurred to make the search which they had ordered unnecessary, took no further action on Mr Hunt's report. They gave him no further instructions, nor did they employ any other expert. On the contrary, they dropped the search which they had initiated, and they did so without any communication with

the pursuer. The said specifications and pamphlets are produced, and held as repeated. Neither these documents, nor Mr Hunt's inquiries, nor the results of Mr Hunt's report, were communicated to the pursuer prior to the closing of the transaction."

He further averred that from the information supplied to the defenders if they had made the slightest examination they would have discovered that there were patents in force which anticipated and rendered invalid those which were to be assigned to him.

He also averred that at a meeting held in the defenders' chambers on or about 20th August 1877, and before the transaction of loans was made, the proposal to consult an expert on the validity of the patents was fully discussed, with the result that the borrower, Claude Martin, procured the following letter from Tongue & Birkbeck, patent agents, who were, and were known by the defenders to be, Martin's own patent agents:—"Messrs C. Martin & Son. Gentlemen, —With regard to our opinion as to the validity of your patents for anchors and chain-cables, dated and numbered respectively, viz., anchors, 30th May 1872, No. 1632; chain-cable, 31st August 1872, No. 2597—there can be no ground for supposing them to be otherwise, inasmuch as their extensive adoption by the Government for the British Navy and by the principal foreign States and by the Mercantile Navy proves their great value. The fact also that no attempt has ever been made to question their validity is the best proof you can have that they are valid, the patents having now been extensively worked for the last five years. We are also of opinion that no previous patents taken for improvements in the construction of anchors can affect in any way the validity of your patent of 1872, because the principles embodied in that patent we believe to be essentially novel. —We are, yours truly, TONGUE & BIRKBECK."

He averred that this letter was procured not by the defenders but by Martin, the borrower, on his own application to Tongue & Birkbeck, that the defenders gave them no instructions to make a search, and that none was made, and that their letter was submitted by the defenders to him (pursuer), but he was not informed that it was written by the patent agents of the borrowers, nor was it pointed out to him that it was not equivalent to a report by an expert, and did not at all include the existence of anticipating patents.

The defenders gave a general denial to these amendments under reference to the document produced, and they also averred that the risks of such a transaction were fully before the pursuer, who was as able as they were to judge of them.

The pursuer also added the following plea, founded on the averments made by him in the amendment—"The defenders having, while acting as the agents of the pursuer, failed to disclose to him facts within their knowledge which were material to the question of his consenting to the said loan, are liable to him in damages as concluded for.

The Court after a discussion on the amendment remitted to the Lord Ordinary to allow a proof.

The proof was taken before Lord Trayner on 12th and 13th November 1885, and its import sufficiently appears from the opinion of the Lord Ordinary, and from that of their Lordships of the First Division.

On 17th November 1885, after the proof, Lord

Trayner allowed the defenders to amend their record and the pursuers to answer, and of new closed the record.

The defenders in their amendment averred that the pursuer had sold to a company the patents originally assigned, and they pleaded that as the pursuer had at his own hand and without notice to them sold the patents in question, *restitutio in integrum* was now impossible.

The pursuer in answer admitted that the trustees for the various lenders on the security of the patents had sold them, that his share of the price was £1250, and that he was ready to deduct this sum from the amount sued for by him in name of damages.

On 12th December 1885 the Lord Ordinary absolved the defenders from the conclusions of the summons.

"*Opinion.*—In March 1877 the defenders, acting as the agents for Mr Claude Martin, inserted in the *Glasgow Herald* the advertisement quoted in the condescendence. [This advertisement was:—"LIMITED PARTNERSHIP.—A very favourable opportunity presents itself to parties willing to contribute from £15,000 to £20,000, in sums of not less than £5000, for the development of 'a business in a highly remunerative patented article for which there is a large and yearly increasing demand. Apply to' the defenders.] In consequence of that advertisement they were waited upon by the pursuer, and after a variety of meetings and communings, which it is not necessary at present to detail, an agreement was ultimately arrived at, under which the pursuer agreed to lend to Mr Martin a sum of £5000 on the security of a patent for 'improvements in anchors,' dated in May 1872, and a patent for 'improvements in the construction of chains for chain-cables and other purposes,' dated in August 1872. This agreement was concluded by Mr Martin (and his son) executing an absolute assignation of the foresaid patents, dated 4th September 1877, in favour of the pursuer and certain other persons, who were lending money on the same security along with him; and by the execution of an agreement, also dated in September 1877, between Mr Martin and his son on the one hand, and the pursuer and the other lenders on the other hand, in which the terms and nature of the transaction, as well as the rights and obligations of the several parties thereto, were set out at length. The pursuer paid the £5000 he had agreed to advance on 5th September 1877 to the defenders' firm, who acted in the transaction as law-agents both for the borrowers and lenders.

"The stipulated interest on the advance was paid to the pursuer for the period from September 1877 till Whitsunday 1879; but no further interest being paid, the pursuer and his co-lenders, after notice to the Martins in terms of the agreement, entered into possession, and under the title of 'Martin's Patent Anchor and Cable Factory,' used and worked the patents which had been assigned to them. They did so until this year, when (in September 1885) they assigned, *inter alia*, the said patents and all their rights therein, to the persons named in the minute of agreement.

"The validity of the anchor patent was challenged soon after the pursuer and his co-lenders began to work it, and the soundness of the challenge was practically admitted by the abandonment of an action which had been raised by the

pursuer and his co-lenders against Wright & Company of Tipton, who were alleged to have invaded the patent right. I do not go into any detail with regard to the proceedings in the action between the pursuer and Wright & Company, and the subsequent proceedings adopted by the pursuer, as I am prepared to hold, on a consideration of the whole evidence, that at the date of the assignment to the pursuer in September 1877, when he advanced the said sum of £5000, the anchor patent was invalid and commercially of no value. It is right, however, to notice that after the practically successful challenge of the patent right by Wright & Company, the pursuer and his co-lenders took certain proceedings by way of proposed disclaimer, for the purpose of making their patent right free from challenge, which proceedings, in consequence of objections stated thereto, were not pressed but were in abeyance, although in dependence, at the date of the sale in September 1885. I am further prepared to hold it as established by the evidence, that the pursuer, through the invalidity of the patent and consequent worthlessness of his security, has lost the £5000 which he advanced.

“In the present action the pursuer seeks decree against the defenders for the £5000 advanced as aforesaid, and for the interest due thereon in so far as not received at or prior to Whitsunday 1879. The total claim is for £5771, 7s. 5d.

“The first and chief ground on which the pursuer bases his right to recover the sum sued for from the defenders is, that he has suffered loss to that extent through ‘the gross negligence or want of due skill, and failure on the part of the defenders in the performance of the duty incumbent on them as the pursuer’s law-agents.’ The negligence and failure in duty alleged consists in this, that prior to the completion of the transaction in question the defenders failed to satisfy themselves of the validity of the anchor patent right, on the security of which the £5000 was advanced by the pursuer. I say the ‘anchor patent right’ because both in the proof and in the argument which followed no notice was taken of what I may call the ‘chain patent.’ The question then which falls to be decided first is this, Was it the duty of the defenders, as the law-agents of the pursuer in the transaction in question, to satisfy themselves, and thus assure the pursuer, of the validity of the patent right offered as security for the advance to be made by the pursuer? I regard this as a question of very considerable importance, not only because of the pecuniary liability depending upon it in the present case, but because it involves a large general question as to the duties and responsibilities of law-agents who are or may be called upon to act for clients in the purchase of patent rights, or in lending money upon their security. In endeavouring to solve this question it has to be remembered that the validity of a patent depends chiefly upon these four considerations, viz.—(1) Whether the subject-matter is patentable? (2) whether the patentee is the true inventor? (3) whether there has been prior use? and (4) whether besides being novel the invention is one of general utility? With regard to these four considerations it is clear enough that a law-agent is not bound to have, nor supposed to have, the skill which would enable him to advise as to the first and

fourth, namely, whether the subject-matter was patentable, or whether the alleged invention was one of general utility. As concerns the third—prior use—it is not maintained by the pursuer (and could not in my opinion be maintained) that the defenders had either the means or the duty of satisfying themselves upon that head. There remains, therefore, only the second of the considerations I have referred to, and it is with reference to it and it only, as I understand, that the pursuer (on this branch of the case) now maintains there was failure in duty on the part of the defenders. The pursuer’s averments on this subject amount to this, that the defenders failed to search, or cause to be searched, the Official Indices to Specifications, kept for inspection in terms of the Patent Law Amendment Act 1852, an examination of which would have disclosed the existence of prior patents fatal to or seriously affecting the validity of the patent in question. In point of fact some investigation was made as to the existence of prior patents, although not of the precise kind here specified by the pursuer, and the result of that investigation affects the decision of another part of this case. But on the matter now immediately under consideration I proceed on the footing that the defenders made no search whatever in the Official Index referred to. Were the defenders bound in fulfilment of their professional duty to the pursuer to make such a search? I confess that at one time the inclination of my mind was to hold that they were, but further consideration with the aid of a very able argument from the bar has satisfied me that they were not.

“It was argued for the pursuer that it was the defenders’ duty as the pursuer’s law-agents to ascertain (1) that the right to the subject to be assigned in security was well constituted; and (2) that the borrowers were in a position to give a valid, free, and unencumbered title to that subject. No doubt has been raised upon this second head of the pursuer’s argument. The defenders satisfied themselves that the borrowers were vested in the right they offered to assign in security, and that no previous assignment or mortgage limited their right or made the security less in value or extent than it was represented to be. It is on the first branch of the pursuer’s argument that the difficulty arises. With regard to it, however, I must say that it appears to me to be ambiguous. In one view of it the pursuer’s argument may be conceded, in another view of it it is unsound. If by the constitution of the right the pursuer meant the constitution of the right as appearing *ex facie* of the letters-patent, I think his argument is not open to any objection. The defenders were bound to see that the letters-patent were in due form, conform to statute, duly stamped, and so on. These were matters within the skill of the defenders as law-agents. But if the pursuer means (and that is what he does mean by his argument) that the defenders were bound as law-agents to go behind the letters-patent and inquire whether the right thereby conferred was one which, on grounds not appearing from the letters-patent, should never have been granted, or could now be set aside, I think his argument is unsound. The case of a proposed transmission of a feu-right was put in illustration, and it was said that the agents’ duty for a lender or purchaser was not

merely to see that the borrower or seller had an unencumbered title under which he could validly transmit, but that he must also satisfy himself that the original grant was well constituted. This illustration is suitable enough, but the difficulty of applying it, if any, arises again from the ambiguity of the word 'constituted.' If the law-agent, in the case supposed, found that the feu-charter proceeding from the superior was valid in so far as appeared *ex facie* of that deed—that it had been duly registered so as to complete the vassal's feudal title, and that nothing appeared on the public records burdening the lands or limiting the vassal's right to convey them in security—what more is the agent bound to do? Must he, in fulfilment of his professional duty, go to the locality of the subjects proposed to be conveyed, and satisfy himself that the subjects described in the title-deeds really exist? If there was no subject, of course there was no well-constituted grant, but it is not the valid constitution of the grant in that sense of which the agent is bound to satisfy himself. Nor is it in the case of a patent right his duty to go behind the letters-patent to ascertain whether there was a good invention. In each case the question whether there exists a heritable subject as described, or a good invention as patented, is a proper subject for inquiry if any doubt is suggested or exists. But it is not the agents' duty to make that inquiry unless he is specially desired or undertakes to make it. Of itself it does not fall within the known and recognised duty of a law-agent as such. The defenders' counsel suggested another illustration, which I think has an important bearing upon this question. Suppose a law-agent for a purchaser, in going over a progress, finds that the person proposing to sell certain lands has a title based upon a precept of *claire constat*, either in favour of himself or some of his authors within the prescriptive period. That precept sets out that the superior has been satisfied of the death of his last entered vassal, and therefore grants precept for the infetment of the heir. Is the law-agent for the purchaser bound, as law-agent, to go behind the precept and inquire on what grounds the superior was satisfied of the death of his vassal, or to institute a separate inquiry to satisfy himself of the fact? And if he does not do so, is he to be personally responsible to his client if the vassal supposed and stated to be dead should after all prove to be alive? I think these questions can only be answered in the negative. The agent appears to me to discharge his duty if by examination of the titles and records he satisfies himself that, *ex facie* of both, the proposing seller or borrower has a good title to the subject which he offers to sell or convey in security. In the present case the defenders did what was equivalent to that. The letters-patent *ex facie* presented no flaw or invalidity, and the register of assignments shewed that the Martins were vested in the right, without limit or incumbrance, and were therefore in a position to give a good and free title to the pursuer and his co-lenders to the right which the letters-patent conferred. Whether that right was assailable, or was commercially valueless, was not the concern of the agents but of the parties.

"The pursuer further argued that the defenders as law-agents knew, or should have known, that no patent right was valid or well constituted un-

less it fulfilled the four considerations or conditions to which I have already alluded, and that it was the defenders' duty, therefore, to see that the four conditions had been fulfilled or purified. But as I have already indicated, there are three out of the four conditions with which a lawyer's skill does not enable him to deal. I think it just as certain that he has not, and is not required to have, skill to deal with the fourth. An examination of the specification of preceding patents might shew him that a patent had been previously obtained for an anchor, or improvements in anchors, but would not enable him as a law-agent to say whether it was in any sense or to any extent an anticipation of the patent which he was called on to transfer. Such a search is not analogous to a search for incumbrances in a property register. The search in the Register of Assignments of Patents is analogous; and that search was made. At all events, no damage is alleged to have arisen from a failure to make such a search; is it not said that there was any previous assignment of the patent in question, or any mortgage or security affecting it.

"I am therefore of opinion that there was no failure of duty on the part of the defenders, as law-agents for the pursuer, in the transaction in question in so far as concerns the matter I have been dealing with. The same view was reached by Lord M'Laren in deciding upon the relevancy of the pursuer's case, and I refer to the opinion delivered by his Lordship as affording additional grounds for the conclusion we have each arrived at. Nothing that was disclosed in the evidence led before me goes to affect in my judgment the opinion expressed by Lord M'Laren.

"The case, however, does not end here. The pursuer refers to the letters written by the defenders on 11th August 1877 to Mr Hunt, a patent agent in Glasgow, quoted in the condescendence, as shewing what the defenders' views were of their duty at a time while the negotiations for the loan in question were still in progress. In that letter the defenders, 'for the information and protection' of their clients (the lenders), express their wish to ascertain (1) 'that no prior or other deeds affecting the patents have been granted, and (2) that there 'are no other or competing patents for the same invention, or that would nullify the patents proposed to be assigned,' and with this view they requested Mr Hunt to cause a search to be made in the Register of Patents. I cannot regard this letter, written by the defenders, as acknowledging or recognising any duty upon them to search the Register of Patents. Indeed it is an acknowledgment on their part that they are not competent to make the search, or they would not have asked an expert to make it for them. It was a proper letter for the defenders to write, however, for they knew the dangers to which the validity of a patent was exposed, and against these dangers they desired so far as possible to guard their clients. This letter, however, whether in itself of so much importance as the pursuer attributes to it or not, acquires undoubted importance from what followed upon it, and this leads me to the second ground on which the pursuer seeks to impose liability on the defenders for the loss he has sustained. The pursuer maintains that whether the defenders were bound to make the search in the official index or not, yet in point of

fact they became aware before the transaction was closed that the patent right in question was invalid, or at least of doubtful validity, that it was their duty to have disclosed all they knew or had reason to believe on this subject to the pursuer, who, if such disclosure had been made, would not have gone on with the transaction; that the defenders failed in their duty by not making this disclosure, hence the loss and the defenders' liability therefor.

“On receipt of the defenders' letter of 11th August Mr Hunt wrote to his correspondents in London ‘to see if any assignment or other document is entered in register of proprietors relative’ to the patents in question. The reply was to the effect that certain assignments were found affecting the patents of 1864, but none affecting the patents of 1872, and along with the reply there was sent to Mr Hunt a book titled ‘Abridgments of Specifications relating to Anchors.’ On receipt of this letter and book Mr Hunt saw Mr Brodie, but what took place between them on that occasion neither of them at this distance of time is able to recollect. Their want of memory, however, is not so material as it might otherwise have been, for from the entries in Mr Hunt's business-books made at the time, and from a letter written within a few days thereafter by Mr Brodie, a sufficiently detailed and, I have no doubt, accurate account can be obtained of what passed between Mr Hunt and Mr Brodie on the occasion referred to. Mr Hunt's account contains this entry, under date 14th August 1877—‘Attending Mr Brodie with notes of assignment, &c., received from London, and conferring with him as to the probable validity of the patents; also examining abridgments of patents relating to anchors, and acquainting Mr Brodie with the result.’ What that result was may be learned, at least to some extent, from Mr Hunt's evidence. He says—‘All the information which I got then as to the validity of the patents was simply from the glance through the abridgments. I would not say that that glance through the abridgments excited a doubt in my mind, but it excited in my mind a feeling that farther research was necessary. We never regard these abridgments as giving anything like an exhaustive search. (Q) Having so examined the abridgments you acquainted Mr Brodie with the result of that examination; what does that mean?—(A) All I can recollect with any certainty is that I stated I thought farther search should be made.’ This evidence is supplemented as I have said by a letter written by Mr Brodie. That letter is dated 20th August 1877, and is addressed to Mr J. R. Miller, one of the pursuer's co-lenders, and in it Mr Brodie not only states in substance what Mr Hunt had communicated, but also the effect of that communication on his own mind. Mr Brodie says—‘I have had a meeting with the patent agent. He has lent me an abridgment of patents on anchors. It would appear that an anchor on a similar principle was patented in 1821. It may be that there is nothing in this, but as the result of my interview I write to say that it will not be possible to be ready for Friday.’ (This Friday had previously been fixed as the day for settlement of the transaction). Mr Brodie concludes his letter thus—‘It occurs to me that it will be necessary to have a distinct report by the patent agent as to the validity of

the patent before proceeding farther. This will require time, and will be attended with expense. The authority of Mr Martin must be obtained.’ There are some parts of this letter which I have not quoted on which some observations were made by the pursuer's counsel, but I notice this only for the purpose of saying that the interpretation of that part of the letter adverse to the defenders disappears before the explanation made by Mr Brodie.

“In view of the evidence I have just referred to, I think it must be held as established (1) that Mr Brodie knew before the pursuer's money was lent or the patent rights assigned to him of the existence of at least one patent prior in date which might affect the validity of those intended to be transferred; (2) that in the opinion of the expert whom he had consulted a search was necessary of a more exhaustive kind than any that had been made before it would be safe to complete the transaction with the Martins or lend them the money; (3) that in the then state of his knowledge Mr Brodie was himself of opinion that before the transaction was completed ‘it would be necessary to have a distinct report by the patent agent as to the validity of the patent;’ and (4) that the settlement of the transaction was postponed in consequence of that opinion.

“The pursuer maintains, as I have already stated, that Mr Brodie's knowledge and opinion being such as I have just described, he was bound to disclose both to his client, the pursuer, and that if he failed to do so, and proceeded to complete the transaction in which the pursuer was risking £5000 without obtaining the expert's report on the validity of the patents which he himself considered ‘necessary,’ or obtained from his client distinct authority to dispense with such a search after he had been fully made aware of the risk which by so doing he might incur, any loss arising which that search if made would have prevented must be borne by him. In short, Mr Brodie should either have insisted on an exhaustive search as recommended by Mr Hunt, or was bound to place the whole matter fully and clearly before his client, leaving with him the responsibility if a search was not made. I entirely agree with this argument, and adopt this view of Mr Brodie's duty. In my opinion the loss which the pursuer has suffered is directly attributable to the want of this ‘necessary’ search. It would have been as easily discovered in August 1877 that the patents of 1872 were invalid, as it was in 1881 when their validity was challenged by Wright & Company. Perhaps the prior use relied on by Wright & Company would not have been discovered, but at least enough could have been discovered to deter the pursuer from going further with the transaction. But the question of fact remains, Did the defender Mr Brodie fail to disclose to the pursuer the knowledge he had? or did the pursuer in the knowledge of all Mr Brodie knew agree to dispense with the search? It is on this part of the case that the proof is least satisfactory, for the recollection of all concerned as to what took place verbally at meetings which they had is very vague. Consequently any evidence derived from entries or notes made at the time comes to be of extreme value.

“It appears from the entries in the defenders' books that after Mr Brodie had had his meeting



with Mr Hunt on the 14th August he put himself in communication on the subject (I take it) of the required search with Mr Martin and his manager Mr Buckland, and on the 17th August a meeting was held in the defenders' chambers, at which the pursuer and others were present. With reference to that meeting there is the following entry—'Meeting Mr Stewart, Mr Caird, and Mr Miller separately, and fully conferring on whole matter, and risks necessarily incident in connection with such a transaction.' Immediately after that a meeting was held at which the three persons previously named seem to have been joined by the others interested, and particularly by Mr Martin and Mr Buckland, and at this meeting the defenders made 'full explanations,' and submitted the draft assignation and back-letter, 'when it was finally arranged to meet again on Friday next (*i.e.*, 24th August) for settlement.' Beyond these entries I think there is no reliable or satisfactory evidence of what took place at these meetings. The parties cannot charge their memories with what took place, but the pursuer says that Mr Hunt's name may have been mentioned 'without exciting any attention,' while he is certain that nothing was said 'calculated in any degree to excite alarm.' Whether Mr Hunt's name was mentioned or not I am disposed to hold that nothing was said at this meeting to the effect that Mr Hunt had recommended a search among the specifications of patents, because the letter written to Mr Miller by the defenders on the 20th (three days after the meeting) refers to what Mr Hunt had said, and as to the necessity of a search in such terms as to satisfy me that the communication made in the letter was then made to Mr Miller for the first time. Now, Mr Miller was present at both the meetings on the 17th, and if Mr Hunt's views had then been explained it is impossible to believe that the letter would not have made some reference to what had taken place at the meeting. It seems to me probable that Mr Brodie did not mention to the meetings of the 17th the result of his interview with Mr Hunt, because he was waiting to learn what Mr Martin was prepared to do in order to remove the difficulties suggested by the interview with Mr Hunt.

"As has been seen already, Mr Miller was informed that the proposed settlement of the transaction on the 24th had been postponed. No such intimation had been given to Mr Stewart, who accordingly went to the defenders' chambers on that day; and the defenders' entry relative to that call is as follows:—'Meeting Mr Stewart, explaining cause of delay in having matters arranged.' On this occasion Mr Stewart saw Mr Morison, then a clerk, and now a partner, of the defenders' firm; but of what took place between them the pursuer has no recollection. He says (on cross-examination),—'My recollection is quite a blank between 17th August and 3d September as regards these transactions.' Mr Morison, however, is examined, and says that he was conversant with what was going on in reference to the transaction in question; he had read the letter of 20th August sent to Mr Miller; he met Mr Stewart on his call on the 24th. He adds,—'I have no doubt I told Mr Stewart what Mr Brodie recommended to be done—that a separate and independent report should be got from a patent

agent, and that it was desirable to postpone the settlement of the transaction till that was done.' Mr Morison on cross-examination admits that he speaks so far from the terms of the entry I have quoted, but he is also pretty positive as to what he told the pursuer. I am disposed to hold on this evidence that the pursuer was informed by Mr Morison of the real cause of the postponement of the settlement, and that the statement made to him was practically a repetition of what had been told Mr Miller in the letter of 20th August. The pursuer had come for the purpose of settling, and would scarcely have been contented with the statement that the settlement had been postponed without any reason being assigned. If any reason was assigned, it is not suggested that any other than the true reason was given; and Mr Morison, who knew the true reason, had no interest in giving a false or withholding the true one. Besides, the entry made at the time bears that 'the cause of delay' was explained to the pursuer.

"No further meeting between the pursuer and defenders took place till 3d September. In the interval Mr Martin had obtained the letter from Tongue & Birkbeck quoted in the condescendence, and handed it to the defenders, and the defenders had inquired through their London correspondents as to the respectability and standing of Tongue & Birkbeck. They had also been informed by Mr Martin (or on his behalf) that this letter must be accepted as sufficient, and that no farther search was to be made at his, Martin's, expense. On 3d September the parties met again in the defenders' chambers. The entry in their books relative to this meeting is as follows:—'Long meeting of parties interested, going over draft agreement and draft assignment, and previously reporting fully as to what had taken place in regard to inquiries as to patents, and when it was resolved to accept report of patent agents in London as furnished—nearly three hours.' It is obviously of the last importance to know what took place at that meeting. The pursuer scarcely recollects anything about it, but one thing he does remember,—'I remember Mr Brodie at our last meeting saying, "Now, gentlemen, if you wish to withdraw, now is your time," and then, I think, he again spoke of the risks incident to such transactions, &c. The defender Mr Brodie cannot charge his memory as to the details of what took place, but looking to the entry I have quoted, he has, 'no doubt,' he explained fully the position of matters. Mr Caird remembers nothing; neither does Mr James Miller. Mr John R. Miller, however, does remember something of what took place. He remembers the meeting of 3d September with 'as distinct a recollection as I can have of things occurring so long ago.' He remembers Tongue & Birkbeck's letter being read, and also the letter by the defenders' correspondent in relation to their respectability and standing. He further says,—'I think one of the things discussed at the meeting was whether Tongue & Birkbeck's report was sufficient to close the transaction upon. At that meeting it was decided to close the transaction on the authority of Tongue & Birkbeck's letter.' 'I remember Mr Brodie distinctly warning us that patents were risky things. He did so at that meeting, and in the hearing of all.' 'The alternative was



put before us—either a further investigation, or to take Tongue & Birkbeck's letter as sufficient, and we decided to accept Tongue & Birkbeck's letter. I think it must have been Mr Brodie who proposed a further investigation. I think we did absolve him from having any further investigation, and accepted Tongue & Birkbeck's letter. We accepted that letter as quite sufficient in the circumstances.' It is quite true that on being further pressed he cannot recollect or be sure whether this (just quoted) took place at the meeting of 3d September or at some other meeting. But I am prepared to hold that it did take place at this meeting, and chiefly for this reason: There was no other meeting which the parties attended (so far, at least, as appears) at which the alternative of taking Tongue & Birkbeck's letter or insisting on further investigation could have been placed before them except this meeting of 3d September. It was plainly not the meeting of 17th August, for Tongue & Birkbeck's letter had not then been obtained; it was not at any meeting with Mr Miller and Mr Brodie alone, for the whole tenor of Mr Miller's evidence bears that it was at some meeting where the parties interested discussed the alternative, and the meeting of 3d September was the first meeting where all the parties met together after the date of Tongue & Birkbeck's letter—indeed after the meeting of 17th August.

"I do not refer to Mr Drummond's evidence, for a reason to be afterwards given; but in my opinion the result of the evidence I have now gone over is this: That the defender Mr Brodie at the meeting of 3d September referred to the risk at all times attending transactions connected with the purchase or lending money on the security of patent rights; that he put before the pursuer and his co-lenders the alternative of accepting Tongue & Birkbeck's letter as to the validity of the patents, or of having a farther investigation made in reference to their validity, and that the lenders, including the pursuer (in the knowledge, as I believe, that Mr Martin had said that if Tongue & Birkbeck's letter was not accepted as sufficient the transaction must go off) agreed to accept the letter before them as sufficient, and 'did absolve' Mr Brodie from having any further investigation made. The whole probabilities of the case seem to me to point in the same direction. In the first place, Mr Brodie had no interest whatever in concealing anything he knew or suspected or doubted in order to urge on a transaction which involved his clients in the loan of a large sum of money on doubtful or bad security. The pursuer was Mr Brodie's personal friend, had been his client, and might be so again, while Mr Martin, the borrower, was a mere chance client, for whom Mr Brodie had not before done business, and with whom in future he might have no business dealings. In such circumstances Mr Brodie's inclination would naturally be to protect the pursuer's interests rather than further the projects of Mr Martin. In the second place, Mr J. R. Miller and his friends were desirous of having the transaction carried through, as likely to lead to the extension of their business and increase of its profits in the larger manufacture than heretofore of an anchor in great demand. The pursuer was not adverse to a transaction in which he got £5000 invested at 12 per cent. interest.

"I am unable to hold, it proved that Mr Brodie, with knowledge of the invalidity of the patent in question, or reason to doubt its validity, or with reason for demanding further inquiry as to its validity, failed to disclose what he knew or doubted on this matter to his clients. On the contrary, I think Mr Brodie disclosed all he knew, and that the pursuer and his co-lenders accepted the responsibility of going on with the transaction at a time when Mr Brodie told them was the time to withdraw from it if they wished to do so.

"It was submitted by the defenders that they should not be made to suffer for any want of recollection on the part of Mr Brodie or the other witnesses, and that if from this cause or any other the proof was defective the disadvantage thence arising should be borne by the pursuer. I agree with that observation. The pursuer founds his claim on the defenders' breach or neglect of duty; I think he must establish that by satisfactory evidence. The *onus* is on him. If he fails to discharge that *onus* that is his misfortune. But in the present case I think that perhaps more than ordinary indulgence is to be extended to the defenders. The transaction in question was completed in September 1877; the pursuer and his co-lenders entered into possession of the patent rights in April 1880; the validity of the patent was challenged in the same year; in 1881 the pursuer and others took steps by proposed disclaimer to have the objections to the patent obviated; and with several reports as to its defects received at different times they continued to work the patent down to December 1882 without making any complaint to the defenders that they had failed in their duty as law-agents. The present claim was not intimated before March 1884. If, therefore, in the interval between September 1877 and March 1884 any evidence has been lost, I think the pursuer is to blame. If he had brought forward his claim in 1880, when the validity of the patent right was challenged, the recollection of the parties would not have been so defective. It is as likely that through this cause the defenders have lost valuable evidence as the pursuer.

"With regard to the parole evidence, I think it right to say that every one of the witnesses seemed to me perfectly honest and candid. But in the case of Mr Drummond, while I think he was as honest as the others, I place little reliance on his evidence, because he was rather rash in his answers, and seemed to me unable to distinguish between what he remembered of the events he spoke to and what he had heard about them since this question of liability was raised.

"On the whole matter, I have come to the conclusion that the pursuer has failed to prove his case, and that my judgment must be in favour of the defenders. Viewing the case as I do, it is unnecessary for me to decide the questions raised by the defenders' third plea-in-law."

The pursuer reclaimed, and argued that the defenders were liable in damages for breach of professional duty upon two grounds—(1) That being law-agents it was their duty as conveyancers to have examined the patent to see if it was free from doubt, and that had they done so they would have seen how matters stood, and could have advised their client (the pursuer) accordingly. (2) Whatever their duty was at

common law in the present case the defenders specially undertook to see if the patent was good, and having failed in this duty they were liable in damages. In the third place, the defenders were liable through their failure to disclose to their client facts affecting the validity of the patent which were within their own knowledge. The defenders undertook the double agency, and they had sacrificed the interests of the pursuer to those of the defender. Looking to the fact that the pursuer was the only stranger to the whole matter [see Lord President's opinion], his interests ought to have been specially looked to. The defenders had undertaken a duty of great delicacy in acting for both parties, and their failure to discharge that duty a right rendered them liable to the pursuer. On the question of the sale of the patent by the pursuer, he was not bound to hold the subject until the issue of the litigation—*Campbell v. Clason*, Dec. 20, 1838, 1 D. 270. Besides, the defenders could not instruct damage by the actings of the pursuer, as the price obtained was admittedly a full price—See *Liquidators of City of Glasgow Bank v. Mackinnon*, Feb. 3, 1882, 9 R. 535. Nor was the pursuer under any obligation to give notice to the defenders of this contemplated sale of the patent.

Replied for the respondent—It was not part of the professional duty of a law-agent to advise his client as to the validity of letters-patent. His duty was limited to seeing that they were *ex facie* regular. Besides, the defenders never undertook the duty of examining into the validity of the patent. A fair reading of the proof showed that the defenders made a full disclosure to the pursuer of all that they themselves knew about this patent. The pursuer was also shown the letter of the London patent agent, and that ought to have put him on his guard. There was nothing illegal in the defenders acting for both borrower and lender, and they discharged their duty by making full disclosures to both parties, and could not therefore be made liable in damages. The pursuer's claim was barred because he sold the patent without notice to the defenders. By so doing he brought the case within the rule laid down in the case of *Mackinnon (supra)*. Here the pursuer disposed of the patent without notice to the defenders after the action had been raised.

At advising—

LORD PRESIDENT—The defenders, who are law-agents and conveyancers in Glasgow, were employed by two persons of the name of Martin, father and son, who were owners of certain patents for improvements on anchors, to raise money for them for the purpose of developing the trade of selling certain articles; and the shape which the proposal originally took, as contained in advertisements in the newspapers, inserted by the defenders, was for a limited partnership to persons who were willing to advance £15,000 or £20,000 for this purpose.

The pursuer Mr Stewart was attracted by this advertisement, and he went to see the defenders, or rather Mr Brodie, one of the partners, with whom he was well acquainted, and whom he previously employed as his law-agent. The end of it was that there was an agreement made out by which the pursuer and four other persons were to advance £10,000, upon an assignation of

these patents, as a loan. The other lenders were Mr Caird, Mr Forsyth, Mr J. R. Miller, and Mr James Miller, persons who were connected with one another in business, and who were also in some degree connected with the patentees in the iron trade. The pursuer was the only party to the transaction who was an entire stranger to the rest of the party. He was a merchant in Glasgow, and he had some money ready for investment, and he was attracted by the proposal which had been made. He put himself entirely in the hands of Mr Brodie as his agent, and left it to him to carry through the transaction so far as he was concerned. The transaction was finally concluded in September 1877, Mr Stewart, the pursuer, advancing £5000, and the other four members advancing £5000 among them in different proportions.

In carrying through this business Mr Brodie, as a member of the defenders' firm, acted as agent for all the parties, and he certainly thereby placed himself in a position of very heavy responsibility, because he had got to attend to interests that were plainly of a conflicting nature. The money was to be advanced upon a very unusual kind of security, and it was to bear interest at the rate of 12 per cent. Now this interest was paid for two years, but then the payments of interest came to an end, and the lenders entered into possession of the subjects of their security, viz., the patent rights, and endeavoured to work them for their own benefit, but found in the end that the patents were invalid for want of novelty, and an attempt to enforce them failing, they withdrew the action which they had raised against supposed infringers, and the result is that the pursuer Mr Stewart has lost his £5000.

The pleas of the pursuer are not stated with all the precision that can be desired in a case of this delicate nature, but I think there are in substance developed in these pleas three grounds of action. The first is an allegation of neglect of duty upon the part of the defenders in having lent their clients' money upon what they ought to have known and seen to be a bad security. The second ground of action is that the defenders undertook to ascertain whether the patents were valid or invalid, and failed to perform that duty.

Now, as regards the first of these grounds of action, I so entirely agree with the judgment of Lord M'Laren, when he disposed of this case originally upon the relevancy, and also with the judgment of Lord Trayner to the same effect upon this point, that I think it quite unnecessary to repeat what they have said.

The duty of a law-agent in lending money upon such a security as this can never extend to finding out for himself whether the patent was a good patent in all respects. It is no part of his duty, and it is not within the scope of his professional work, to ascertain whether a patent is valid in respect of novelty of its subject-matter, or whether its subject-matter has been previously used so as to render it invalid, or has formed the subject of a previous patent. That is not the work of a conveyancer at all. Of course it is his duty to see that the assignation which his client obtains to such a security is a valid and good assignation, and also to see that the letters-patent themselves are *ex facie* regular and suffi-

cient. All that is plainly within a conveyancer's duty, but the notion of his setting about to inquire for himself whether in every point and effect the patent is unassailable is quite beyond the scope of his professional duty. Therefore this ground of action, I think, entirely fails. And that was really the only ground of action that was originally libelled by the pursuer. But when he came here by reclaiming-note against Lord M'Laren's interlocutor he was allowed to amend his record, and that developed in the first place the second ground of action to which I have already referred, viz., that the defender expressly undertook the duty of ascertaining whether the patents were valid, and failed to perform that duty.

Now, in regard to that ground of action, I cannot say that I see any evidence that there was an express undertaking upon the part of the firm or of Mr Brodie to perform this duty. There is no doubt a good deal of talk about that, but I do not think there is evidence, and I do not think the pursuer himself says that there was any express undertaking or obligation by the defenders to perform this duty.

But then there remains the third ground, which is much more formidable, and that is, that the defender Mr Brodie having ascertained that the patent could not be trusted to as a valid patent without further inquiry than had been made, failed to communicate this to his client, and allowed him to advance his money in ignorance of that risk.

That involves two questions—in the first place, whether the defender Mr Brodie had really ascertained whether there was a serious difficulty about the validity of the patent, requiring at all events to be cleared up; and in the second place, whether notwithstanding of his knowledge of that difficulty he not only failed to have it removed by ascertaining by further inquiry whether the patent was valid, but failed to communicate to his client the existence of that difficulty, and the necessity for further inquiry.

Now, these are two separate matters of fact, and as regards the first of them I really have very little difficulty. I think there can be no doubt at all upon the evidence that Mr Brodie knew, in consequence of his communications with Mr Hunt, a patent agent in Glasgow, that it would not be at all safe to accept of this security, or to go on with the transaction without further inquiry. Mr Brodie's letter to Mr Hunt makes this very clear. He says to Mr Hunt on 11th August 1877—"It is proposed that the three patents noted on the other side should be assigned to clients of ours, but before the assignment is proceeded with we wish to ascertain, for the information and protection of our clients, that no prior assignation, or other deed affecting the patents, have been granted, and that there are no other or competing patents for the same invention, or that would nullify the patents now proposed to be assigned, and it will be obliging if you will cause a search to be made in the Register of Patents with the view of ascertaining whether or not there is anything which would render it impracticable or inexpedient to proceed with the proposed assignation."

Now, the answer which he got from Mr Hunt was not in writing, but in conversation, and I do not think there is any doubt, or that Mr Brodie

himself did suggest any doubt, as to what the import of Mr Hunt's communication was. He told him very distinctly that he had made investigations up to a certain point, and the result of that was not to satisfy him that the patent was good, but, on the contrary, to suggest the necessity for further inquiry. And this is made still more clear by the letter which I shall have occasion to refer to more than once, but I refer to it at present for the single purpose of showing what Mr Brodie knew to be the opinion of Mr Hunt at that time. It is the letter of 20th August 1877, addressed to Mr J. R. Miller, and he says to him—"I have had a meeting with the patent agent. He has lent me an abridgment of patents on anchors. It would appear that an anchor on a similar principle was patented in 1821. It may be that there is nothing in this; but as the result of my interview I write to say that it will not be possible to be ready on Friday. I should wish you to call here to-morrow. I shall not be here, but please ask for Mr Thomson. If you cannot call to-morrow, please do so on Wednesday. Inform Mr Caird and the others, except Mr Stewart, simply saying that it has been found necessary to postpone the meeting fixed for Friday." And then he says—"It occurs to me that it will be necessary to have a distinct report by the patent agent as to the validity of the patent before proceeding further. This will require time, and will be attended with expense. The authority of Mr Martin must be obtained." There was thus presented to the mind of Mr Brodie a serious difficulty which, as he himself expresses it in his own letter to Mr Hunt, it was necessary to have removed "for the satisfaction and protection" of his clients.

Now, in these circumstances, what was it the duty of Mr Brodie to do? I should say certainly to insist upon the inquiry which he himself thus pronounced to be imperatively necessary for the protection of the lenders of this money. But in the end he does not do that. There is no further inquiry either through Mr Hunt or anybody else, and nothing done to remove the difficulty, or to remove the suspicion that there was a previous patent which anticipated the patent of Mr Martin. It is not at all necessary, I think, to go through the whole of the evidence with regard to this, because the result of it I think has been very satisfactorily stated in Lord Trayner's opinion. He comes to the same conclusion as I am disposed to do with reference to this matter. He says, when going over the evidence as to Mr Brodie's knowledge and the importance of the difficulty which had arisen—"The pursuer maintains, as I have already stated, that Mr Brodie's knowledge and opinion being such as I have just described, he was bound to disclose both to his client;" and so on. Now, without reading any part of the evidence as to the knowledge and opinion of Mr Brodie, I adopt the view of the Lord Ordinary on this part of the case, and I also fully agree with him in saying that Mr Brodie was bound to disclose to his client his knowledge and opinion upon this important matter.

In that view the only question that remains for consideration is whether he did make that disclosure? The Lord Ordinary says that Mr Brodie should either have insisted on an exhaustive search as recommended by Mr Hunt, or was

bound to place the whole matter before his client, leaving with him the responsibility if a search was not made. "I entirely agree," his Lordship says, "with this argument, and adopt this view of Mr Brodie's duty. In my opinion the loss which the pursuer has suffered is directly attributable to the want of this necessary search. It could have been as easily discovered in August 1877 that the patents of 1872 were invalid, as it was in 1881 when their validity was challenged by Wright & Company. Perhaps the prior use relied on by Wright & Company would not have been discovered, but at least enough could have been discovered to deter the pursuer from going further with the transaction."

Now, that being so, of course the question is whether Mr Brodie did make that full and fair disclosure to his client which the Lord Ordinary says it was his duty to do, and upon that point I am sorry to say that I cannot agree with the conclusion of the Lord Ordinary. Indeed, I think his Lordship has fallen into a mistake as to where the burden of proof lies in this case. He says in a subsequent part of the note to his interlocutor that "it was submitted" by the defenders that they should not be made to suffer for any want of recollection on the part of Mr Brodie or the other witnesses, and that if from this cause or any other the proof was defective, the disadvantage thence arising should be borne by the pursuer. I agree with that observation. The pursuer founds his claim on the defenders' breach or neglect of duty. I think he must establish that by satisfactory evidence—the *onus* is on him."

Now, if Mr Brodie was in that complete knowledge which the Lord Ordinary assumes he is said to have, and failed to disclose both his knowledge and his opinion, it appears to me that the *onus* of proving that he did disclose them is upon the defenders, because that was undoubtedly Mr Brodie's professional duty, and it is distinctly alleged by the pursuer that he received no such information from Mr Brodie. That is a negative. It is impossible for the pursuer to prove that negative otherwise than by examining Mr Brodie, and letting Mr Brodie tell his own story.

Now, I think with the Lord Ordinary that he was bound to lay this knowledge and opinion of his fully and clearly before his client. These are the words of the Lord Ordinary, and I adopt them, and it certainly will not do to gather out of mere fragments and scraps of evidence that somehow or other this knowledge came to the ears of Mr Stewart, the pursuer, that the opinion of Mr Brodie was somehow directly or indirectly communicated to him, for it does not seem very clearly which of these is the true state of the fact. As represented by the pursuer it was the duty of this gentleman himself personally, with that fullness and clearness which the Lord Ordinary demands, to lay the matter before his client. Has he fulfilled that duty? I say no. I think the *onus* is upon him to prove it, and I do not think it has been done. It would not have been at all difficult to prove, because it should have been done in so formal or at least so distinct a manner that neither Mr Brodie nor the pursuer could have failed to recollect it. This is not a matter that ought to depend upon what took place at a conversation. It was a very important and imperative duty that lay upon the defender

in this matter, and he was bound undoubtedly to make a complete disclosure.

Now, in considering the question of fact whether he did make that disclosure or not I am carried back to the letter I have already referred to—I mean the letter of Mr Brodie to Mr J. R. Miller of 20th August—and here it is necessary to keep in mind that Mr Brodie in writing to Mr Miller was writing to one of his several clients. He was agent for the borrower Mr Martin. He was agent for the four lenders, who were strangers to the pursuer—Mr Caird, Mr Forsyth, and the two Millers, and he was agent also for his old client Mr Stewart.

Now, what is the line which he takes when he has become perfectly satisfied that there is a serious difficulty in the way? He writes to Mr Miller telling him in the words I have already read from that letter. But then he adds these—"Inform Mr Caird and the others, except Mr Stewart, simply saying that it has been found necessary to postpone the meeting fixed for Friday." And then he goes on to add these words, expressive of his decided opinion, "that it will be necessary to have a distinct report by the patent agent as to the validity of the patent before proceeding further."

Now, I cannot quite see the explanation that has been given of this letter by the defenders' counsel. His desire to express to Mr Miller that he is not to tell Mr Caird and the others anything except that the meeting is postponed, certainly indicates a desire for concealment, at least, in the meantime. He takes upon himself to tell Mr Stewart. I accept that interpretation of the words "except Mr Stewart," that he did not charge Mr Miller with a message to Mr Stewart but kept that to himself. But then what does he do? Did he tell Mr Stewart anything about it? He left Mr J. R. Miller to inform the other lenders that the meeting was postponed, but to Mr Stewart, his former client, he does not communicate at all, so far as one can see. One would expect that he would have written him a letter. He was no doubt quite close at hand, but in a matter of this vital importance verbal communications are not to be expected, and what I should have expected Mr Brodie would have done would be to tell Mr Stewart in writing that a difficulty had occurred about the sufficiency of the security afforded by these patents, and that in consequence of that the matter had been postponed. If he had done that, I do not think he was bound to go any further in the meantime in the way of giving Mr Stewart explanations of what was precisely the difficulty. It is plain upon the whole proceedings and evidence that Mr Stewart was a man who knew nothing about patents. He was perfectly ignorant upon the subject, and very likely would have at once insisted on a detailed explanation on the subject. But at all events I should have expected Mr Brodie to tell him that the settlement of the transaction was postponed because there was a difficulty about the sufficiency of the security.

Now, how is it that the defenders say that this knowledge was communicated to Mr Stewart after these doubts had arisen. There was a meeting fixed for the 24th of August which Mr Brodie by means of this letter postponed. But he did not communicate that to Mr Stewart—did not even tell him that the meeting was postponed

—and the consequence was that Mr Stewart went to the meeting, which was to be in Mr Brodie's office. He did not find Mr Brodie there, but he found Mr Morison, and Mr Morison says that he has no doubt he told Mr Stewart the cause of the meeting having been postponed, and he has no doubt he would say so and so, and he thinks he is sure of that, because otherwise he thinks Mr Stewart would not have been satisfied unless he had known the reason of the postponement of the meeting. Is that evidence of the communication of these important difficulties and of the knowledge which Mr Brodie had of the patent from the patent agent? I look upon that evidence as merely trifling with the subject. In the first place, it is quite obvious by the way that Mr Morison speaks that he is not speaking from any decided recollection. He is conjecturing that that happened which probably would have happened when he met Mr Stewart on that occasion, and nothing more, and therefore I cannot receive that as amounting to what the Lord Ordinary calls a full and clear explanation to Mr Stewart of the difficulties which had occurred.

Now, the evidence otherwise consists really of the statements made by Mr Brodie, and by the pursuer himself, and I shall take the liberty of referring your Lordships to one or two passages for the purpose of showing whether there really is any ground for holding that the knowledge possessed by Mr Brodie and the opinion entertained by him were distinctly and fully explained to Mr Stewart. In the first place, Mr Brodie speaks thus. He is asked as to that part of the letter to Mr J. R. Miller, to which I have already referred, and he says—"Mr Stewart's office was on the opposite side of the street from ours, and I have no doubt that I expected to explain to him myself the difficulty in the way. It was not that I had any desire that Mr J. R. Miller should conceal the matter from Mr Stewart, but that I intended to communicate with Mr Stewart about it myself. (Q) Why was Mr J. R. Miller in communicating with the others whom he represented simply to say that it had been found necessary to postpone the meeting?—(A) My desire had evidently been to save Mr J. R. Miller the trouble of a long explanation, and that it would not be needful for him to go into details as to what was in the letter, and that all he had to say was that it had been found necessary to postpone the meeting. (Q) But why did you desire him not to tell the others of the difficulties which had arisen?—(A) I had asked Mr Miller to call and confer. He had originally brought Mr Martin, and he was, so to speak, the one to whom I naturally looked. (Q) Was it that you did not want to alarm the others about this difficulty?—(A) I cannot put it in that way, but I would put it that Mr Miller was simply to inform them that it had been found necessary to postpone the meeting, a difficulty having arisen. (Q) But you cannot tell why he was simply to do that, and to do nothing more?—(A) I cannot say. The letter goes on to say that 'it will be necessary to have a distinct report by the patent agent as to the validity of the patent,'—that was my view at the time. The patent agent was Mr Hunt. (Q) Then we may take it that that implied that you did not consider you had as yet had a distinct report from Mr Hunt as to the validity of the patent?—(A) My inquiries up to that time had

been preliminary, and the letter just read suggests that I could not report upon the validity of the patent, but that if it was to be reported upon it must be done through a patent agent, and further, that I had not yet got such a report as I would care to trust to. The letter goes on to say that 'this will require time, and will be attended with expense, and the authority of Mr Martin must be obtained.' The authority of Mr Martin was to be obtained because he was to pay the bill. There was no letter from me to Mr Stewart between the 20th and the date of the proposed meeting. I had no meeting with Mr Stewart up to the 24th. Up to that time I had not carried out my intention of communicating with Mr Stewart." Then he says, in answer to the question, "What was Mr Martin's proposal for obviating the difficulty?—(A) It had been communicated to Mr Buckland and Mr Martin" (Mr Buckland was Mr Martin's confidential agent, and Messrs Tongue & Birkbeck were his patent agents in London), "or either of them, in some form, the one as the mouthpiece of the other, that a report by a patent agent was considered necessary." And then he goes on to tell about Mr Martin having got a letter from Messrs Tongue & Birkbeck. He says "a proposal was made, and appears to have been made to Mr Martin on the 24th of August, to the effect that in lieu of a report by Mr Hunt, counsel's opinion should be taken. That I take to be the opinion of an expert—not an advocate, but a patent agent. Mr Hunt was a patent agent. (Q) Is it not clear that counsel's opinion is put there as contradistinguished from an expert's opinion—the expert being Mr Hunt?—(A) I am merely suggesting, the entry is there to speak for itself, and it is a guess on my part. The question of taking the opinion of counsel was never discussed between Mr Buckland and me. (Q) Why did you resolve not to take Mr Hunt's further opinion?—(A) Doubtless because it was objected to by Mr Martin. On 24th August Mr Martin sent down the letter from Tongue & Birkbeck, and sent that as suggesting that it should be taken in lieu of a further report from Mr Hunt. I have no doubt that when Mr Buckland called that report from Tongue & Birkbeck would be considered. I cannot recollect whether I inquired how it had been got, or what purpose had been expressed to Tongue & Birkbeck as the purpose of getting it. (Q) Did it not strike you as material to learn how that report had been got and upon what footing?—(A) The report as shown by that memorandum had been handed to me with the alternative, 'You must either take it or give up the transaction,' and with that before me I had to put myself, or rather the gentlemen who were interested in this matter, in the best possible position for judging for themselves. I did not consider it material as agent acting for clients to inquire into the circumstances under which the report had been got. I did not think it my duty to make up my mind as to whether the report was a satisfactory substitute for a report from Mr Hunt." Now, that is a most remarkable piece of evidence, because when we look at the report from Messrs Tongue & Birkbeck it is perfectly obvious that that letter was, as a substitute for such a report as Mr Brodie originally thought should be obtained from Mr Hunt, a piece of mere waste paper. It is not the result of any

investigation or inquiry. It is simply an expression of opinion upon the part of these London agents that in consequence of the patent having been used for a number of years, and in consequence of their having acted as agents in taking out the letters-patent for Mr Martin, they were quite satisfied that the patent was all right. That is what it comes to, and nothing else, and that is what Mr Brodie considered satisfactory to him, and because the alternative was presented to him—you must either take this as sufficient or give up the transaction. He did not think it his duty to make up his mind whether that letter was a satisfactory substitute for a report from Mr Hunt—that is to say, he did not choose to take any further trouble in thinking about the matter—and in that frame of mind it is not very wonderful that he did not make that full and fair disclosure to his client which I think he was bound to make. Now, if it was a matter as to which he was not bound to make up his mind, and in which he did not in point of fact feel bound to make up his mind, it is not wonderful that he did neglect his duty. I see he says, that “having read Tongue & Birkbeck’s report, I considered it, and came to the conclusion that it was satisfactory;” and further, he says, “Mr Buckland had seen me on the 27th. I think it quite likely that I stated to him on that occasion that I would advise the contributors”—that is, the lenders—“that the report was satisfactory.” And then comes the meeting of the 3d September, when this transaction was closed, and certainly the evidence on that subject given by Mr Brodie does not lead me to the conclusion that he had departed from that resolution, that he would advise the contributors that Tongue & Birkbeck’s letter was satisfactory. And if he did so, and advised them to proceed upon that without the necessity of obtaining a report from Mr Hunt, the patent agent, after investigation, he just did that very thing which the Lord Ordinary has absolved him from doing, viz., concealing from the pursuer—I do not speak of the other lenders, because we do not know what their state of knowledge was—but undoubtedly concealing from the pursuer the important knowledge which he had obtained from Mr Hunt, and the opinion—the clear opinion—which he had originally formed as to the necessity of further investigation.

The pursuer himself is quite distinct so far that he never heard of the difficulty which occurred—that he never heard of Mr Hunt at all, or of any patent agent having reported a difficulty, or that a difficulty had ever existed or been noticed. I need not read his letter showing that as to the title his recollection is very imperfect, and no wonder, because in the state of his knowledge there was nothing to impress on his mind. All that happened was that a good deal of talk took place at the meeting at which the transaction was settled about the riskiness of patents and about their not being such good securities as other things—but all that was to be counter-balanced by 12 per cent. interest. That was all that the pursuer saw of the matter.

Now, is it possible upon evidence of that kind to say that Mr Brodie has discharged the duty which the Lord Ordinary says lay upon him. I think the result of the evidence is, that he not only failed to disclose to the pursuer the fact which he had within his own knowledge, and

which had very strongly impressed his own mind, that an independent patent agent, Mr Hunt, insisted upon further inquiry, but he also concealed from him the opinion which he, Mr Brodie, originally at least held as to the matter of the additional inquiry, or rather has of its absolute necessity for the protection of the lenders. The conclusion then which I come to in this part of the case is, that being in possession of knowledge which materially affected the risk of making this loan, he entirely failed to disclose that to his client Mr Stewart, and entertaining, at one time at least, the strong opinion that until the difficulty which Mr Hunt had suggested had been cleared up the transaction should not proceed, he also concealed from Mr Stewart that he ever had entertained such an opinion.

Now, that is a very serious matter, but it becomes a great deal more serious when one recalls the fact that this gentleman Mr Brodie had charged himself with the almost incompatible duties by acting as agent for all the parties to this transaction. It was his duty as agent for the borrower to obtain the loan upon the best possible terms he could, and at the least possible expense, and Mr Martin the borrower, Mr Brodie’s client, was anxious to save expense, and insisted upon substituting the worthless letter of Tongue & Birkbeck for a careful inquiry by an independent patent agent. He was anxious to save him that expense, and that was the duty he performed to Mr Martin. But did not he in the meantime forget the duty he owed to Mr Stewart, and is that not just because he had placed himself in that most dangerous position in acting for all the parties to a transaction of this kind? But he did fail in his duty to one of them. I would be disposed to ask whether anybody could believe that if Mr Brodie had been acting for Mr Stewart alone—for the lender alone, and not also for the borrower—he would have done what he did? I feel perfectly certain that any man reading this proof can come to but one conclusion, and that is that the interest of one client was sacrificed to that of another.

I am therefore for altering and finding the defenders liable.

**LORD MURE**—I have come to the same conclusion as your Lordship on all the parts of this case, and I entirely agree in the exposition which your Lordship has now given upon the law applicable to the case, and upon the evidence which has been adduced in support of the pursuer’s case.

When this case originally came before us upon the reclaiming-note against Lord M’Laren’s interlocutor, we were all of opinion that the action as originally laid was not laid on relevant grounds, and at that time an amendment of the record was offered by the pursuer, which contained the statements in the sixth and seventh articles of the condescendence. This new record contained new and material averments, and in particular a letter from the defender Mr Brodie to Mr Hunt of 11th August 1877, and allegations as to what took place, in consequence of the information which had been sent by Mr Hunt to the defender, in regard to the necessity for further inquiry into this patent, and I have now no doubt whatever of the relevancy of this action, because I agree with your Lordship in thinking, that as that information was received by the defender, it was his duty to communicate the difficulties which had occurred

to his client, whose interests he had it in charge to attend to. And I think that in that respect the Lord Ordinary has taken quite a sound view of the position of the defender in regard to this case in the passage which your Lordship has read from the Lord Ordinary's opinion; and that it was clearly, as the Lord Ordinary explains, the duty of Mr Brodie to insist on an exhaustive search as recommended by him on the advice of Mr Hunt, or to place the whole matter fully and clearly before his client, leaving with him the responsibility if a search was not made. His Lordship says that the question therefore remains, Did the defender Mr Brodie fail to disclose to the pursuer the knowledge he had?

Now, that puts very distinctly the main question that is to be disposed of, and in the letter which Mr Brodie wrote to Mr Miller, and which your Lordship has read, he distinctly states to him that such difficulties had arisen as to render it necessary to postpone all further proceedings in the transaction till these had been cleared up. I have never been able to find in the evidence, and we have had no suggestion from the bar, as to why Mr Brodie did not in these circumstances write a similar letter to Mr Stewart. If Mr Brodie in that letter to Mr Miller had stated the difficulty and asked him to inform the other lenders, or had written Mr Stewart to the like effect, I cannot conceive it possible that Mr Stewart, a man of business and position in Glasgow, and ready to lend his money upon good security, if he had got such a letter as that which was written to Mr J. R. Miller, would not have insisted upon the transaction not going on till the difficulties were cleared up. Well then, Has it been proved that any such communication was made? I think that has not been done, and that the attempt to shew this by direct evidence has entirely failed. I am quite unable to draw the inference from anything which is proved to have passed in conversation at any of the meetings which took place between the parties, that the serious difficulty raised by Mr Hunt had been communicated to the pursuer. The pursuer himself distinctly says that he has no recollection of anything of the kind being done, and no one present at these meetings can say more than that they thought it was possible, perhaps probable, that the subject may have been mentioned. The defender himself says, "There was no letter from me to Mr Stewart between the 20th and the date of the proposed meeting. I had no meeting with Mr Stewart up to the 24th—up to that time I had not carried out my intention of communicating with Mr Stewart. On the 24th there is an entry shewing that Mr Stewart came to our office, but I was absent. He saw Mr Morison, who I have no doubt reported to me what took place on that occasion. I cannot recollect what he reported to me. In all probability Mr Morison had not been made aware by me verbally as to the difficulties which led to the postponement of the settlement, but he was familiar with the general course of the transaction through the letter book and otherwise." And he says—"I cannot say whether I shewed to Mr Stewart at this or any other meeting my letter to Mr Hunt quoted on record, or any of the documents which Mr Hunt had handed to me in answer." That is the account which the defender himself gives of the matter. The pursuer's evidence is not very long, but it is quite distinct as to his recollection. He says, speaking of Mr Brodie—

"He never communicated to me that Mr Hunt had suggested that further inquiry should be made. So far as my memory goes, I was not aware of any inquiry having been made at a patent agent relative to this patent, except that which appeared upon Tongue & Birkbeck's letter of 24th August, which was laid before us at our meeting. Tongue & Birkbeck's letter was supported by another letter produced by Mr Brodie certifying the standing of Tongue & Birkbeck." Mr Miller, to whom the letter of 24th August was written, says, when asked "Did Mr Brodie at that meeting, or at any other meeting with yourself and others, mention that Mr Hunt, the patent agent, had been consulted in the matter?—He mentioned Mr Hunt's name to myself, and asked if I thought he should be consulted. I did not know Mr Hunt then or his standing as a patent agent, and I said he must just do what he thought best himself. That was a conversation between Mr Brodie and myself. I do not remember anything of that kind taking place in the presence of any of the other lenders. Mr Brodie made me aware that he had communicated with Mr Hunt, but the precise terms of the communication I do not remember. I do not remember whether he acquainted me with the answer which he got from Mr Hunt. (Q) Did he tell you that Mr Hunt had recommended a further investigation?—(A) It strikes me there was something about a further investigation, but I cannot recollect it distinctly. I did not say anything against a further investigation, so far as I recollect. I left the matter in Mr Brodie's hands to do what he thought best, as I wished to keep clear of it altogether. That was at a meeting at which Mr Stewart was not present."

Now, the only other evidence that there is about this is the meeting which your Lordship has referred to with Mr Morison. I think the evidence of Mr Morison is worthless in a case of this sort. He says he thinks he told Mr Stewart of this matter, but the only knowledge of it which he possessed was derived from the letter book. He had seen the letter in which Mr Brodie tells Mr Miller not to speak to Mr Stewart. I think that Mr Morison, who was a clerk at the time, though now a partner, would have told him nothing that Mr Brodie his master intended to be kept from him, and therefore I put aside Mr Morison altogether.

As regards the inferences to be deduced from the pursuer's want of recollection as to what actually took place at some of these meetings, at which some important representations were made, and which was strongly rested upon by the defenders, and in some respects is founded upon by the Lord Ordinary, it seems to me that the only natural and legitimate inference is that Mr Stewart was never told of the difficulties raised by Mr Hunt, and I think so upon this plain reason, that I cannot conceive that anyone who was going to lend money on a security which on good information was bad, or at all events was of so doubtful a character as to make it necessary to have further investigation, would have allowed the transaction to go on, or, at any rate, go on before these difficulties were put out of the way, and as I come to the conclusion that the difficulties were never told to Mr Stewart or in his presence, I concur with your Lordship in the opinion that we should recall the interlocutor of Lord Trayner and find for the pursuer.



**LORD SHAND**—This case has required and has received anxious consideration. It involves a question of considerable delicacy, and the decision results in serious responsibility to the defenders. It became obvious in the course of the argument that there were strong grounds to doubt the soundness of the view taken by the Lord Ordinary on the evidence, and all of these considerations have led me very carefully to consider the proof and the argument for the parties.

It is, I think, necessary at the outset to see precisely what was the position of the respective parties to the transaction of the security with reference to which the defenders acted as law-agents. Mr Martin, the borrower, was primarily interested in the money being obtained, but the pursuer Mr Stewart, on the other hand, occupied a somewhat exceptional position among the lenders of the sum of £10,000 which was advanced. The pursuer agreed to lend £5000 of the money, and the remaining £5000 was contributed thus—Messrs Forsyth, Miller, & Company, of which Mr J. R. Miller and Mr Forsyth were partners, £2000, Mr Caird, who was Mr Miller's father-in-law, £2000, and Mr James Miller, brother of Mr J. R. Miller, £1000. Mr Stewart was in an exceptional position amongst the defenders, in this respect, that his sole reason for entering into the transaction was to obtain a good and profitable investment of his money. All the other lenders had the further reason that they desired to aid the borrower, and were indeed interested in his success in procuring the loan. This circumstance is in my view not without its importance in considering the extent of the information communicated to the respective parties as the transaction proceeded.

The £10,000 was required for the purpose of enabling the patents for the improvements on anchors to be practically worked, and as the manufacture was to be carried on by the firm of Forsyth, Miller, & Company, the partners of that firm had practically the same interest as Mr Martin to get the money. The firm in lending £2000 were practically getting £2000 paid into their own business for the purposes of working the patent, but getting the obligation of Mr Martin and an assignation of the patents as a security. Again, Mr Caird, who was Miller's father-in-law, expressly states that the motive which induced him to lend the money was for the benefit of the business, and Mr James Miller says in similar terms that he wished to benefit the business and oblige his brother, so that really all of the lenders with the exception of Mr Stewart were interested in this money being got by the borrower although they were agreeing to become lenders.

The defenders undertook to act both for the borrowers, from whom the first employment came, and for the proposed lenders. An agent in a transaction of this kind as acting for the lenders is clearly bound to see that the title he takes is a sufficient and valid title to the patent, and as your Lordship has observed he is probably bound to see that the letters-patent are in proper form, and to see that the due formalities have been carried out in obtaining the letters-patent. Whether in a particular case his duties may go further or not appears to me to depend upon the special circumstances of the particular case, and I do not think one is in a position to lay down

any general rule on that subject applicable to every case. The extent of the duty and obligation on the part of the agent must depend I think on the particular terms of their communications, and on circumstances which must vary in each individual case.

But undoubtedly where, as here, a law-agent undertakes double agency—agency for the borrower and also for the lender—he places himself in a very responsible position. I do not say that the position of acting for both parties is one in which the duties are incompatible, but I do say that the responsibility of that position is very considerable with reference to the duty to be discharged to the lender. Should any question arise such as occurs in this case, I think it is incumbent on the agent to show that he was scrupulously careful in the discharge of his duty to the lender, because an agent who is also acting for the borrower is acting in some respects for an opposing interest, and is liable to the influence or bias which that opposing interest may create. The borrower will naturally seek to obtain the loan on as easy terms, with as little trouble, and at as little cost, and as expeditiously as possible, and pressure to secure some of these objects, if yielded to, may lead to the sacrifice of the interest of the lender to have a safe security. In such a transaction the personal interest of the law-agent may be further involved, for it depends upon his carrying out the particular transaction whether he will get his own professional remuneration, which in transactions of this kind is entirely paid by the borrower, though it includes fees for the double agency. It is clear then, I think, that if a case involving the question whether an agent who has acted for two or more parties having conflicting interests has discharged his professional duty to one of his clients arises, the agent must be prepared to show that the duties which he undertook were as fully and fairly discharged as if he were acting for the lender alone, and it must always be an element—more or less weighty according to circumstances to be considered on the evidence—that he had a conflicting or opposing interest to represent.

The question for decision in this case, notwithstanding the long proof that has been led, comes to a very narrow point, as your Lordship has pointed out—Did Mr Brodie make the pursuer aware of Mr Hunt's and his own view that there ought to be a proper search and report on the validity of the patents before the money was advanced on the security of them? We have important written evidence bearing on that point, and a considerable parole proof. Of the parole evidence I feel bound to say that I think Mr Stewart, the pursuer, has given his testimony in a scrupulously careful way—I should almost say sensitively careful—that he should not say one word that could not be thoroughly relied on. On the other hand, it is due to Mr Brodie to say that his evidence is characterised from beginning to end by the utmost fairness and candour, and with regard to Mr Drummond, I agree with the Lord Ordinary in thinking that, for the reasons which his Lordship has explained, little or no reliance can be placed on it. I do not think that Mr Drummond's memory enables him to speak of the matters that were put to him with any degree of accuracy.

The question then to be determined is, Whether

Mr Brodie communicated to his client the necessity for a further search and inquiry being made in the Register of Patents with reference to the previous patents for improvements on anchors? On the 11th of August 1877 Mr Brodie wrote a letter, which I must characterise a very proper letter in his character of agent for the lenders, or at least in their interest, to Mr Hunt, in which he desires "to ascertain, for the information and protection of our clients, that there are no other or competing patents for the same invention that would nullify the patents now proposed to be assigned." It is clear that Mr Brodie thought that he had a duty here, the duty of protecting his clients. He considered it necessary for the protection of his clients that he should ascertain that there were no other or competing patents, or anything that would nullify the security proposed to be given, and it may fairly be assumed that this duty was undertaken because of his communications with Mr Stewart and the other lenders, and his knowledge of what he knew they expected of him. Following upon that letter, Mr Hunt did make the requisite inquiries in London. He had sent down to him from his correspondents there an Abridgment of Patents, and he more or less carefully—perhaps not very carefully—went over that Abridgment, and became satisfied that further and more careful inquiry was absolutely necessary, in consequence of noting the terms of a number of entries contained in the Abridgment. It occurred to him that it was not improbable that this patent might have been anticipated, and accordingly on 14th August, having come to that conclusion, he had a meeting with Mr Brodie, and we have recorded in his account what took place at that meeting—"Attending Mr Brodie with notes of assignments, &c., received from London, and conferring with him as to the probable validity of the patents, also examining Abridgment of Patents relating to anchors, and acquainting Mr Brodie with the results." He tells us in his parole evidence that that correctly records what occurred. He conveyed to Mr Brodie at that meeting that he thought there were a number of patents in that Abridgment which would require to be examined before it would be safe to make the patents in question the subject of a security. Mr Brodie being asked on that subject, says, with reference to that meeting and the entry in Mr Hunt's account (being first shown the book of Abridgments), "I am satisfied I got it from Mr Hunt either at that or at a subsequent meeting;" and then being referred to the entry, he says, "I have no doubt that correctly represents what took place at the meeting on the 14th." Mr Brodie did not order Mr Hunt to make any further investigation. It appears that the assignment of the patents in favour of trustees for the lenders was drawn on the same day.

Three days afterwards, on 17th August, there was a meeting of all the parties. Now, I ask, on considering this proof, what was Mr Brodie's duty on that day? He had his clients present, some of them desirous of obtaining a loan from others, and others who were asked to lend their money on the security of the letters-patent. Was it not clearly his duty at that meeting to say—I have been in communication with Mr Hunt, and I have been making

inquiries, and Mr Hunt is of opinion that a further search and inquiry will be necessary before lending money on the security offered? I cannot doubt it was his duty to say so, but not a word was said on that subject, and I confess I am unable to understand at this moment why that was so. In the defenders' books of that date there is an entry in these terms—"Attending meeting of all parties, viz., Mr Stewart, Mr Caird, Mr Miller, Mr Forsyth, Mr Drummond, for Mr James Miller, Mr Martin, and Mr Buckland (who was acting for Mr Martin in this matter), and making full explanations, and submitting draft assignment and draft back-letter, and when it was finally arranged to meet again on Friday next for settlement. Engaged about two hours." Now, although it is there stated that "full explanations" were then made, it is perfectly clear that not one word was said about the inquiry which had been made through Mr Hunt, and the necessity for a further search and report. The matter was of consequence, as Mr Brodie knew. That is demonstrated, as the Lord Ordinary observes, by the letter to Mr Miller, to which your Lordship has referred, written three days afterwards—on 20th August—in which Mr Miller is informed of what had taken place with Mr Hunt, and where it was stated that the meeting proposed to be held on the 23d must be adjourned on that account. Then when we turn to the parole testimony (and I shall only read two or three passages from Mr Brodie's evidence on this subject) it will be found that the matter is left in a most unsatisfactory position. Mr Brodie is asked—"(Q) If the meeting which you refer to in this letter was the meeting on the 14th, can you explain why you had not at your meeting with your clients on the 17th reported the result of that meeting?—(A) I really cannot." And again he says, with reference to the letter to Mr Miller—"I had asked Mr Miller to call and confer. He had originally brought Mr Martin, and he was, so to speak, the one to whom I naturally looked. (Q) Was it that you did not wish to alarm the others about this difficulty?—(A) I cannot put it in that way, but I would put it that Mr Miller was simply to inform them that it had been found necessary to postpone the meeting, a difficulty having arisen. (Q) But you cannot tell why he was simply to do that, and to do nothing more?—(A) I cannot say" again is the answer.

Now, if Mr Brodie, having this important information before him, and having formed the opinion that further inquiry ought to be made, is unable to say why he did not disclose the state of matters to his clients at the meeting which occurred thereafter, it is not only a very extraordinary circumstance, but it lays on him quite clearly the *onus* of showing distinctly that at all events at some subsequent meeting or otherwise he did give this information. The meeting of 24th was put off, and it was put off simply because of this important matter. But the only person informed by Mr Brodie of the reason for deferring it was Mr J. R. Miller, who was acting very much in the interest of Mr Martin, which was in material respects his own interest, and who indeed introduced Mr Martin to the defenders. Here again it seems as if Mr Brodie at least had resolved that, for the time, the communication of Mr Hunt's view should not be made to the lenders on this security, and I do not think that any satisfactory reason is given

for not informing Mr Stewart of the true reason for the postponement of the meeting.

The next meeting of the parties was held on 3d September. In the meanwhile what appears to have happened? Upon turning to the accounts of the defenders I find that they had no less than seven meetings, one with Mr J. R. Miller's partner and Mr Buckland, and six others with Mr Buckland. These meetings are recorded in the account. First of all, upon the 23d of August there is a "meeting with Mr Forsyth and Mr Buckland, and fully conferring on subject of difficulty in the way of settlement taking place, and discussing modes of obviating same." Well, that was a meeting with Mr Buckland acting as the representative of Mr Martin, the borrower, and Mr Forsyth, who practically was in the same interest. Again, on the 25th there is a meeting with Mr Buckland. No less than seven meetings are held with the borrowers or their representatives who were anxious to obtain the loan. Now, it resulted from these meetings that Mr Buckland was able by a letter of 27th August to write to Mr Martin as follows—"I have only a few minutes before post time. I have just seen Mr Brodie. He will advise the contributors, and that the report is satisfactory." If this report to Mr Martin was right, then Mr Brodie, having conferred with the borrower or his representatives alone, seems to have made up his mind to advise his other clients, the lenders (notwithstanding Mr Hunt's opinion and what had been his own opinion as to the necessity for an inquiry and report), that the letter of Tongue & Birkbeck was satisfactory. That this is so is confirmed by Mr Brodie's evidence. On being shown Mr Buckland's letter he says—"I have seen this letter within the last few days. Mr Buckland had seen me on the 27th. I think it is quite likely that I stated to him on that occasion that I would advise the contributors that the report was satisfactory."

Now, what was the position that Mr Brodie occupied when he met all his clients on the 3d of September. If notwithstanding Mr Hunt's advice he had formed his own judgment that Tongue & Birkbeck's certificate was satisfactory, and he had himself come to the conclusion on his own responsibility as the lender's agent that an inquiry and report by Mr Hunt was quite unnecessary, and if in consequence of this view he had said nothing at the meeting on the subject, there would be something to say for his position. Even in that case I should have been disposed to hold that it was his duty to explain to his clients that difficulties had been suggested, and that they had in his opinion been obviated by the letter of Tongue & Birkbeck. I do not think it would have been satisfactory even in that aspect of the case, because the letter of Tongue & Birkbeck would have been by no means sufficient, as it seems to me, if the lenders had been represented by an agent acting for them alone to remove the doubts suggested by Mr Hunt; for all that it comes to is this, that the patent had been in use for five years without challenge—and that in their opinion is everything—and that in their view the patent was a good one. It is clear, however, that Mr Brodie did not take this view of his duty or responsibility. He did not say to his clients that doubts had been suggested and that they had been removed from his mind. I find, on turning to his evidence, that he declines entirely to take

that responsibility. He says with reference to this, when asked the question, "And you regarded the report as perfectly satisfactory?—(A) I had got the report, and I had been placed apparently in such a position that the parties had to judge for themselves whether they would take it;" and he further says, being again referred to the terms of Mr Buckland's letter to Mr Martin—"I cannot recollect that I ever said to Mr Buckland that I would advise the contributors that the report was satisfactory. I think what I would do, looking to the alternative I had—"You must consent or reject,"—would be to place the report before these gentlemen and allow them to judge for themselves." That is to say, he was himself to decline to form any opinion upon Tongue & Birkbeck's report, but to place it before the lenders and allow them to judge for themselves. The same position and the same general view of his duty is clearly enough indicated in another passage of Mr Brodie's evidence, where, being asked as to whether he did not order Mr Hunt to make an additional inquiry, he says—"I cannot recollect what I told him on that subject. I did not tell him to go on. (Q) Did you tell him not to go on?—(A) I could not tell him to go on without instructions, and I did not regard it within the line of my professional duty. I was left under the impression that in his view a further search ought to be made, and I did not order that further search because I did not think it was within the line of my professional duty."

Now then, as Mr Brodie had plainly resolved in his mind to leave the responsibility of judging of the value of Tongue & Birkbeck's letter with his own clients, what was the position of the parties on 3d September? It was obviously of vital consequence in judging whether that letter should be received as satisfactory and sufficient to warrant the lending of the money, that the lenders should know what Mr Brodie knew, viz., that Mr Hunt was of opinion that further investigation should be made. Take it in the one view. If they knew nothing of Mr Hunt's view, in which Mr Brodie had concurred, then they might fairly think Messrs Tongue & Birkbeck's letter was quite a satisfactory document to go upon. In that view there had been nothing to suggest to the minds of the lenders that there was any reason for further investigation. Beyond a conversation about the general risks attending loans on patents, the lenders had not been put on their guard. They had no hint that this particular patent was one requiring special inquiry and report. Tongue & Birkbeck's letter made no such suggestion to the lenders. But if, on the other hand, at that meeting, when the question arose whether Tongue & Birkbeck's letter should be acted upon, the lenders had been told to keep in view that Mr Hunt had considered the question, and was of opinion that there should be further inquiry, according to all reasonable probability the transaction would have gone off. The completion of any loan must, I think, have been postponed until such an investigation as was made in the after litigation had taken place, and it would then have been shown that the patent was practically worthless.

It therefore becomes of vital consequence to see whether at this meeting of 3d September there was any communication made to the lenders of what had taken place between Mr

Brodie and Mr Hunt. I see there were five persons present—the pursuer, Mr Caird, Mr J. R. Miller, Mr James Miller, and I think Mr Drummond—and there is not one of these witnesses will say that the advice that Mr Hunt had given was communicated to the meeting. The pursuer says Mr Brodie “never communicated to me that Mr Hunt had suggested that further inquiry should be made. So far as my memory goes, I was not aware of any inquiry having been at a patent agent relative to this patent, except that which appeared upon Tongue & Birkbeck’s letter of 24th August, which was laid before us at our meeting. Tongue & Birkbeck’s letter was supported by another letter produced by Mr Brodie, certifying the standing of Tongue & Birkbeck.” And without going into the evidence of the other witnesses, which I have read carefully, I may just say that there is not one of them who can speak to any such communication having been made to the lenders at all. Lord Mure has referred to the evidence of Mr J. R. Miller, who says that he knew perfectly well of Mr Hunt’s objection, which had been communicated to him by Mr Brodie, and which had indeed formed the subject of much conversation at the time. Mr Miller says, however, that he never heard anything of the kind mentioned in the presence of the other lenders who are interested in this security. Upon this matter Mr Brodie no doubt says, when asked, “Can you say you told them that Mr Martin had objected to a report by Mr Hunt, and had insisted upon Tongue & Birkbeck’s report being taken or the transaction going off?—(A) I have no doubt that would be so taken in connection with the memorandum.” And then he says, “I am speaking again from the terms of the account, and from the memorandum of my previous meeting with Mr Buckland.” He cannot say so from memory. I cannot see that the memorandum to which he refers has anything to do with this point, and I think he made no such communication. From the terms of his letter of 20th August to Mr Miller it is quite clear that it was written on the footing that there was no duty imposed on Mr Miller to communicate it to the lenders, who were simply to be told that the meeting was to be postponed. Mr Brodie is unable to give a satisfactory reason for that restriction, and I see no evidence that he ever removed it or made the communication himself.

But I think the pursuer’s contention is strongly corroborated by the correspondence which took place between the parties before the action was raised. I find in the correspondence of 1884 that M’Clure & Company rendered their account for the heavy litigation that took place in vindicating the validity of this patent, and that Mr Stewart being called on for payment of that account indicated in his reply that he considered the account should not have been presented, and that if it were pressed he would raise the question as to whether the defenders were not liable to him because the security had proved worthless. In a letter of 5th May 1884 he mentions this, and observes—“It has long been a matter for wonder for me how it was that Martin came to be asked to name a patent agent for reference when there was within easy reach such a man as Mr Hunt, who was well known to you as a firm. What Mr Hunt so ably performed in 1881 he would

have done just as ably and as surely in 1877 if he had only been taken into council. He would have detected the spurious nature of the security offered by a simple reference to the document nearest his hand in connection with the 1872 patent—Martin’s immediately preceding patent of 1864. That is my point, and nothing in your reply even professes to be an answer to it.”

Now, is it conceivable that that letter could have been written by Mr Stewart if he had been told of all that had taken place with Mr Hunt—that Mr Hunt had actually been consulted previous to the settlement of the transaction? This letter of Mr Stewart not only seems to disprove the allegation that he was informed at the time that Mr Hunt was of opinion that further inquiry was necessary, but it also corroborates other parts of his evidence very strongly, and the answer is evidence in the same direction. The answer is, not that Mr Stewart had been fully told that Mr Hunt held that opinion at the time, as one would have expected if that had been the case, but it is—“If we are not mistaken, Mr Hunt’s name was suggested by us in connection with the question whether Tongue & Birkbeck’s letter should be accepted or another report obtained.” These letters appear to me to be very strongly confirmatory, if not conclusive, of the question on the evidence as it stands as to whether any such communication was made.

The Lord Ordinary seems to gather from the evidence generally that such a communication must have been made. I must say I think his Lordship leaves out of view altogether the important effect of these letters and of the letter of 20th August to Mr J. R. Miller. His Lordship speaks of the failure of the memories of the parties. Well, if there be such a failure there is important evidence in these writings. The first of these writings plainly makes the request that Mr Hunt’s advice should not be communicated to the lenders, and when we come to the later letters there is no assertion on the part of Mr Brodie, any more than in his evidence, that he made any such communication. Concurring with your Lordship in opinion that the *onus* lies with the agent of showing that he made the requisite communication to his client, and that he has failed to prove this, I go further, and say that even if the *onus* were the other way I think it is proved that no such communication was made. If it had been otherwise some of the persons present at the meeting of 3d Sept. must have remembered a matter of so much importance. I think Mr Brodie failed in his duty in not having disclosed to his client the view which Mr Hunt and he entertained, and therefore that the judgment of the Court must be against the defenders. I do not impute deliberate concealment to Mr Brodie, but there was a failure to discharge the duty of disclosure, which arose probably from the fact that he had cross interests to deal with instead of the interest of the lenders alone. If the interest of Mr Stewart had been in the hands of a separate agent I cannot doubt, as your Lordship has said, that the communication of the view of Mr Hunt would have been made, and resulted either in the transaction at once going off, or in such an investigation being made as would have proved the worthlessness of the security.

It only remains to notice the evidence of Mr

Morison, and I have to say regarding it, that I place no reliance on his statements as to the purport of the information he believes he gave for the pursuer. Mr Brodie says when he is asked the question as to what Mr Morison would report to Mr Stewart when he called on the 24th—"In all probability Mr Morison had not been made aware by me verbally as to the difficulties which led to the postponement of the settlement, but he was familiar with the general course of the transaction through the letter book and otherwise. (Q) Do you mean that Mr Morison had had special charge of this transaction from first to last?—(A) I should explain that I had not been in a condition of health to enable me to go into all these details, and I was obliged to commit certain things to others, and some of these things were performed by Mr Morison. (Q) Was Mr Morison on the 24th cognisant of the difficulties which led to the postponement of the settlement, and which were specially referred to by you in your letter to Mr Miller of 20th August?—(A) I had no doubt been in communication with Mr Morison, but I am not prepared to say that he knew the special difficulties." Then when we turn to Mr Morison's evidence, he says, as your Lordship has noticed, that he has no doubt he communicated this to the pursuer when he called, but then he says he got from the letter book his knowledge of the state of the matter. I must further observe that even if he did read the letter book he would find the communication to Mr Miller expressed anxiety that he should not make the communication to the other lenders. Any man reading that letter book—I mean anyone in Mr Morison's position—would I think have given to Mr Stewart only the same information as Mr Brodie asked Mr Miller to give to the other lenders—simply that Mr Brodie had found it necessary to postpone the meeting. I shall only further say, in regard to the evidence of Mr Morison, that I take exactly the same view as your Lordships have done, and I agree with your Lordship that it is difficult to suppose that Mr Morison made a communication which he was never asked to make, and with reference to a piece of business of which he had no charge whatever.

I have exhausted all that is to be said on the proof in the general question between the parties. I see the Lord Ordinary has been impressed by the length of time taken by the pursuer to bring forward his claim against the defenders. It is unfortunate, but I do not think it can be laid to the pursuer's charge at all. The loan was obtained in September 1877, and the interest was paid down to Whitsunday 1879. In April 1880 the trustees took possession of the patent, and in August of that year they found it necessary to raise an action against infringers to protect their right, and then Mr Hunt being called in, found upon inquiries that the patent was invalid, upon which the trustees lodged a disclaimer, and afterwards the action was abandoned. The result of these proceedings was to cause a considerable amount of delay. The defenders, it must be kept in view, were acting for the pursuer in all these matters, and in doing so a large account was incurred to them, and when it was presented, as I have already said, this point was immediately taken, and this action was raised after full investigation.

A further point was raised by the defenders' plea, which amounts to a bar of action—that since the action was raised there has been a sale of this patent for a certain sum of money, and therefore that restitution is now impossible. I am of opinion that that plea is quite untenable. The case is not one in which there is a proposal to rescind a sale. It is not an action in which the question has arisen between Mr Martin the borrower of this money and the lenders. It is an action of damages with reference to the loan, raised against the law-agents who conducted the proceedings, but under the deduction of the price that was paid by the buyer, and to such a case *restitutio in integrum* has of course no application. It is to be observed that the sale of this patent which took place in satisfaction of the debt was made by the body of trustees who got authority from Mr Martin to make that sale; and it is further to be observed that there is on the record an offer made before any such sale took place to restore the patent and all connected with it if the pursuer's claims were recognised. In these circumstances I am clearly of opinion that a plea of bar arising out of the sale of this patent cannot be successful, and that all the defenders can ask is that they shall receive credit, as they are no doubt entitled to do, for the sum which the pursuer has received, in reduction of his claim. It is not said that the sum that was realised for the patent was below its value, or that the patent was sacrificed by the mode of realisation, or anything of that kind, such as occurred in the case of *Mackinnon v. The City of Glasgow Bank* [sup. cit.], and that being so, all that the defenders can ask is that they shall receive credit for the sum which the pursuer has obtained from the sale in reduction of the amount he now claims in this action.

On these grounds I agree with your Lordship in thinking that we should alter the Lord Ordinary's interlocutor and give judgment for the pursuer.

LORD ADAM—I agree with your Lordships, and I think there would be no advantage in my repeating all that your Lordship has so well stated, in less clear and forcible language.

I would only wish to add that this is one of those unfortunate cases of which we have had several before us of late, where the whole trouble has arisen from law-agents having failed to realise the responsibility that attaches to them when they accept employment from the parties on both sides of a transaction like this where competing interests exist and are likely to arise. Nobody can read the papers in this case without coming to the conclusion that the decision at which your Lordship has arrived, unfortunate for the defenders though it is, is right, and I therefore acquiesce in it.

LORD PRESIDENT—I think it right to say that I forgot to deal with that additional plea that was put in after the record was amended, a plea in bar founded on the fact of the pursuer having sold the patent right. On that part of the case I entirely concur in what has been stated by Lord Shand.

The Court pronounced the following interlocutor:—

"Recal the interlocutor: Decern against the defenders to make payment to the

pursuer of the sum of £4521, 7s. 5d., with the legal interest thereof from the date of signing of the summons in the cause till payment."

Counsel for Pursuer—D. F. Mackintosh, Q. C.  
—Taylor Innes—Begg. Agents—Bruce & Kerr, W. S.

Counsel for Defenders—Pearson—Low.  
Agents—J. W. & J. Mackenzie, W. S.

Tuesday, June 29.

## SECOND DIVISION.

[Lord M'Laren, Ordinary.]

RAE v. MEEK AND OTHERS.

*Reparation—Agent and Client—Professional Responsibility—Process—Separate Defenders.*

Beneficiaries under a trust brought against the trustees and the law-agents under whose advice they were alleged to have acted, an action to have them jointly and severally, or according to their respective liabilities, ordained to replace funds lost through the alleged gross negligence of the trustees and the alleged gross negligence and want of skill of the law-agents. The Court (*alt. judgment of Lord M'Laren, and distinguishing from Robertson v. Fleming, 4 Macq. 167*) allowed a proof in the action as laid against both defenders.

Mr and Mrs Robert Reid Rae were married in 1852. An antenuptial contract was entered into whereby certain trustees, John Meek and others, were appointed. Mrs Rae, in respect of certain provisions and obligations by Mr Rae in full of her legal rights, conveyed to the trustees for the purposes of the trust her entire property, which consisted of certain heritages, a share in the Glasgow waterworks, and £2500, the total value of what she conveyed being £5000. Certain rights were by the contract conferred on Mrs Rae and on the children of the marriage. The trustees had powers of sale and of re-investing the price in purchasing heritages, feu-duties, &c., bank stocks, or in heritable securities, and on such personal security as they approve, declaring "that the said trustees shall not be answerable for errors, omissions, or neglect of diligence, nor for the insufficiency of securities, insolvency of debtors, or depreciation in the value of purchases."

In May 1874 the trustees received the sum of £4750, being nearly the whole capital of the trust estate, for investment.

This was an action by the two children of the marriage against John Meek, Robert Rae, and Mrs Rae, the accepting and acting trustees who were acting in May 1874 in the transaction after mentioned, and also against the firm of Hotson & Howie, writers, Glasgow, Robert Howie, the surviving partner of that firm as such and as an individual, and H. A. Hotson, son of and universal donee of the deceased John Hotson, the other partner, and also against the trustees as trustees, concluding for declarator that the defenders were conjunctly and severally or in such way and manner as the Court should decide, bound to make payment of £4500 to the trustees as trustees, in conformity with the trust

created by the antenuptial contract and for decree ordaining them to make such payment.

The pursuers stated that they had a right on the decease of the surviving parent to have the estate paid over to them.

They also stated that Hotson & Howie were agents in the trust, and were instructed by the trustees on 30th January 1874 to look out for an investment for the sum of £4750 above mentioned; that at a meeting of the trustees, in Hotson & Howie's office, it was agreed to lend £4500 to William Anderson on the security of buildings in Gallowgate which had been valued at £6500 by an architect, provided Mr Hotson should be satisfied with the title; that £4500 was thereafter lent to Anderson over that property at 5 per cent.; that the property was subject to a heavy annual feu-duty. The Gallowgate, they averred, was one of the poorest parts of Glasgow, and prior to the City Improvement Trust having acquired said ground, the ground was covered with old houses, which were let at small weekly rents which were difficult to collect. Mr Anderson was a spirit-dealer in Glasgow, and the buildings he proposed to erect on the said property consisted of shops below and of warehouses and workshops above, and these buildings were finished about the end of the year 1875. "So far as erected on the subjects conveyed to the said marriage-contract trustees, their cost, it is believed, did not exceed £4000. The buildings were financially a failure, and it is believed and averred that from the first they never in any year realised sufficient to pay the feu-duty. It is certain that they never have done that since the year 1878, and it is believed and averred that they never will. The said sum of £4500 has thus been wholly lost to the trust estate. The said Jessie Croil or Rae is presently sixty-eight years of age, and her husband the said Robert Reid Rae is also presently sixty-eight years of age, and they are now almost without means of support. The pursuers are also without means of support, further than what they can earn themselves. The only means which they had to rely on were the sums in charge of the said trustees, but which have now been almost entirely lost. It is believed and averred that neither the trustees nor their law-agents made any inquiry to ascertain what revenue the property yielded after it was completed. It was their duty to have done so, and had they made such inquiry they would have found that the property was almost all unlet, and that the portion let yielded a sum much less than the ground-annual. If it be true that the property could have been sold at any time during 1875-9 for £7000 [as was alleged in answer], it was the duty of the trustees and their law-agents to have called up the bond. The trustees and their law-agents thus grossly failed in their duty, and the loss of the bond arose, *inter alia*, from such failure." "The said sum of £4500, and interest thereon, was lost to the trust estate through the gross negligence and violation of duty of the said trustees who were present at the meeting of the 5th May 1874, and through the gross negligence and want of skill of the said Messrs Hotson & Howie, the agents in the trust. The investment was one which no prudent or reasonable man would ever have made, and there were plenty of good and safe investments to be had for the money. The said Mrs Jessie Croil or Rae and her husband