Lord Young—I also am of the same opinion. I confess when I read the record it occurred to me that parties were at issue on matters of fact which ought to be ascertained before judgment was pronounced. But Mr Lorimer, in answer to questions put more than once in the course of the argument, declined to ask for further probation. It was quite a fair and legitimate course for a complaining party to take. He preferred to take judgment on the complaint on the footing of his adversary's statement being according to the fact. It then came to this. It was admitted that there had been a deviation from the original agreed-on line of the aqueduct, but that deviation was made with the consent and approbation of the complainer here. It is otherwise put on record when the respondents' averments to that effect are denied, but I now take the case on the footing that there is no dispute about that. Then the complaint was this, as represented to us, that insufficient clay pipes had been superseded by efficient iron pipes in the same line, the argument presented being that the respondents were not entitled to substitute the efficient iron pipes for the insufficient clay pipes, or at all events (for it was put alternatively), that when they put in the efficient iron pipes they were bound to remove the inefficient clay pipes.

Now, on the assumption that there was no ground for complaint with respect to the line, and that all that was done was to substitute efficient pipes for inefficient ones, I am of opinion with the Lord Ordinary that the complaint is not well founded. Then with respect to the non-removal of the clay pipes, I must there again take the case on the footing as stated by the respondents in their statement of facts, and by the Lord Ordinary in his note—"The respondents might no doubt have removed the old fire-clay pipes when they laid the iron pipes, and they say they would have done so if they had known that the complainer wished that to be done. But I regard this as a matter of no moment. The old clay pipes (at a depth of 14 feet or more below the surface) do the complainer no harm. He does not aver any damage or inconvenience thence arising. If he has suffered or yet suffers damage therefrom he has his remedy." I agree with this entirely, and see no ground to interfere.

Lord Craighill—I concur.

Lord Rutherfurd Clark—I have not found this case so easy as your Lordships. The respondents have here a way-leave, but no right of property in the lands, and I rather think (and I do not think the contrary was contended) that the way-leave was for a single pipe I think it was quite within their powers to substitute an iron for the clay pipe originally laid down. But my doubt was whether they were entitled to lay down two pipes when there was a way-leave only for one, and if they chose to substitute an iron for the clay pipe I doubted whether the condition of their right to do so was not the previous removal of the clay pipe. But while I have these strong impressions I do not desire to dissent from the unanimous judgment of your Lordships in the case.

The Court adhered.

Counsel for the Reclaimer—Gloag—Lorimer. Agents—Stuart & Stuart, W.S.

Counsel for the Respondents—D.-F. Mackintosh—Dickson. Agents—Carment, Wedderburn, & Watson, W.S.

HOUSE OF LORDS.

Friday, July 22.

(Before the Lord Chancellor (Halsbury), Earl of Selborne, Lord Watson, Lord Herschell, and Lord Macnaghten.)

STEWART *v.* M'CLURE, NAISMITH, BRODIE, & MACFARLANE, AND OTHERS.

(*Ante*, vol. xxiii. p. 740; 13 R. 1062.)

Agent and Client—Duty of Agent when lending Client's Money on Security of Patent.

A law-agent was employed by a client to obtain a loan on the security of a patent. Another client, after consulting the law-agent, lent £5000. The patent was subsequently found to be invalid, having been anticipated by prior patents. An action was raised at the instance of the lender against the law-agent, for payment of the sum alleged to have been lost through the transaction, on the ground that before the loan was completed the defender had been advised by a patent-agent that a search ought to be made for the purpose of ascertaining the validity of the patent, and that this advice was concealed from the pursuer; that by reason of this concealment, and in ignorance of the advice given to the defender, the pursuer was led to advance his money on a worthless security. *Held* (*rev.* judgment of First Division, *diss.* Lord Chancellor Halsbury) that the *onus* of proving that the communication had not been made lay upon the pursuer, and that he had failed to discharge it. Defenders *assoilzied.*

This case is reported *ante*, June 18, 1886, 23 S.L.R. 740, and July 7, 1886, 13 R. 1062, where the facts are stated.

The defenders appealed.

At delivering judgment—

Lord Chancellor—My Lords, in this case, with one possible exception with which I will deal presently, it seems to me that no question of law arises, but that it is one simply of fact.

The history of the case, although it will take some time to go through the details of it, may, I think, shortly be summarised in this way—That from the month of March in the year 1877 down to the month of September in the same year, Mr Brodie, one of the defenders, was endeavouring to procure the sum of £10,000 for the Messrs Martin, who were patentees of improvements in anchors. The original intention had been to create a partnership, and an advertisement issued from Mr Brodie's office inviting persons to become partners and to advance capital. The pursuer, who had been a client for

some time of Mr Brodie, was, I think, as early as the month of June in the first instance brought into the matter, and after some negotiations with reference to a partnership the question became one of loan, and in the course of the negotiations it became apparent to Mr Brodie that if some lenders could be induced to advance £5000, and he might be able to say so, it would facilitate matters in the success of the adventure in which they were all commonly interested. The only person, I think, who can be properly said to have filled that character was the pursuer. By reason of family ties and business ties the others had intentions not simply as investors, and Mr Brodie was acting for them. Now, I think it is impossible to deny that the interests of the respective parties were necessarily to some extent of a counter character. Those who were borrowing money had an interest in getting that money lent, and those who were lending it had an interest in seeing that the money so lent was properly secured. The person who was endeavouring to borrow was in this instance the person whose duty it was to see that the security was sufficient. I do not say that it is impossible to reconcile those two positions, but I think it casts upon him the duty of being on his guard against himself, and of seeing that he does not sacrifice the interests of one client to the interests of the other. Whether he did so or did not do so is the question in the case.

Now, my Lords, something has been said about the lapse of time which has taken place between the supposed cause of action and the attempt to recover damages for it in a court of law, but the whole question in the cause is, whether the pursuer did or did not know in what way his interests had been regarded by Mr Brodie? A subsequent question arose, about which I will say a word presently. I am not quite certain that the question of the lapse of time is very material except in this sense, that it may render it more difficult for either side to prove their case; but whatever may be said as to lapse of time, not by way of fault on the part of the pursuer, but by reason of the proper and just mode of disposing of the case, those who allege a fact must prove it whatever the lapse of time may be, and no court of law would be satisfied with less than an adequate amount of proof because time has elapsed.

Before dealing with the facts I wish to say one word about the *onus*. It appears to me that if the Lord President has laid down the rule that in this case the *onus* was on anyone else than the pursuer, he was in error. I cannot acquiesce in that view of the law. I will refer to a case in which a somewhat similar question arose, namely, the case of *Elkin* v. *Janson*, 13 M. & W. 655. There an action being brought upon a policy of insurance, plea that material facts were not disclosed, replication *de injuria*, it was argued that the person who was bound to establish the fact that the communication was made was the plaintiff, and very much upon this ground, I rather think, the Lord President misunderstood the matter, but I think that when the decision in that case comes to be looked at it appears to be put upon this ground—Counsel was commenting on a case in Maule & Selwyn, where it was held that upon a conviction against a carrier for having game in his possession, it lay on the defendant to prove the affirmative of his qualification, and not on the informer to prove the negative. Mr Justice Bayley in that case said—"I have always understood it to be a general rule that if a negative averment be made by one party which is peculiarly within the knowledge of the other, the party within whose knowledge it lies, and who asserts the affirmative, is to prove it, and not he who avers the negative." Mr Baron Alderson, upon hearing Mr Justice Bayley's words read, intervened, and said —"I doubt as a general rule whether those expressions are not too strong. They are right as to the weight of the evidence, but there should be some evidence to start it in order to cast the *onus* on the other side." That I believe to be the accurate rule, and applying it to this case I have no doubt in the world that it lay on the pursuer here to give evidence to show that the communication which is all important in this case was not made to him. On the other hand, dealing with it simply as a question of the degree of weight which should be attached to each step of evidence in the cause, I think it is important to bear in mind whose duty it was to communicate the fact which was so material in this case.

Now, my Lords, adverting to the facts, and admitting fully that the *onus* was upon the pursuer in the first instance, it appears to me to come to this—I will say one word about the effect and value of Mr Brodie's entries presently, but assuming the complexion which those entries take in my view to be the correct one, I will state what appears to me, with the most sincere deference to those who take a different view, to be the effect of the evidence. Mr Brodie in the first instance endeavoured, I have no doubt, to do his duty to his client; he consulted Mr Hunt; he received Mr Hunt's report, together with what for this purpose I will call the transcript (it is the original), on the 14th of August, and it is taken as a fact by all who have dealt with this case that from the 14th of August to the 3rd of September he made no communication of that fact to the pursuer. Therefore it appears to me that it cannot be doubted that that first proposition is made out which, as I say, appears to have been accepted as a fact by everyone who has taken part in the discussion of this case; that though he made no communication of this fact to the pursuer he made entries which show communications of a very considerable character between himself and Messrs Martin, and those who represented them. So, if I am right, Mr Brodie thought it consistent with his duty to the lender who was lending his money to enter into these communications and consultations with the borrower of the money, having in his pocket this communication which he had received from Mr Hunt, and never communicating either by word or letter the result of that communication to the man who was trusting him as the person who was to advise him with respect to the advance of his money. Now, my Lords, does it appear to be a matter of doubt that even when the communication is suggested to have been made (upon the question whether it was made or not I will say one word presently), it was made in a way different from that in which everyone will agree it would have been made if the pursuer had had a solicitor of his own to ad-

vise him, and it is not of course denied that where a person is undertaking the double capacity of advising persons who may have adverse interests his duty towards each of them is not lessened by the double capacity which he affects to fill. The result of that appears to be that the first communication (if made at all) made by Mr Brodie to the pursuer was made in the presence of all the other parties, and at a meeting at which all the other parties were to attend, and he was to be presented with these alternatives—"Either the matter must go off, or you must accept Messrs Tongue & Birkbeck's report." Now, I say that those are alternatives which ought not to have been so presented to him, because from the beginning to the end of the transaction it is not suggested that by word or letter Mr Brodie ever gave the pursuer an opportunity of considering this matter. And one test which I would apply would be this—suppose Mr Brodie had been only the adviser of the pursuer, is it conceivable that he would not have had communications with him either by word or letter, and consultations with him apart from the other party to the transaction, so as to give him an opportunity of deliberating over and considering the very important investment which he was about to make?

Well, my Lords, that is so far what I may call the admitted complexion of the facts, but I cannot help thinking that that admitted complexion of the facts reflects some light upon the question whether or not we are to assume that that communication which is here suggested to have been made was in fact made. Now, upon that matter it is a remarkable fact that of all the persons present there is not one of them, with the exception of the defender himself, who will allege that that communication was made. And even when one speaks of the defender himself, it must be said that he very candidly declined to pledge himself that by any effort of memory he could recal a state of facts upon which he could aver that the communication was made, but he says that seeing a condition of things so novel, and placing his mind so far as he can in the condition of a person who would be subjected to great loss by reason of the neglect of a precaution which ought to have been taken, he is satisfied that he could not have permitted his client to enter into that transaction without having made the communication in question. So that of all the persons present there is really not one who will say as matter of memory that that communication took place.

Now, my Lords, I am not disposed to undervalue the record made at the time; it is most important, and I do not undervalue its importance, but I think a greater effect than is just is given to the language in which it is conveyed. The object and purpose of this record is an entirely proper one, namely, keeping a record of the business done on behalf of the Messrs Martin; to charge them with the amount of work which was done. It is in the ordinary course of the entries made for the purpose of afterwards making out a solicitor's bill, but in the end it does not purport that at the time it was anything like an exhaustive description of everything which was done, and indeed if one translates it by comparing those things which are in it, together with matters which still survive, they enable us to judge of the true effect and meaning of what those entries were intended to convey—words in the entries which speak of explanations are satisfied by something which is neither full, nor which explains. I will take, for example, the last of the entries which are under the date of the 15th of August—"Writing Mr Stewart, explaining and arranging meeting." Now, if that letter had not been extant, and had not been before us, it probably would have been argued, or it certainly might have been argued with some force, as it has been argued with regard to some other entries, that when Mr Brodie wrote that entry, "Writing Mr Stewart, explaining and arranging meeting," he must have explained in that letter the information which he had received from Mr Hunt, which was in truth the reason of the postponement of the meeting, and explaining the difficulty which had arisen. As a matter of fact the letter survives, and we see that the letter contains no such explanation. But no one will suggest that that entry was made with a fraudulent design to misrepresent the character of the letter therein referred to. So when one refers to the entry of the 17th of August, "Attending meeting of all parties" (giving the parties) "and making full explanations," if the letter of the 20th had not been written I suppose it would have been irrefragable evidence, according to the argument which is suggested, that the whole of Mr Hunt's communications to Mr Brodie were then explained. The evidence admitted that they were not. Again, I say no one will suggest that that entry was made with a fraudulent design to represent explanations as having been made which were not made, but, as I say, having reference to the object and purpose with which such entries are made. I think that they ought not to be carried further than this, that some business corresponding generally to the character of what is therein described was done, for which Mr Brodie had a right and a proper desire to make a charge against the person who was responsible for payment for the business which had been done.

My Lords, I am aware that it is said—"If you suppose that this information was withheld, you are making a serious charge of fraud against Mr Brodie." Now everyone—counsel, Judges, and everyone else — is very reluctant indeed to charge fraud. A person who charges fraud undertakes a heavy burden, and the tendency of all courts is certainly not to make light of it. Therefore the learned counsel who attended at your Lordships' bar have not only with great propriety, but with great prudence also, declined to accept that issue. The question really is, whether a breach of duty was committed? and if a breach of duty was committed, whether it is charged as fraud or as negligence is, so far as the pursuer is concerned, immaterial; but, for my own part, I do not think that it is a just observation to say that people may not, in the position which Mr Brodie had voluntarily entered into, possibly commit grave errors of judgment which, if they had the independent view in their minds which they ought to have, they would recognise as not just to one or other of their clients. Mr Brodie had been from the month of March endeavouring to effect this loan.

It is quite possible that with a perfect desire to help both parties, and thinking that everything would go right, he may not have given all the information and advice to the pursuer which he should have done, and yet not have been conscious of sacrificing the interests of his client. I quite admit the broad proposition, apart from the circumstances, apart from the mode in which a man gradually slides from negligence in the earlier stage to something which afterwards assumes the complexion of fraud. I think that in human nature it is very likely that a man in Mr Brodie's position, who begins with a real desire to do what is right at the time, gradually slides into what is not just to one of his clients, because he is endeavouring to reconcile the interests of both. But however that may be, my Lords, taking the impression upon my mind from what I may describe as the counsels which, apart from the pursuer, Mr Brodie carried on with Mr Martin, and considering the admitted facts proved by the letter, that he had made up his mind without consultation with the pursuer himself, to advise the pursuer to waive any further inquiry and to accept the report of Messrs Tongue & Birkbeck, and looking at the circumstances under which he exposed his client to admitted difficulty without previous consultation with him, and apart from the other persons interested in this transaction—the alternative being suddenly placed before him of either accepting or rejecting a profitable investment which was almost within his grasp—I have come to the conclusion as a matter of fact that Mr Brodie did not make the communication which I think his sense of duty ought to have led him to make, and if he did not make that communication I believe all your Lordships are of opinion that he would be responsible in damages for the loss of this money.

My Lords, I have thought it right to make these observations, not that I have so much confidence in my own judgment as to suppose that I am right when your Lordships take a different view, but I thought it was only just to the learned Judges below who have shared the view which I take, shortly to express the grounds upon which I have come to the same conclusion as they have. I am quite aware that the result of the ultimate deliberation will be to overrule the judgment of those learned Judges, and to re-establish the judgment of the Lord Ordinary.

Earl of Selborne—My Lords, I am glad that this case has been twice argued, because it would not have been satisfactory that an unanimous judgment of this nature of the First Division of the Court of Session should be reversed either by a small number of your Lordships not unanimous, or without very full consideration; but for my own part I see no reason, after having heard the second argument in this case, to alter the opinion which I formed upon the occasion of the first hearing, which was in the appellants' favour.

The Lord Ordinary and the Inner House of the Court of Session have differed upon a question not of law but of fact. I cannot in any case dissent from an opinion in which four learned Judges have been agreed, without much and careful consideration, but in this instance I have been led, after repeated consideration, to the same conclusions with the Lord Ordinary. The question seems to me to depend very much less upon the oral evidence of the parties and witnesses (speaking on both sides, after a lapse of eight years, from a confessedly imperfect recollection of what had passed in conversations at that distance of time) than upon the confirmation which the statements on one side or on the other receive or fail to receive from documentary evidence contemporaneous with the transaction in question, and the reasonable presumptions from uncontested facts. Of the parole evidence in this case (so far as it depends upon unaided memory) I should be disposed to say that it would not by itself on either side furnish at all a satisfactory basis for judgment, and that if the balance had not been turned by the documents (in which I include the entries in the appellants' books, which are among the evidence on the record, and were referred to in Mr Brodie's testimony), and by those considerations which fairly arise out of the probabilities of the case, much might have depended upon the *onus probandi*. The pursuer's evidence may have been (I assume that it was) sufficient to throw upon the defenders the burden of producing some evidence on the other side to show that those communications, which the pursuer denies, were made in point of fact, but it is not positive, in that sense which would make a conviction for perjury possible, if the fact were ever so clearly established against him. The state of Mr Brodie's memory in 1885, if not aided by letters and entries in his books, might not have enabled him to satisfy the burden of proof which, as I have assumed, was thrown upon him; but I am of opinion that the entries in his books ought to receive credit, and ought to be considered in connection with his evidence, and I cannot help adding that they appear to me to have received less consideration than I think due to them in the Court from which the appeal is brought.

The action was for negligence in the discharge of a duty undertaken by the appellants as law-agents for the pursuer on the occasion of his becoming a contributor in the autumn of 1877 to a loan of £10,000, made to two French gentlemen named Martin upon the security of a patent or patents taken out by the Martins in 1872 for certain improvements in anchors. The pursuer (respondent here) contributed £5000; the rest was found by Messrs Miller, ironfounders at Glasgow, and some friends of theirs whom they induced to join. Throughout that transaction the appellants' firm acted as law-agents for all parties, and by the interlocutor appealed from they have been ordered to make good to the pursuer the whole loss which he has sustained by failure of the security, for the patents being disputed three years afterwards, turned out to be bad. Mr Brodie was the partner in the appellants' firm who acted in this transaction, and the conclusion drawn by the Lord President (with the concurrence of at least two of the other Judges of the First Division) from the whole evidence was, that Mr Brodie "concealed" from the pursuer some very material facts which ought to have been disclosed to him, and that "the interest of one client was sacrificed for that of another."

The Lord President justly said that this was "a very serious matter," and it is on that account necessary to be careful and vigilant, lest injustice should be done to Mr Brodie by affirming such a condemnation upon insufficient grounds. In the language of those courts of this country with which I have been most familiar, concealment of material facts by a solicitor from one of his clients in order to promote at his expense the interest of another client would generally be called fraud, and no doubt the averments of the pursuer in his amended condescendence do cover such a case of fraud though the word is not used. The respondent's counsel at your Lordships' bar declined studiously and emphatically to impute fraud, but they did not suggest an omission of duty arising out of mere oversight or inadvertence; they admitted that the non-communication of the matter in question to the pursuer (if it was not communicated) must have been intentional, and they did not give up any part of the substance of the pursuer's allegations whatever judicial estimate might be formed of them. I do not say that such a line as this, if taken out of tenderness towards the feelings and reputation of a former friend, ought to operate in any way to the pursuer's prejudice; but the appellants are entitled under such circumstances to the full benefit of all ordinary and reasonable presumptions consistent with the proved facts of the case in favour of their honesty and good faith, and I think it right to add that I could not myself reconcile the non-communication of those things which the pursuer says were not communicated to him under the actual circumstances, with honesty and good faith on Mr Brodie's part, especially having regard to the terms of the entry in the appellants' books of the 3rd of September 1887. That entry is in these words—"Long meeting with parties interested; going over draft agreement and draft assignment, and previously reporting fully as to what had taken place in regard to the inquiries as to the patent and when it was resolved to accept report of patent-agents in London as furnished—nearly three hours." Mr Stewart and the other proposed lenders of the £10,000 were present at that meeting. What had happened "in regard to inquiries as to the patents," and as to the report of the patent-agents in London then furnished, was this—Mr Brodie of his own accord wrote on the 11th August to Mr Hunt, a patent-agent in Glasgow (whose place of business was very near his own), a letter. On the 14th of August he saw Mr Hunt, and what then took place appears by Mr Hunt's entries in his books, and by Mr Brodie's letter to Mr J. R. Miller of the 20th August. Mr Brodie ascertained in this way that there were some patents earlier than 1872, not which did, but which possibly might, affect the value of the proposed security, and he thought (as Mr Hunt also did) that it would be "necessary to have a distinct report by the patent-agent" (by which expression he then meant Mr Hunt, but it is obvious that Mr Hunt was not the only patent-agent in the world from whom such a report might be sufficient) "before proceeding further." This (he said) would require time, and as it would be attended with expense (which Mr Martin would have to bear), "the authority of Mr Martin must be obtained." With this view a series of communications followed between Mr Brodie, Mr Martin, and Mr Buckland, who was Martin's agent; the first on the 15th of August (the day after the interview with Mr Hunt), and the last (as I collect from the entries in the appellants' books) on the 29th of that month. Mr Martin, before the 24th August (on which day there was a conference on the subject between Mr Morrison, the appellants' clerk, and Mr Buckland), had proposed, as Mr Morrison then understood, that "counsel's opinion" should be "accepted in lieu of a report from Mr Hunt." It is not, however, unlikely that Mr Martin may have meant (whether using inaccurately the word "counsel" or not) the opinion which he did obtain from his own patent-agents Messrs Tongue & Birkbeck, and which is dated on the 24th of August. At a subsequent meeting (either on the 25th or on the 27th of August) Mr Buckland placed in Mr Brodie's hand that opinion or (as Mr Martin called it) "report" of Messrs Tongue & Birkbeck, and communicated to him a letter to himself (Buckland) from Martin in which it was enclosed, and in which Martin said—"If this is not sufficient and satisfactory to the utmost we must give up without the least hesitation." From what passed during that or the following interview Mr Buckland inferred that Mr Brodie would "advise the contributors that the report was satisfactory" and would "endeavour to get them together as soon as possible" so that they might "either reject or consent then and there," and so Mr Buckland, in a letter from Glasgow dated the 27th August (which I accept as evidence, finding it on the record, though in strictness it might have been objected to by the appellants), informed Mr Martin. Mr Brodie, however, did not accept that "report" as satisfactory without first making an independent inquiry through his own London correspondents, Messrs Anderson & Sons, as to the reputation and standing as patent-agents of Messrs Tongue & Birkbeck, and Messrs Anderson & Sons received from Messrs Carpmael (very good authority on such a subject) a quite satisfactory account of them, which they duly reported to Mr Brodie.

The meeting of the 3rd of September (a meeting of Mr Brodie and all the lenders) was then appointed to take place "in order" (as explained by Mr Brodie to Mr J. R. Miller) "that the drafts might be submitted and a report made as to what had taken place since the last meeting, which had to be postponed." A meeting which had been appointed (on the 17th) for the 24th August had been in fact postponed on account of what passed between Mr Brodie and Mr Hunt, as was clearly explained to Mr J. R. Miller in Mr Brodie's letter of the 20th August already mentioned. I assume in the respondent's favour that no similar or equally full explanation was given before the 3rd of September, to anyone else.

These being the circumstances which led up to the meeting of 3rd September 1887, I am clearly of opinion that if Mr Brodie did not communicate to the parties, who then decided to accept Messrs Tongue & Birkbeck's report as sufficient for their purpose, the material inquiries as to the patents which had led to that report being obtained and offered to them by the Martins, and especially the substance of what passed between Mr Brodie himself and Mr Hunt, the entry of the 3rd of

September in the appellants' books was not true and could not have been honestly made. That entry is not similar to that of the 17th of August; it is not expressed in vague or equivocal terms. It says that Mr Brodie then "reported fully as to what had taken place in regard to inquiries as to the patents," and this as introductory to the question whether the "report of patent-agents in London as furnished" should be accepted. That could not have been done without stating the inquiries made in the first instance through Mr Hunt and what followed thereon, and I think it impossible (independently of that entry) that facts so material to the question which the parties had to consider and determine at that meeting could have been kept, under the circumstances, from the knowledge of the parties then assembled without some improper motive.

Is it then a just conclusion from the materials before your Lordships that there was a suppression of those facts, and that the entry of the 3rd September ought to be rejected as false, or as not extending in its fair and natural import to the matter now in question? On the one side there is nothing except the postponement of any communication of the facts to more than one of the lenders until that time, and the terms of the letter of the 20th August by which they were communicated to Mr J. R. Miller; on the other side (as it seems to me) are all the probabilities and ascertained facts of the case pointing to the conclusion that the entry is entitled to credit, and that the proper communications were made. The statements of Mr Brodie, confirmed by those of Mr John Ritchie Miller, appear to me to be quite enough to support the entry as honest and true, and also to show (as far as the recollection of those witnesses goes) that the explanations given were such in all respects as they ought to have been.

There is no suggestion and no probability of any motive operating, or which can be conceived as likely to have operated, on Mr Brodie's mind to pervert his judgment, or obscure his sense of duty, or lead him to prefer the interest of the borrowing to that of the lending clients. He had long known the pursuer, and was on friendly terms with him; his acquaintance with the borrowers was recent, and in this transaction only. The appellants entered into this business without knowing anything more of the patent than that it was commercially successful, and had been in use without challenge for five years, and that the Messrs Miller, who had manufactured anchors for the patentees under it, thought so well of it as to be disposed to lend their own money, and to induce some of their friends to do the same. Whether the treaty for the loan was completed or went off the appellants' costs would at all events be paid.

The general facts do not tend to show that in this matter the appellants thought only of the borrowers' or neglected the lenders' interest. When they consulted Mr Hunt (as they did spontaneously) on the 11th of August, they were manifestly acting *bona fide*, not in the borrowers' but in the lenders' interest, and the "jottings" also prove that during the period between the 24th of August and the 1st of September they were still continuing to seek information on various points in the lenders' interest and theirs only. In the same interest they inquired through their London correspondents as to Messrs Tongue & Birkbeck's position and character. What reason can be suggested for their acting otherwise at the meeting of the 3rd of September? I am content to take it as a just inference, from the terms of the letter of the 20th of August, that they did not enter into this matter with their clients at the first meeting held after their interview with Mr Hunt on the 17th August. It is also true that when informing Mr J. R. Miller of the most material facts in their letter of the 20th August, as constituting reasons for the postponement of the meeting then fixed for the 24th, they said—"Inform Mr Caird and the others, except Mr Stewart, simply saying that it has been found necessary to postpone the meeting fixed for Friday." If those circumstances were not open to any honest and rational explanation, and if the case were made that Mr Brodie and Mr J. R. Miller were acting in collusion together for the borrowers' interest, there would be force in the observations of the Judges of the First Division on this part of the case. But no such imputation on Mr J. R. Miller was made or insinuated, nor can I see the least ground for it, although he was connected as a manufacturer of anchors under the patent with the Martins, and had on their behalf introduced this business to the appellants' firm. He was not likely for that reason to be willing to lend his own money, still less to advise his friends to lend theirs, without necessity, upon the security of a bad patent. In the absence of such collusion between them it is impossible to suppose either that Mr Brodie, having written as he did to Mr J. R. Miller on the 20th of August, could have been silent as to the material facts mentioned in that letter at the meeting of the 3rd of September, or that, if he had been then silent, Mr Miller, as an honest man, would have held his peace on that subject during the whole three hours while the meeting lasted.

The non-communication of the whole facts to any of the lenders except Mr J. R. Miller before the 3rd September, and the suggestion to Mr J. R. Miller that he should "simply" inform his friends of the postponement of the meeting fixed for the 24th of August (without entering into the reasons for it), seem to me to admit of an easy and natural explanation, consistent with the indifferent and impartial performance of his duty by Mr Brodie towards all his clients. The communications with the borrowers, arising out of what passed between him and Mr Hunt, had begun just two days before the meeting of the 17th August, and were still depending and in an early stage of progress. Mr Brodie, if he expected that they would have a satisfactory result, might well think and might honestly and reasonably act on the opinion that it was not necessary or desirable in the meantime to enter into partial explanations or discussions on that subject upon imperfect materials. He had initiated those inquiries without previous instructions from or communication with his clients, and they had not yet been brought to a point; it was impossible on the 17th of August to know with certainty what might result from them; the result, when arrived at, ought to be communicated, but in the meantime other things might well go forward. It is consistent with the whole evidence that Mr Brodie may have said at that meeting enough to make all present under-

stand that there might be matters not then ripe for consideration which might come before the next meeting; even if he did not say so, I could not infer from his silence at that stage of the matter any purpose of suppression. The same reasons might lead him to think it unnecessary for Mr. J. R. Miller to explain to his friends the causes of the postponement of the meeting fixed for the 24th August, and to prefer doing so at the proper time himself. As for the exception of Mr Stewart in the letter, I am satisfied (as the Lord Ordinary was) with Mr Brodie's explanation, although he did not give Mr Stewart any notice of the postponement until the day appointed, when Mr Stewart was informed of it, with some reasons then given by Mr Morrison, Mr Brodie's clerk, whom I assume not to have entered into any unnecessary particulars, though I do not doubt the truth of the entry made by him in the appellants' books.

The Lord President appears to have thought that nothing short of some written communications on this subject to the pursuer (and I presume also to all the other lenders) ought to be held sufficient. With that view I am unable to agree. If all the material facts were communicated to the lenders when assembled at the meeting of the 3rd September, the duty of the law-agents was in my opinion sufficiently performed. His Lordship also thought that there was some concealment by Mr Brodie of his own opinion as to the necessity of additional inquiry for the lenders' protection. From that opinion I am also compelled to differ, unless it ought to be concluded that Mr Brodie considered—or as a reasonable man of business was bound to consider—Messrs Tongue & Birkbeck's letter insufficient for that purpose. That letter, besides referring to the undisputed and successful user of the patent for five years as affording (which it certainly did) strong practical grounds for a belief in its validity, went on to state the opinion of those patent-agents (whose standing and reputation was attested by the high authority of Messrs Carpmael), "that no previous patents taken for improvements in the construction of anchors could affect in any way the validity of the patent of 1872," and that they "believed the principles embodied in that patent to be essentially novel." To myself it never would have occurred as a possible supposition (and therefore I cannot think it was actionable negligence in Mr Brodie if it did not in September 1887 occur to him) that competent and respectable patent-agents could put their names to such an opinion without having first looked into the "previous patents taken for improvements in the construction of anchors," or without applying their skill and judgment to the consideration of the question of the novelty of the invention of 1872 with reference to those previous patents. That letter or "report" was, in my judgment, equivalent to a representation that they had done so, with a result altogether favourable to the patent of 1872. The specifications of all the previous patents were as accessible to Messrs Tongue & Birkbeck in London as they could have been to Mr Hunt at Glasgow, or to any other patent-agents whom the appellants might have consulted there or elsewhere. Nor does it appear to me that either Mr Brodie or his clients had any reasonable ground for distrusting Messrs Tongue & Birkbeck's opinion because it had been obtained by the patentees themselves, and was embodied in a letter addressed to them. The patentees had as much right to receive from any competent patent-agent whom they consulted on such a subject honest and proper advice as any independent person would have had, and nothing had occurred which could at that time suggest a doubt to any reasonable mind as to the good faith of the patentees in the whole course of the negotiation. That Mr Stewart might have forgotten what was said about Mr Hunt is likely enough, although everything ought to have been explained, for he himself says that Mr Hunt "was at the time quite unknown to him," and that "Mr Hunt's name might have been mentioned without exciting his attention." In connection with this point it is not immaterial to observe that the facts which Mr Hunt had ascertained and communicated to Mr Brodie did not "excite a doubt" (as Mr Hunt himself says) as to the validity of the patent, but only "a feeling that further search was necessary." All who are conversant with patents must know that it has been an extremely common thing for the most successful and important patents to be disputed on the ground of anticipation by previous patents, often plausibly, but seldom with success. The appellants might therefore well retain and continue to act upon the presumption and belief that their patent (which had stood the test of five years' public and extensive use without challenge) was good and valid pending the inquiries which they still thought it necessary to make, and they might in the meantime quite consistently proceed with the preparation of all necessary instruments so as to be ready for the completion of the loan at the proper time. I cannot, under the circumstances, impute it to them as actionable negligence if they (explaining in a proper manner what had previously occurred) regarded Messrs Tongue & Birkbeck's report as substantially the thing wanted, and as a report which their clients might, if they thought fit, accept as safely as if it had proceeded from Mr Hunt or from any other patent-agent in Glasgow or in London of their own or any other person's choice.

My conclusion is, that the Lord Ordinary was right, and that the interlocutor appealed from ought to be reversed with costs, and the interlocutor of the Lord Ordinary restored, and I so move your Lordships.

Lord Watson—My Lords, the divided state of judicial opinion in the Court of Session, as well as in your Lordships' House, sufficiently indicates that the present case is one by no means unattended with difficulty. At the close of the argument yesterday I had formed an opinion, which I have seen no reason to alter, to the effect that the interlocutor of the Inner House ought to be reversed and that of the Lord Ordinary restored. Having since had the advantage of reading in print the judgment which has just been delivered, I shall not enter upon an examination of the evidence, and shall content myself with expressing my entire concurrence in the reasoning and conclusions of the noble and learned Earl.

Lord Herschell—My Lords, I also entirely concur in the opinion which has been expressed

by the noble and learned Earl opposite. I can entertain no doubt that in this case the burden lay upon the pursuer of establishing that breach of duty on the part of the appellant which was the foundation of this action. His case was that the appellant had omitted to disclose certain material facts, of which, upon all hands it is admitted, it was his duty to make full disclosure. Now, my Lords, it appears to me that unless the pursuer established that fact he made out no case at all against the appellant, and I am at a loss to understand why in this case, any more than in any other case where a breach of duty or negligence is alleged, it should not lie upon the person making that charge to establish it by proof.

My Lords, when I examine the proof given by the respondent, I am unable to find any satisfactory evidence that the breach of duty alleged was committed. No single witness (I include the respondent himself) pledges his memory upon oath to the fact that the failure to disclose, which is the foundation of the action, really occurred. Mr Stewart uses language such as this—"Nothing was said at that meeting on the 3rd, so far as I know, as to Mr Hunt having been consulted;" "He did not say anything about employing any other expert, so far as I remember;" "I am not conscious of having heard of Mr Hunt having been employed until the case against Wright & Company was going into Court;" "I think that no communication was made affecting in any way the validity of the patent;" "I do not remember whether I was aware before the transaction was closed that Mr Hunt had been consulted; I am not prepared to say definitely that his name was not mentioned to me; it may have been mentioned and made no impression;" "So far as my memory goes, I was not aware of any inquiry having been made at a patent-agent's relative to this patent except that which appeared upon Tongue & Birkbeck's letter."

Now, my Lords, I think I have read all the passages from the respondent's evidence upon which his action is founded, and there is no evidence more clear or conclusive given by any of the witnesses whom he calls, and I confess it appears to me that it would be a somewhat strong measure, if the matter stood there alone without any further evidence, to hold upon evidence such as that that the pursuer had established the breach of duty which he alleges. Certainly his memory as to what passed is somewhat imperfect, because he states that until quite a recent period he was in ignorance of the fact that the letter from Tongue & Birkbeck had been got by Martin; he was under the impression that it had been got by Mr Brodie's firm. Now, he states himself that the letter was read to him at that meeting, and the letter begins in these terms—"Gentlemen,—With regard to our opinion as to the validity of your patents." Now, how any person hearing that letter read could doubt for a moment that it was addressed to the patentees and not to the law-agent I am at a loss to understand.

So much with reference to the case as made out by the pursuer. But when we contrast with that the evidence on the other side, borne out as it is by the entries in the books, it appears to me that it would be acting not only upon unsatisfactory evidence, but acting in defiance of evidence of a much more satisfactory character the other way, if it was held in this case that the pursuer had made out the charges which he has alleged against the appellants.

Under these circumstances, my Lords, I entirely concur in the judgment which has been moved.

Lord Macnaghten—My Lords, in 1877 the respondent Mr Stewart, and four other persons, employed the appellant Mr Brodie, and his partners, as their law-agents in the matter of a loan on the security of a patent relating to improvements in the construction of anchors. The borrowers were Messrs Martin. Mr Brodie's firm acted for them also. The patent afterwards turned out to be invalid.

Mr Stewart maintains that in the course of his employment Mr Brodie was guilty of professional negligence, owing to which he suffered pecuniary loss. For that loss the judgment under appeal holds Mr Brodie and his firm responsible.

The point of the case is this. It is alleged by Mr Stewart, and admitted by Mr Brodie, that before the loan was completed Mr Brodie was advised by Mr Hunt, a patent-agent whom he consulted, that a search ought to be made for the purpose of ascertaining the validity of the patent. It is further alleged by Mr Stewart, but denied by Mr Brodie, that this advice was concealed from Mr Stewart. Mr Stewart asserts that by reason of this concealment, and in ignorance of the warning which Mr Hunt's advice conveyed, he was led to advance his money on a worthless security.

There is no doubt or dispute as to the duty which under the circumstances was cast upon Mr Brodie. The only question is, whether that duty was discharged? To determine that question your Lordships are called upon to review occurrences which took place so far back as 1877. The materials for such a review consist partly of the oral examination of Mr Stewart, Mr Brodie, and some but not all of the other persons concerned in the transaction, partly of letters, some of which were written at the time and some at a later date, when Mr Stewart's claim was first put forward, and partly of entries contained in the law-agent's books. The recollection of the witnesses examined was extremely hazy and imperfect. Very few of the letters are material. The later letters are, I think, wholly unimportant. Under these circumstances much, as it seems to me, must depend on the entries in the law-agent's books. They were made at the time, and their general accuracy is vouched for in the usual way. If they are to be relied upon they afford the most trustworthy evidence of what occurred.

It is important to bear in mind that Mr Brodie is not charged with anything approaching intentional dishonesty. The respondent's counsel, who argued the case with equal fairness and ability, disclaimed any imputation on Mr Brodie's integrity. But it was said that his own judgment, which would naturally have led him to make a frank and full disclosure, was somehow overborne by others who were interested in having the matter carried through at all hazards, or at anyrate interested in having it carried through without a due consideration of the risk involved. At the same time it is not suggested that Mr Brodie was in any way deficient in professional skill or in business capacity, or that he

was a man of less than ordinary independence of character and firmness of purpose. The conduct which, if the respondent be right, casts on Mr Brodie the heavy liability with which he has been charged is attributed to the fact of his having been employed by the borrowers as well as by the lenders, and is said to be the natural consequence of his having acted in that double capacity.

Professional men who undertake to act for persons having different and possibly conflicting interests do undoubtedly place themselves in a position of great difficulty. Sometimes throughout the transaction they regard one of their clients as having a paramount right to their services, and they treat the interests of the other as of secondary importance. That is not the case here. Sometimes a sudden conflict of interests arises, and on the spur of the moment even a prudent and capable person is embarrassed and perplexed, and is driven to take a wrong course. That, again, is not the case your Lordships have to consider. The case presented to your Lordships is singular in one respect; if Mr Brodie erred, as it is alleged he did, he certainly showed on two distinct occasions immediately before the error was committed that he fully understood and appreciated his duty to the client whose interest he is said to have sacrificed apparently from no adequate motive. That no doubt is a conceivable case, but I imagine it is one of rare and exceptional occurrence.

Of the five lenders Mr Stewart is the only one who complains. He advanced £5000. The others who provided £5000 between them were in a somewhat different position. Apart from the loan Mr Stewart had no interest in the success of the patent. Mr Forsyth and Mr Miller as a firm advanced £2000, but they were manufacturers who had been employed in making the patented article, and they hoped by means of the advance to have their business extended. Mr James Miller, who found £1000, was a brother of Mr Miller. Mr Caird, who found £2000, was his father-in-law. It is said that these four were a family party to whom it was a matter of little or no importance to ascertain whether the proposed security was good or bad. I think this argument was pushed too far. Mr James Miller and Mr Caird certainly seem to have given themselves very little trouble about the matter. Probably they trusted to Mr Miller, but I can see no reason for assuming that Mr Miller and Mr Forsyth were indifferent to the question whether the security was a good one or not, however anxious they might be to increase their business. Mr Miller suggests that owing to his brother and father-in-law being brought in he wanted to keep clear of the matter. But this reason, whatever its force may be, does not apply to Mr Forsyth. With these preliminary remarks I propose very briefly to review the history of the transaction in question. The important chapter in that history opens with the letter to Mr Hunt of the 11th of August 1877. Admittedly it was a perfectly honest letter. In it Mr Brodie treats himself as acting solely for the lenders, and states that for their information and protection he wishes to ascertain two things —(1) Whether there were any prior deeds affecting the patents proposed to be assigned as security; and (2) whether there were any prior patents affecting their validity. At that time the proposal was to include in the security three patents, one of 1864 and two of 1872. The 1864 patent and the second patent of 1872, which related to chain cables, were comparatively unimportant.

Nothing could be more proper than this letter. It is not, perhaps, immaterial to observe in connection with the respondent's view of Mr Miller's position that it would appear from his evidence that the letter was written after consultation or communication with him.

Mr Hunt communicated with his agents in London. On the 14th of August, having heard from them, he had an interview with Mr Brodie. It happened that the patent of 1864, which had nearly run out, had been charged or dealt with by several instruments, a note of which was given to Mr Brodie. As regards the other matter in reference to which Mr Hunt was consulted, he told Mr Brodie that in his opinion further search was necessary. He had been furnished by his London agents with a printed abridgment of specifications relating to anchors. He had glanced through it hurriedly, and that was the result at which he had arrived. It is, I think, very important to keep in view what Mr Hunt's opinion and advice came to. As to the validity of the patent he had formed no opinion one way or the other. In answer to the Court he says—"I would not say that that glance through the abridgment excited a doubt in my mind, but it excited in my mind a feeling that further search was necessary." At that interview, or perhaps shortly afterwards, Mr Brodie obtained the abridgment from Mr Hunt, but it does not appear that he saw him again.

On the same day, and after the meeting with Mr Hunt, the assignation of the letters-patent was drawn. On the next day—the 15th of August—there is an entry of a long meeting with Mr Martin and Mr Buckland, who was Martin's manager or agent, "in regard to patents, making inquiries, and receiving explanations in regard to same matters." But I think it is to be inferred that this interview related mainly, if not entirely, to the 1864 patent and the charges upon it.

On the same day there is the entry—"Writing Mr Stewart, explaining and arranging meeting." The letter to Mr Stewart referred to in that entry is in evidence. It makes an appointment for a meeting on Friday the 17th, and explains the occasion of the meeting. Mr Martin had come from London, and it was thought desirable that all the parties should meet him at Mr Brodie's office. It was said by the counsel for the respondent in the first argument that that letter, taken in connection with the entry, throws some doubt on the accuracy of the law-agents' books—apparently for no reason except that, with the knowledge which we now possess, and having regard to the importance which subsequent events have given to Mr Brodie's interview with Mr Hunt, it might possibly have been inferred from the entry, standing alone, that the explanation referred to had something to do with Mr Hunt's suggestion or advice. I think there was no ground for this attack on the accuracy of the books. The letter does explain why the meeting was summoned, and having regard to what appears

in the letter, I think the entry perfectly accurate.

The proposed meeting took place on the 17th. All the persons concerned were present except Mr James Miller, who was represented by a Mr Drummond. There was a preliminary meeting with Mr Stewart, Mr Caird, and Mr Miller. Mr Brodie pointed out the risks necessarily incident to such a transaction. But I think it may be inferred from the letter written on the 20th to Mr Miller that neither during the preliminary discussion nor at the meeting afterwards was any reference—or at anyrate any pointed reference—made to Mr Hunt or to the advice which he had given as to a further search being necessary. Mr Hunt's advice could not have been forgotten. But no action had been taken upon it. Nor could any advantage, that I can see, have been gained by discussing it at that stage of the proceedings. Mr Martin had come from London, and the important thing was, to agree upon the security and settle the terms between the borrowers and the lenders. The meeting was a long one, and it was finally arranged to meet again on Friday the 24th for settlement. That was allowing a week for completion of the drafts, and for clearing up the point suggested by Mr Hunt.

On Monday the 20th the minute of agreement between Mr Martin and the lenders relative to the assignation of the letters-patent and the terms on which the loan was made was drawn in Mr Brodie's office. And then it would appear that all other questions having been disposed of, Mr Brodie took up the matter which had been suggested at the interview with Mr Hunt, and he wrote to Mr Miller the letter of the 20th of August. This letter was severely commented upon by the learned Judges of the First Division. As I have said, I think it may be inferred from it that Mr Hunt's advice was not discussed or mentioned at the meeting of the 17th. Considering that Mr Brodie's honesty is not questioned I do not think that any adverse inference can be drawn from the circumstance that Mr Miller was directed to postpone the meeting without giving any reason for the postponement. Nothing, I think, would have been gained by communicating at that stage to the different lenders the reason for the postponement. The exception of Mr Stewart is, I think, satisfactorily accounted for by the reason given by Mr Brodie that he lived just opposite, and that it would be no trouble to him to come over, when he would receive a personal explanation.

It turned out that on the 20th, and before he received Mr Brodie's letter, Mr Miller went to Peterhead. He did not return till Monday the 3rd of September. Mr Brodie therefore had no opportunity of communicating orally with him in the meantime.

One thing certainly appears clearly from the letter of the 20th, and that is, that at that time Mr Brodie was impressed with the idea that it would be necessary to obtain a distinct report by Mr Hunt as to the validity of the patent, and that his view on that point was then at least as strong as it could have been immediately after the interview with Mr Hunt.

Of course it was necessary, as Mr Brodie said, to obtain the authority of Mr Martin before consulting Mr Hunt, as the expense would fall upon him.

During the next fortnight several meetings took place between Mr Brodie and Mr Buckland on the subject of the difficulty which had occurred. Mr Martin seems to have objected on the score of expense. At one time it was proposed that counsel's opinion should be obtained in lieu of Mr Hunt's report. That proposal was not carried out, and ultimately Mr Martin, through Mr Buckland, furnished Mr Brodie with a letter or report written by Messrs Tongue & Birkbeck, his own patent-agents. It was proposed that the lenders should accept this letter in lieu of what Mr Brodie required. Mr Brodie was not informed of the circumstances under which Messrs Tongue & Birkbeck's letter had been procured. He satisfied himself by inquiry through his own agents that Messrs Tongue & Birkbeck bore a respectable character, and having learned that Mr Tongue had been for twenty years mechanical draughtsman in the office of one of the first—if not the first—patent-agents in London, he was favourably impressed with Tongue & Birkbeck's letter, and he consented to call a meeting for the purpose of submitting it to the persons concerned, and concluding the matter if they thought fit to accept it.

We know now that Tongue & Birkbeck's letter was absolutely worthless, and it is impossible to speak too strongly of the conduct of the writer. But on the assumption that the writer was an honest and respectable person, possessed of information without which no honest person could have written the letter, Mr Brodie was not in my opinion to blame for thinking that the document was one which the lenders might at anyrate consider, with a view of accepting it in lieu of the formal report which Mr Hunt had recommended, and which Mr Brodie himself had at one time thought necessary.

Under the circumstances an appointment was made for the 3rd September. The real question is, what took place at that meeting?

In the interval Mr Forsyth had certainly been informed of the difficulty which had occurred, and probably Mr Stewart when he came to attend the meeting which was postponed was told something about it. He did not see Mr Brodie; he saw Mr Morrison. Mr Morrison's recollection is not very clear, and though Mr Hunt's name was probably mentioned to Mr Stewart, I do not think that any reliance can be placed on what passed on that occasion.

I now come to the important meeting of the 3rd of September. On the morning of that day Mr Miller came up from Peterhead to attend the meeting, and he saw Mr Brodie before the meeting took place. I do not think there can be any doubt that Mr Brodie then told Mr Miller in substance everything that had occurred. But apparently, if Mr Miller's recollection is to be relied upon, Mr Brodie did not get much help from him. Mr Miller suggests that he felt some delicacy in taking any part in determining what to do, as his brother and father-in-law were putting their money into the adventure, and he preferred therefore that Mr Brodie should act on his own responsibility.

The meeting then took place. Now, it is to be observed that whatever Mr Brodie said was said in the presence of Mr Miller and Mr Forsyth. Both of them must have been acquainted with

all the circumstances of the case. One of them, if he correctly represents his state of mind at the time, must have been desirous, for the sake of his brother and father-in-law, that the matter should be fairly put before the meeting. He would, I should think, have been struck by any material omission on Mr Brodie's part, especially when he found that Mr Brodie was throwing on the meeting that responsibility which he wished Mr Brodie to take on himself.

The entry of the meeting in the law-agents' books is thus—"Long meeting with 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 the patents, and when it was resolved to accept report of patent-agents in London as furnished—nearly three hours."

Now, it seems to me that if this entry is to be relied upon, Mr Brodie must have told the whole story. He could not have avoided placing before that meeting his interview with Mr Hunt, Mr Hunt's advice, and the opinion which at one time at anyrate he himself strongly held. Without these details his report to the meeting would be imperfect and misleading, and as Mr Brodie admittedly was honest and not incompetent, I come to the conclusion that the whole matter was fairly put before the meeting.

The oral evidence is very imperfect, but Mr J. R. Miller does say—"The alternative was put before us either of 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."

Mr Stewart says that to the best of his belief Mr Hunt's name was not mentioned at that meeting, but in substance his evidence only comes to this—"Nothing was said at that meeting calculated in any degree to excite alarm; if Mr Hunt's advice had been mentioned it would have excited my alarm, and therefore I feel certain that it was not mentioned." Otherwise, though he seems to accept the information disclosed by the documents recovered in the suit, his recollection of the meeting is a perfect blank.

Now, I do not see why at that time a faithful and exact account of the interview between Mr Brodie and Mr Hunt should have excited any alarm. Mr Hunt had not formed an opinion adverse to the patent. It would not have been accurate to say he had. He had not even formed a doubt in his mind; all he said was that in his opinion a further search was necessary. Mr Stewart at that time knew nothing of Mr Hunt. As he says himself—"Mr Hunt at that time was quite unknown to me, and Mr Hunt's name might have been mentioned without exciting any attention;" and again—"I do not remember whether I was aware before the transaction was closed that Mr Hunt had been consulted. I am not prepared to say definitely that his name was not mentioned to me. It may have been mentioned and made no impression."

Mr Brodie says that he has no doubt he told the meeting that Tongue & Birkbeck's report was got in lieu of a report of Mr Hunt which he had previously considered necessary; he could not indeed charge his memory with having told them so. The entry led him to think he did.

My Lords, in this state of the evidence it appears to me that if you were to assume that Mr Brodie abstained from communicating to the meeting the report of his interview with Mr Hunt, Mr Hunt's opinion, and the opinion which he himself had formed at an earlier stage of the proceedings, you would not only be coming to a conclusion for which there is no evidence, but you would be assuming a state of things which is contradicted by the entry in the law-agents' books, and which is incompatible with the honesty with which admittedly Mr Brodie is to be credited.

In the result, therefore, I am unable to concur in the interlocutor under appeal.

The case, I admit, is one of difficulty, and it is impossible to dissent from the unanimous decision of the Judges of the First Division without some misgiving. I have therefore considered the case with great anxiety, and I have endeavoured to note the different steps in their reasoning which I am unable to follow. I find attributed to Mr Brodie a desire for concealment, for which I can discover no reason, and of which I fail to see any evidence. I find that to Mr Hunt's opinion there is ascribed a much more serious and alarming character than I think it deserves. I find it suggested that Mr Brodie was bound to communicate in writing the information which he is said to have withheld, and it seems to be supposed that verbal explanations would have been insufficient. That point counsel for the respondent declined to argue. Above all, I find that the entries in the law-agents' books are treated as of little or no account, when in my opinion they afford important and trustworthy evidence. And on the whole, after much consideration, I am unable to decide in favour of the pursuer without doing that which Mr Rigby very properly refused to do, but which I think the Judges of the First Division have in substance done, attributing to Mr Brodie something akin to dishonesty.

Interlocutor appealed from reserved; interlocutor of the Lord Ordinary restored, the respondent to pay to the appellants the costs in both Courts.

Counsel for the Appellants—Balfour, Q.C. — Pearson — Haldane. Agents — Grahames, Currey, & Spens, for Bruce & Kerr, W.S.

Counsel for the Respondent—Rigby, Q.C.—Begg. Agents—Clayton, Sons, & Fargus, for J. W. & J. Mackenzie, W.S.