respect of which they are liable for the claim now made.

The deceased was not the servant of the defenders. He was in the employment of the London Stevedore Company, who were employed by the defenders to discharge the vessel. There is no averment that the defenders were bound to supply whatever appliances were requisite for the discharge of the ship, and in the absence of such averment I must suppose that the London Stevedore Company were bound to give their own servants all the appliances necessary for performing this work. It is said that the defenders failed to provide a safe and proper means of descent into the hold of their ship, but there could be no actionable failure in providing unless there was a duty to provide. Such a duty, as I have said, is not averred. There were means provided for the descent into the hold of the vessel, but these are said to have been dangerous and unsuitable. The deceased must have seen this, but it is not suggested that he complained of the existing means of descent, or asked them to be supplemented or replaced by others. If the deceased accepted without objection or complaint the existing means, and proceeded to use them, it must be held that he regarded them as sufficient.

The real ground of action is that the construction of the ship was faulty in not providing some means of descent other than those which existed. But there is no averment that the construction of the "Buteshire" was in any respect unusual. If it was of a usual and ordinary construction, in so far as the means of descent into the hold was concerned, the defenders were not guilty of fault in adopting it.

The averments as to previous accidents and subsequent improvements have no bearing upon the relevancy of this particular case.

LORD MONCREIFF was absent.

The Court approved of the issue as the issue for the trial of the cause.

Counsel for the Pursuer — Younger. Agent—Walter C. B. Christie, W.S.

Counsel for the Defenders — Clyde. Agents—Webster, Will, & Co., S.S.C.

Thursday, March 10.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

WEIR *v.* GRACE.

Process — Proof — Proof or Jury Trial — Reduction of Will in Favour of Testator's Law-Agent—Court of Session Act 1825 (6 *Geo. IV. cap.* 120), *sec.* 28—*Court of Session Act* 1850 (13 *and* 14 *Vict. cap.* 36) *sec.* 49—*Evidence (Scotland) Act* 1866 (29 *and* 30 *Vict. cap.* 112) *sec.* 1—*Court of Session Act* 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 27.

Even in the case of the "enumerated causes" under the Court of Session Act 1825, section 28, the Lord Ordinary before whom the case depends has now a wide discretion as to whether proof or jury trial should be allowed, and though his decision is subject to review, the Court will not interfere with it except upon very special grounds.

Question — Whether an action for reduction of a will on the ground of undue influence alone, there being no averments of fraud or circumvention or facility, came within the provision as to the "enumerated causes" in the Court of Session Act 1825, section 28.

In an action for the reduction of a will on the ground of undue influence alone, there being no allegations of fraud or circumvention or facility, the pursuer averred that the defender, in whose favour the will had been made, had for many years acted as law-agent, factor, and banker to the testatrix, an elderly maiden lady, that though the will had been drawn in the office of another law-agent, he had acted on the instructions of the defender, and that the result of the course adopted in regard to the preparation of the will was that it was in no way differently situated in this respect than if "it had been actually prepared by" the defender himself. *Observed* that in such a case proof was more expedient than jury trial.

This was an action of reduction at the instance of Alexander Weir, Melbourne, Australia, and Mrs Ann Weir or Key, St Andrews, against Stuart Grace, banker and solicitor, St Andrews, C. S. Grace, W.S., St Andrews, and certain other persons, legatees under the will, which was one of the documents sought to be reduced.

The summons concluded for reduction in so far as regards any right which the defender Stuart Grace or the defender C. S. Grace could claim under them—(1) of a letter dated 5th March 1881 purporting to embody the testamentary directions of Miss Margaret Brown and Miss Ann Brown, who resided at New Grange House, St Andrews; (2) a deed of settlement by Miss Margaret Brown dated 1st April 1881, with relative codicils dated respectively 15th June 1886 and 6th April 1893, whereby she

conveyed all her property, heritable and moveable, to her sister Miss Ann Brown, and in case of her predecease (which happened) to the defender Stuart Grace and his heirs under burden of the legacies, and appointed Miss Ann Brown, whom failing the defender Stuart Grace, whom also failing the defender C. S. Grace to be her executrix or executor; and (3) a testament-testamentar by the Sheriff of Fife and Kinross in favour of the defender Stuart Grace as executor-nominate of Miss Margaret Brown, following upon the deed of settlement second sought to be reduced. Reduction was not sought of the letter or settlement in so far as the special legacies were concerned.

Defences were lodged for the defender Stuart Grace.

The pursuers averred that they were cousins-german and next-of-kin of Miss Margaret Brown, and that the pursuer Alexander Weir was her heir in heritage, that the defender Stuart Grace or his firm or late firm of Stuart & C. S. Grace, of which the defender C. S. Grace, son of the defender Stuart Grace, was the only other known partner, acted as law-agent or law-agents, factor or factors, and banker or bankers to Miss Margaret Brown for many years prior and down to her death; that in the repositories of Miss Margaret Brown there were found after her death, which occurred in April 1897 (Miss Ann having predeceased her sister nine years before) (1) the letter first sought to be reduced, and (2) the deed of settlement and codicils second sought to be reduced.

The letter was in the following terms:—"*New Grange, 5th March* 1881. Dear Mr Grace—My sister and myself thinks we should now make our will, and as you have been our kindest friend in giving us your good advice at all times, we both think we cannot do better than leave you at our deaths New Grange, Mountville, the two cottages and gardens at East Grange, and the house No. 62 in South Street, St Andrews, and all that is in our possession at the time of our demise. We leave it solely to you, also all the furniture in our house, silver plate, jewellery, books, pictures, napery, crockery, and wearing apparel, &c., &c. We leave you sole executor, with the exception of a few legacies (six) for you to pay out of the fund.—MARGARET BROWN." Then followed legacies amounting in all to £5000.

The deed of settlement was to the effect above set forth.

The pursuers also averred that Miss Margaret Brown left property, heritable and moveable, to the value of £21,600, and that Mr Stuart Grace had obtained confirmation and had entered into possession of the heritable estate; that parts of the heritable estate had been in the family of the deceased and of the pursuers for a very long period; that for 30 years prior to the death of Miss Ann in 1888 the Misses Brown lived at New Grange House in a very secluded fashion, and that although possessed of ample means they lived in a miserly fashion, stinting themselves and their dependents even in the matter of food, and grudging all expenditure.

They further averred as follows:—"(Cond. 10) In matters of business both the ladies were exceedingly simple and inexpert. From the time of their father's death onward Mr Stuart Grace acted as their law-agent, banker, and factor, and gradually gathered into his own hands the whole management of their affairs, and from a date prior to 1880 he had a dominating influence over both of the said ladies which he deliberately set himself to increase, and so increased, that from before 1880 down to the dates of their respective deaths they were entirely subject to his influence and advice, and, as he well knew, never acted contrary thereto, or acted independently thereof, except in the most trivial matters. For fully twenty years prior to Miss Margaret Brown's death he was a constant visitor at their house, going there often when there was no business call for his attendance. He was quite aware of the niggardly and self-denying mode of life of the ladies, but although he was their sole adviser, and was well aware of the extent of their means, he took no steps to encourage them to spend more in the comforts befitting their age and station. He rather encouraged their impression of their inability to attend to their own affairs, and he came personally to make all their payments for them, including such trifles as servants' wages and tradesmen's accounts. He also forebore to take any steps to enlighten them as to the true extent of their means, or to disabuse their minds of the impression that they were comparatively poor. He thus latterly reduced the old ladies to such a state of dependence on him that they were afraid to disburse even small sums without his sanction. At the same time he received and accepted from them constantly, over a period of years, gifts of the best of their poultry and garden produce—making them trifling gifts on special occasions. The said defender too, on his frequent visits, set himself assiduously to flatter Miss Margaret Brown (who was very susceptible to flattery), and with such success that she was quite under the influence of his wishes in regard to the management of her affiairs, and, against her own wishes and judgment, on two occasions incurred considerable expense in improving and enlarging New Grange at the instigation of the said defender and his son. By the ascendency which he had so gained over the ladies, and by taking advantage of the opportunities his position gave him, Mr Grace had acquired a degree of influence over them which he used unduly, and in breach of his duty towards them as their law-agent, in regard to the testamentary settlement of their affairs. (Cond. 11) By the said conduct and arts the said defender acquired such influence over the ladies as to be able to induce them to write the letter above quoted. At the date thereof the said defender was the law-agent and the only adviser of the said ladies, and being their confidential adviser, and having acquired over the said ladies, in

consequence of the trust and confidence they reposed in him as such, a dominating and ascendant influence, which as he knew they were unable to resist, he abused his position and violated his duty as such law-agent and adviser and induced his client Miss Margaret Brown to execute and grant said letter, and his clients Miss Margaret and Ann Brown to execute the two settlements after mentioned, for the purpose of securing his own great advantage and the great lesion of his said clients and the pursuers by obtaining the whole means and estate, heritable and moveable, belonging to both of said ladies. Miss Ann Brown, who had less liking for the defenders than her sister, did not sign the letter, but she was subsequently induced to sign a deed of settlement similar to that executed by her sister. The foresaid letter of 5th March 1881 is not the spontaneous production of Miss Margaret Brown. She was unlearned and unskilled in her expressions, engaged in written composition seldom and with difficulty, and was utterly ignorant of legal phraseology. The said letter was either written to the dictation of or after a model furnished by defender Stuart Grace. Mr Stuart Grace was also forthwith made aware of its execution and purport, and he advised that its provisions should be embodied in two deeds of settlement. (Cond. 12) On learning that the alleged intentions of the ladies as to their succession had been embodied in said letter, Mr Stuart Grace did not urge upon them the propriety of obtaining independent advice on the matter. Nor did he, in himself advising them as to the making of former wills, take such steps as were necessary to acquaint them fully as to their means, and to ensure that they had clearly before them all circumstances bearing on the claims of their own relatives in the disposal of their property, and especially of the heritable properties which had been so long in the family. One or other of these courses it was his duty as their agent to have followed. Instead of so doing, however, he advised a course in regard to the preparations of said wills which, while avoiding the obvious disadvantage of having them drawn by himself or in his own office, effectually secured that the two old ladies should have no efficient independent advice in the matter. (Cond. 13) . . . On ascertaining that the letter of 5th March 1881 had been executed, Mr Grace wrote to his own Edinburgh correspondents, Messrs Maitland & Lyon, S.S.C. (the sole partner of which firm, Mr Hugh Lyon, S.S.C., was also related to Mr Grace), instructing them to prepare a will for each of the said ladies. Mr Lyon received no other instructions, except verbal instructions from Mr Grace, and immediately prepared two drafts of two settlements, one for Miss Margaret and one for Miss Ann. From those directions Mr Lyon was able to prepare drafts, and on 23rd March 1881 he wrote to Mr Stuart Grace." . . .

They averred that although these deeds were framed in draft (there being either only one draft or two drafts in identical terms) with the names of the residuaries, legatees, and executors failing Miss Ann and Miss Margaret respectively left blank, this was merely a matter of form, Mr Lyon having been made aware of the dispositions proposed, and that this appeared from the form of the deeds themselves; that a clerk from Mr Lyon's office was sent to St Andrews, who was introduced by Mr Stuart Grace to the Misses Brown, who told the clerk the names to be filled in, but that this was a mere matter of form, the whole matter having been arranged beforehand, and that no effort was made to ascertain that the ladies were really fully aware of their means, and of any claims which there might be upon them; that the deeds were taken back and revised and extended in Mr Lyon's office, and thereafter were taken by Mr A. C. Logan, W.S., who was employed in Mr Lyon's office, to St Andrews, where they were signed by the Misses Brown; that with the exception of the letter of introduction and directions as to signing, &c., which was brought by Mr Logan, no communication passed between Mr Logan and the Misses Brown as to the deeds of settlement. "(Cond. 15) . . . Mr Lyon was personally unacquainted with their circumstances, and took no steps to ascertain these, or to discuss with the ladies the propriety of the provisions of their settlements. He took no personal concern in taking instructions for or preparing said deeds, but was absent in Moffat during the whole time the business was pending. The whole matter was entrusted by him to clerks acting under directions of Mr Grace. With the exception of the insertion of the names of the executors and legatees by Mr Robertson as narrated, the drafts referred to in Mr Lyon's letter of 23rd March, as then prepared by him in blank, before he or anyone from his office had seen or been in communication with the Misses Brown, were not altered or varied in a single particular before extension. (Cond. 16) Neither Miss Brown nor her sister were ever advised by any neutral person, acting independently of Mr Grace, in regard to the testamentary disposal of their means, and neither had any opportunity of deliberately judging of the matter free from his influence, and with full appreciation of all the circumstances, as to the extent of their property, &c., which should have been before them. The result of the course adopted in regard to the preparation of the deeds was that they were in no way differently situated in this respect than if the deeds had actually been prepared by Mr Grace himself."

The defenders pleaded, *inter alia*, (1) The pursuers' averments are irrelevant, and insufficient to support the conclusions of the summons."

The following issues were proposed by the pursuer for the trial of the cause by jury—"(1) Whether in March and April 1881 the defender Stuart Grace, being the law-agent of the late Miss Margaret Brown, who resided at New Grange House, near St Andrews, did wrongfully, and in breach of his duty as agent aforesaid, induce the said Miss Margaret Brown to execute the

letter and deed of settlement, or one or other and which of them, being respectively Nos. 8 and 9 of process, so far as sought to be reduced, to the lesion of the said Miss Margaret Brown and the pursuers? (2) Whether in March and April 1881 the defender Stuart Grace, being the law-agent of the said Miss Margaret Brown, acted in the preparation of the said letter and deed of settlement, or one or other and which of them, and whether the said letter and deed of settlement, or one or other and which of them, in so far as sought to be reduced, is not the free and uninfluenced act of the said deceased Miss Margaret Brown, deliberately entertained and carried through by her with full knowledge of its effect?"

On 16th February 1898 the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor—"The Lord Ordinary having heard counsel for the parties on the issues proposed by the pursuers, No. 23 of process, disallows the same; allows both parties a proof of their respective averments on record, and to the pursuers a conjunct probation," &c.

Opinion.—"This is an action of reduction of a settlement by an old lady in favour of her law-agent. I am not aware of any case in which such a will has, when challenged been sustained without inquiry, and I think that in this case there must be inquiry. The authority most in point is *Grieve* v. *Cunninghame*, December 17, 1869, 7 Macph. 317, which would have been conclusive had the deed under challenge been made by the defender as agent. But the pursuers have made averments which, if proved, might show that the defender was the true author of the deed. They say that Mr Lyon was employed only to conceal that fact and to give the appearance of independent advice. The defender, on the other hand, as might be expected, avers that it was Mr Lyon who made the deed on the employment of the Misses Brown, and that he, the defender, had nothing to do with it. These conflicting averments necessitate inquiry. But it appears to me that the question is ill-suited for jury trial, because it involves such delicate questions of law, and there would, I think, be great danger of miscarriage if it were remitted to a jury. It is not a case appropriated for jury trial, and I have therefore allowed a proof. Had I held that the case should be tried by a jury, I should have thought the first issue, taken from the case of *Harris* v. *Robertson*, February 16, 1864, 2 Macph. 614, appropriate for the trial of the question. But I should have disallowed the second issue."

The pursuers reclaimed, and argued—The fact that a will had been made in favour of the testator's law-agent gave rise to a presumption which supplied "the want of all other elements of fraudulent impetration," and such a will could only be sustained if the law-agent showed that it "was the free and uninfluenced act of the testator."—*Grieve* v. *Cunninghame*, December 17, 1869, 8 Macph. 317, *per* Lord Barcaple (Ordinary), approved by L.-P. Inglis in delivering the judgment of the Court at p. 322; *Huguenin* v. *Baseley* (1807), 14 Ves. 273, 2 White & Tudor 547. See also *Gray* v. *Binnie*, December 5, 1879, 7 R. 332, *per* Lord Shand at p. 346, and *Logan's Trustees* v. *Reid*, June 13, 1885, 12 R. 1094. As regards the English authorities referred to by the defender, it was true that a distinction was drawn between *inter vivos* and *mortis causa* deeds, but this distinction did not apply in the case of a law-agent or other person who himself was concerned in the preparation of the will by which he benefited, and the *onus* lay upon such a person to show that the will was the genuine will of the testator—*Fulton* v. *Andrew* (1875), L.R., 7 H.L. 448. Here it was averred that the will in question was practically prepared by the defender although another law-agent was nominally employed. It was plain, therefore, that this case could not be disposed of without inquiry. The proper mode of inquiry was jury trial. Actions for the reduction of wills on the ground of fraud or facility and circumvention ought as a rule to be tried by jury unless there was some special reason to the contrary—*Clark* v. *Young*, December 18, 1885, 13 R. 313, where the interlocutor of the Lord Ordinary allowing a proof was recalled and jury trial ordered. An action of reduction on the ground of undue influence was in the same position. In *Harris* v. *Robertson*, February 16, 1864, 2 Macph. 664, an issue was granted in the same form as the first issue now proposed by the pursuers. See also *Munro* v. *Strain*, February 14, 1874, 1 R. 522. In the case of *Rooney* v. *Cormack*, June 22, 1895, 22 R. 761, an issue of undue influence was refused only because it was unnecessary. The issue which was approved in *Harris* would have been allowed. Undue influence really was a variety of fraud and circumvention—see 2 White & Tudor, 572; *Moxon* v. *Payne* (1873), L.R., 8 Ch. App. 881, there referred to, and *Allcard* v. *Skinner* (1887), 36 Ch. D. 145. It might be that the Lord Ordinary was not bound to send the case to a jury, but in virtue of the Judicature Act and the case of *Clark* v. *Young*, *cit.*, such cases as the present ought as a rule to go to a jury, and if the Lord Ordinary ignored this rule and, without stating any special reason for the course he adopted, refused an issue, the Court would interfere with such an exercise of his discretion and direct a trial by jury, as was done in the case of *Clark*. There was here no special reason for proof being allowed rather than trial by jury. There was no special legal difficulty. The only question really was whether the defender was in truth the person who directed and superintended the preparation of this deed, and that was purely a question of fact. As to the form of the issues, the first had been approved by the Lord Ordinary following *Harris* v. *Robertson*, *cit.* The second was the issue which a law-agent had to meet in accordance with the views expressed in *Grieve* v. *Cunninghame*, *cit.*

Argued for the defender—In terms of the Evidence (Scotland) Act 1866, section 1, and the Court of Session Act 1868, section 27,

the Lord Ordinary had a wide discretion even as regards the "enumerated causes" under the Court of Session Act 1825, section 28, and the Court as a rule would not interfere with his exercise of that discretion—*Dent* v. *North British Railway Company*, February 4, 1880, 17 S.L.R. 360. Here the Lord Ordinary after hearing a full argument had refused issues and sent the case to proof, and his interlocutor should not be interfered with. The case of *Harris* v. *Robertson, cit.*, was decided before the passing of the Evidence (Scotland) Act 1866, and would now have been sent to proof before a Lord Ordinary. In the case of *Grieve* v. *Cunningham, cit.*, proof was allowed and not jury trial. Further, this case does not fall within the "enumerated causes." It was not a reduction "on the head of furiosity and idiotcy, or on facility and lesion, or on force and fear." There were no relevant averments of facility, or of fraud or circumvention. This was therefore a reduction on the ground of undue influence alone. No such case had ever been sent to a jury. In *Harris* v. *Robertson, cit.*, there were averments of fraud. In *Clerk* v. *Young, cit.*, there were averments of fraud and incapacity. In such cases no doubt it was usual to appoint the case to be tried by a jury, and that was sufficient to account for the decision in the latter case, which was consequently distinguished from the present. Assuming that the Lord Ordinary had discretion in the matter, his discretion was wisely exercised here. Nice questions of law might arise on the facts as proved. The exact amount and kind of undue influence which would suffice to justify reduction was a delicate question of law which was better left to the decision of a judge subject to the review of the Court upon the case as a whole. See *Gray* v. *Binnie, cit., per* Lord Deas at p. 351. As averred, this was a much weaker case than *Grieve* v. *Cunningham, cit.* The will in question had been made many years before the testatrix' death. The pursuer's advisers had carefully abstained from averring fraud or circumvention or facility. Nothing more was said than that the testatrix was inexpert in business and susceptible to flattery. No arts were set forth as having been used by the defender except flattery. Indeed, there were no averments of any positive acts done by the defender with the purpose and effect of unduly influencing the testatrix to make a will in his favour. All that was alleged was that he had failed to do certain things. It was plain therefore that questions would probably arise as to whether such undue influence as the law demanded had been proved. It rather appeared that the pursuer's intention was to avoid the *onus* which lay upon the pursuer in the ordinary case where facility and fraud or circumvention were averred, and the difficulties encountered by the pursuer in the case of *Rooney* v. *Cormack*, relying upon a presumption arising from the fact that the defender was the testatrix' law-agent. But the rule that where a donor or donee stood to one another in certain relations, the donee was under the necessity of rebutting a presumption to the effect that a gift in his favour had been procured by undue influence—a rule which had emanated from the English Equity Courts, was chiefly illustrated by English decisions, and must be taken subject to the limitations which had been applied to it in England—only applied to *inter vivos* donations and not to wills and legacies—*Parfitt* v. *Lawless* (1872), L.R., 2 P. and D. 462; *Morley* v. *Loughnan* (1893), 1 Ch. 736; *Allcard* v. *Skinner, cit.*; *Wingrove* v. *Wingrove* (1885), 11 P.D. 81. *Inter vivos* gifts could be set aside, either upon the equitable presumption referred to, or upon substantive proof of undue influence, but a will could not be set aside upon the equitable presumption but only upon substantive proof of undue influence, and in this connection proof of undue influence meant proof that the testator had been "forced, tricked, or misled" or "coerced" into making the disposition in question—*Allcard* v. *Skinner, cit., per* Cotton, L.-J., at p. 171, and *per* Lindley, L.-J., at p. 183; *Wingrove* v. *Wingrove, cit., per* Hannen, P., at p. 82; *Morley* v. *Loughnan, cit., per* Wright, J., at p. 751. The case of *Harris* v. *Robertson, cit.*, related to an *inter vivos* gift. Here there was no averment that the testatrix had been "forced, tricked, or misled" or "coerced." The defender did not desire, however, that the case should be disposed of without inquiry, but he maintained that the pursuer's averments were not relevant to support the issues proposed, and that the authorities quoted showed that delicate questions of law would arise in this case, which made a proof more expedient than a jury trial, especially in view of the further complication that admittedly the will was prepared by another law-agent, in which respect this case was distinguished from *Grieve* v. *Cunningham, cit.*, and also of the further peculiarity that even supposing the will to be reduced there still remained the question whether the letter was not by itself a sufficient and effectual testamentary writing. See *M'Millan* v. *M'Millan*, November 28, 1850, 13 D. 187. There were no averments relevant to sustain the conclusion for reduction of the letter.

LORD JUSTICE-CLERK—I think that as the law now stands this case ought to be tried by the Lord Ordinary without a jury. The question whether in a case of this kind the case ought to be sent to a jury or a proof before the Lord Ordinary allowed is mainly a question of discretion to be exercised by the Lord Ordinary before whom the case depends. I am not prepared to say that in no case is his decision subject to review. But the decision at which he arrives in the exercise of his discretion ought not to be interfered with except upon the strongest grounds. In this case I am not prepared to interfere with his decision. I think he has used his discretion wisely. Upon the facts as they may be determined there may arise difficult questions of law, and if a proof is allowed and led before the Lord Ordinary, his decision

upon the case as a whole can be brought under the review of the Court.

LORD YOUNG—I am of the same opinion. I think this is a case which raises only the question whether a man of business has abused the influence which his position as a man of business gives him with his client, and obtained an advantage by the undue pressure of that influence upon his client. There are no averments of incapacity on the part of the lady to make the will which is the subject of reduction here. She was quite capable of making it, and it must stand unless it shall appear, as the result of inquiry, that there was undue influence exercised by a party using influence, and yielded to by her under circumstances and with an effect which should induce the Court to interfere and set it aside. And I am also of opinion that the inquiry which is legitimate in all such cases is most properly made, not by adjusted issues for trial before a jury, but by a proof before a judge.

There are a great many averments here which I hope in the proof which is now to be taken will not be followed up by the examination of witnesses upon them; but I hope that the proof will really be confined to this—whether a man of business with an old lady as his client unduly used influence to the effect of obtaining the will which is the subject of reduction—to ascertain the facts on which the Court is asked to judge whether there was an improper use of that influence or not. I think it may be a very short proof indeed, so far as I can judge from the import of everything that can be alleged here. There are a great many principal statements made. For example, that which I called attention to when we were referred to it particularly in the course of the argument when a part of the record was read—that letter which, now nearly twenty years ago in the early ages—she is said either to have written to his dictation or by copying a draft or sketch which he had sent to her. There are more suspicions of that kind, without apparently any foundation, put in here; but I hope the proof will be confined; and it will be in the interests of both parties, certainly in the interest of the pursuer, and enable his case to be more safely judged of with safety to his interest, if the proof is really limited to that—whether there was any improper censurable exercise of the influence which a respectable man of business undoubtedly has on every client whom he has faithfully and honourably served for years. And that, I should think, may be within very narrow compass indeed.

I quite agree with the observation which has been made I think more than once in the discussion here, to which I understand your Lordship to assent, that when in any case, certainly in a case of this kind—but I should say when in any case—the Lord Ordinary before whom the case is argued in the Outer House thinks inquiry into the facts is necessary before decision—where that is either obvious or is the result arrived at by him—the mode of the inquiry which he orders ought not, unless in distinctly exceptional circumstances, to be interfered with. And therefore, even if I had thought—contrary to the opinion which I have expressed and entertained—that this case might have been fittingly tried before a jury, I should not have been at all disposed to interfere with the order of the Lord Ordinary to have it tried in the way he prescribed.

LORD TRAYNER—I agree. It is not, in my opinion, imperative that we should send this case to a jury. It may be open to question whether this case falls within the enumerated cases appropriated to jury trial in the Judicature Act of 1825. I think that is quite open to question. But assuming that it had been one of the enumerated causes, the course of legislation bearing upon our practice in modern times has been distinctly to limit the number of cases appropriated to jury trial, and it is observable, I think, on looking through the statutes, that as these changes have advanced there has been more power given to the Lord Ordinary before whom the case depends to decide the manner in which the inquiry is to be made which he deems necessary to be made for the determination of the question at issue. In the Act of 1850, which amended the Judicature Act, there was an allowance by section 49 that in any case before the Court of Session it should be competent for the Lord Ordinary before whom the case depended, on consent of both parties or on the motion of one party, with the leave of the Inner House, to allow proof to be taken on commission instead of adjusting issues. But the Evidence Act of 1866 went a little further because it provided that if both parties consented, or if special cause were shown, it was competent for the Lord Ordinary to take the proof before himself and not by adjustment of issues. That made this difference on the preceding state of the law—that it was not necessary for him, where only one party moved and the other did not consent, to go to the Inner House for leave to take a proof. Then the Court of Session Act of 1868 (section 27) gives the Lord Ordinary an unlimited discretion—not unlimited in the sense that it is not subject to review, but a discretion broad enough to warrant the view which Lord Young has just expressed, that the mode of inquiry approved of or chosen by the Lord Ordinary is not to be interfered with unless there be some exceptional or special cause for doing so.

I agree, therefore, in thinking that the inquiry necessary in this case should be made in the mode which the Lord Ordinary has appointed.

LORD MONCREIFF was absent.

The Court adhered, with expenses since the date of the interlocutor reclaimed against.

Counsel for Pursuers—Sol.-Gen. Dickson, Q.C.—Christie. Agents—Simpson & Marwick, W.S.

Counsel for Defenders—Johnston, Q.C.—C. K. Mackenzie. Agents—Mackenzie & Kermack, W.S.