was called in the Special Case. There is a part only of the interlocutor as regards him which is appealed against, and I agree that that should be altered in the manner which the Lord Chancellor proposes. Then comes the last case, namely, that relating to Finlay, which is the subject of the eighth query. A part of what was there appealed against has been given up. The whole of what was there appealed against has not to be altered, but a part has to be altered, and accordingly I think that the interlocutor ought to be varied in the way proposed.

Lord Fitzgerald—I concur in the reasoning of the Lord Chancellor and in the amendments of the interlocutor which he proposes. I am the only member of the House now present who took part in the decision of *Brownlie's* case. That case was not disposed of immediately after the hearing of the argument. There was some novelty in it, and time was taken for consideration, and even more than ordinary care was applied to it. From the beginning of the argument in the present appeal I have thought that it was governed in every part by the decision of your Lordships' House in *Brownlie* v. *Russell*.

Lord Chancellor (Herschell)—The order will be that the costs of both parties be paid by the liquidator out of the society's estates.

Interlocutor appealed from varied by omitting the answer to query 5, and substituting therefor the following words—"In answer to query 5, find and declare that the sixth party is entitled to cease being a member of the society, and to have his bond and disposition in security discharged in terms of rule 27, without any further payment, and that he is not liable to bear a share of the loss sustained by the society in proportion to the sum standing at his credit on his shares at 11th April 1882;" by omitting so much of the answer to query 6 as is appealed against, and substituting therefor the following words—"So far as regards the other shares held by him in respect of which the advances mentioned in art. 24 of the case were made, he is entitled in terms of art. 27 to a discharge of his bonds, and to cease to be a member of the society, upon payment of the difference between the amount of his bonds with interest thereon down to Martinmas 1882, on the one hand, and on the other hand the amount of the instalments paid in respect of the shares, with interest on the amount of the instalments from time to time paid at 5 per cent. to Martinmas 1882, and that he does not fall to bear a share of the losses of the society in proportion to the sum standing to his credit on his shares;" and by omitting the answer to the eighth query and substituting the following—"In answer to the eighth query, find and declare that the ninth party is entitled to have his bond discharged, and to cease to be a member of the society, in terms of art. 27, upon payment of the difference between the amount of his bond with interest thereon down to Martinmas 1882, on the one hand, and on the other hand the amount of the instalments paid in respect of his shares with interest on the amount of the instalments from time to time paid at five per cent. to Martinmas 1882, and that he does not fall to bear a share of the losses of the society in proportion to the sum standing to his credit on his shares, but that he is not entitled to complete his shares by paying up the instalments which remain due thereon, getting credit for all profits which have been allocated upon his shares, and upon such completion to have his bond discharged and cease to be a member.

"The costs of all parties to this appeal to be paid out of the estate of the respondent society."

Counsel for Appellants—Sol.-Gen. Davey, Q.C. —Farwell. Agents—Davidson, Burch, & Co., for Mackenzie & Black, W.S.

Counsel for Respondents—Cookson, Q.C.—MacClymont—C. E. Allan. Agents—Lindo & Co., for David Turnbull, W.S.

COURT OF SESSION.

Friday, November 26.

SECOND DIVISION.

[Lord Fraser, Ordinary.

HUTCHISON STIRLING *v.* MACKENZIE, GARDNER, & ALEXANDER.

Agent and Client—Duty of Agent—Responsibility of Agent.

A law-agent who recommends a security to a client having money to lend is responsible not merely as a conveyancer, but is also bound to take all reasonable care in inquiring as to the sufficiency of the security, even though the client is a man possessing a knowledge of business, and who judges for himself as to whether the investment is prudent.

Such duty on the part of an agent does not, however, extend to the making of inquiries as to whether the property is likely to continue fully let so as to maintain a rental equal to that existing at the date of the loan, it being, in the ordinary case, sufficient that the agent shall ascertain, and truly communicate to the client, the existing condition of the security, as to rental and otherwise, at that date.

Circumstances in which it was *held* that an agent who had recommended a heritable security to a client who wished a security which would yield good interest, and knew that the security recommended was not first-class, was not liable to the client for loss arising from the failure of the security owing to the depreciation in the value of heritable property.

In this action James Hutchison Stirling, Esq., LL.D., Edinburgh, sought to make the firm of Mackenzie, Gardner, & Alexander, writers, Glasgow, liable for £3000, with interest at 5 per cent. from Martinmas 1882, as loss which he alleged he had suffered from an investment made on their advice as his agents, which advice he alleged they had given with want of due care and with gross negligence.

The pursuer had from time to time for a number of years consulted as to his investments the senior member of the defenders' firm, who was on friendly terms with him. He was engaged

in literary pursuits, and averred in this action that he was not conversant with business, but it appeared from his letters produced in this action that he was in use to some extent to study investments in stocks and companies, and was to some extent acquainted with the Stock Exchange. His letters showed also that he paid considerable attention to railway investments. He was in use occasionally to reject investments proposed to him by the defenders—*e.g.*, an investment over property in Ardrossan, mentioned *infra* in the opinion of Lord Fraser—and he often also, in his correspondence with them, suggested investments for their advice, and showed that he watched the markets to some extent.

In February 1878 he had an interview with Mr Alexander, one of the partners of the defenders' firm, as to the investment of the price of some United States Funded Bonds, amounting to the amount of £3651, which he had sold out. Mr Alexander soon after wrote to him with regard to this interview—"What has now to be done is to secure investments for this money, and I think I gathered from you that you would like to have bonds on house property to yield 4½ per cent. At present it is somewhat difficult to negotiate investments of that kind with a due regard to safety and eligibility." It appeared indeed from the whole correspondence produced that the pursuer was careful to obtain, if possible, a return of at least 5 per cent., and was well aware that 4½ was at the time as much as could possibly be got on the best heritable security. Writing on 28th February 1879 he said (after discussing sundry investments)—"In fact, failing the possibility of depressed railway purchases, I must seek the best more permanent investment I can. They say property—I mean house property—is in a very bad way with you in Glasgow, and that great caution is necessary in regard to it. You see, then, that my idea is to do the best I can with the money, divided or undivided, and just in any way. I should be glad and grateful did you afford me the assistance of your advice, information, and negotiation on this occasion." The defenders replied on 14th March 1879, after an interval, that they supposed he had made his arrangements without hearing from them, but they had had an opportunity of investing £3000 of his money—"What we had to propose to you was a loan on heritable property in Glasgow bearing 5 per cent. interest, which we consider a perfectly safe investment, and which is now available only because of the holders requiring for temporary purposes some funds. The bond in question is for £4000 over a property in Stirling Square, east end of Ingram Street, all let, rental of which is £581, 17s., and ground-rent £214, 17s. The property belongs to a client of our own, and the bond is held by the Property Investment Coy. of Scotland, for whom we act. The loan was got when money was dear, and with the big ground-rent was only given at 5 per cent. interest. As we have said, the bond is for £4000; but as the company have occasion for the money, they are willing to give a preferable assignation of the bond to the extent of £3000 to anyone who would take that amount of it up, the result of the arrangement being that the £3000 would become a first security, and the remaining £1000 postponed to it over the property. The property was recently valued at £6500 over and above the ground-annual, and we know that the proprietor about a year ago refused £6000 for it. We are quite satisfied that the property is ample security for the £3000, and as the interest is ½ per cent. more than usual, the opportunity is a good one, both as regards return and permanency of investment. In case you might still be open to think of the proposal, we send you a detailed rental and valuation of the property, and if you should think the matter worth consideration, you can let us hear from you regarding it."

It was on this letter, and the investment following on it, that the pursuer founded.

Along with this letter the defenders sent him, as the letter stated, a valuation made by Mr T. D. Smellie, an experienced valuator, in 1875. It was got by the Investment Association, as lenders, when advancing the £4000, and showed a valuation of £6500, as the letter stated. The rental of the property, and the fact that it was all let, were also correctly stated in the letter, but it was also the fact that one of the tenants had intimated his intention to give up his tenancy.

The history of the bond and assignation which it was proposed that the pursuer should take over, was thus described by the Lord Ordinary in his note—"John Findlay, a wright and builder in Glasgow, was proprietor of heritable property situated in Stirling Square, Glasgow, which consisted of a store, three shops, and a common lodging or dwelling-house above the shops. This property belonged to the City of Glasgow Improvement Trustees, and was sold by them to William M'Culloch. M'Culloch sold the property to Findlay on 12th January 1875, and in part-payment of the price Findlay on the same date granted a bond for £4000 in favour of M'Culloch over the subjects. This bond M'Culloch assigned to the Property Investment Company of Scotland (Limited) on the 28th May 1875." The pursuer returned the rental which accompanied the valuation enclosed with a letter dated 15th March 1879, in which he said he closed with the defenders' proposal, and that he had given it his best consideration. Accordingly in the same month—March 1879—an assignation was executed in the pursuer's favour of the Scottish Property Investment Company's bond. By this assignation the Investment Company assigned their bond over the property in question in favour of the pursuer of the bond, "but that only to the extent of the sum of £3000 sterling of principal, with the interest thereof from the date hereof. . . . Providing and declaring, as it is hereby expressly provided and declared, that the sums, principal and interest, and penalties hereby assigned, shall be ranked and preferred *primo loco* on the said subjects and others, and the rents thereof, and also on the prices and proceeds to be realised therefrom in the event of a sale of the same, or of any part or portion thereof, and that preferably to the remainder of the said principal sum, interest, and penalties contained in the said bond and disposition in security, which shall be ranked only on the said subjects and others, and on any balance of the rents and prices or proceeds thereof that may remain after the sums, principal, interest, and penalties, hereby assigned shall have been paid in full." This assignation was dated 21st March 1879, and was recorded on the 25th. The defenders acted as agents not only for the pursuer, but also for the Investment Company and Findlay, the proprietor of the security

subjects. The effect of the transaction was thus that the pursuer became the preferable bondholder to the extent of £3000, and the Property Investment Company were made to hold a postponed security for £1000.

Interest was paid on the bond to the pursuer down to Martinmas 1882, but thereafter ceased to be paid. The whole rents were swallowed up in payment of the ground-annual of £214,17s., payable to the City of Glasgow Improvement Trustees, and which Findlay had allowed to run into arrears to a very large extent. The amount of arrears still owing at the date of this action was £192, though the defenders had taken the matter into their charge and diminished the arrears. They had done so whenever they became aware that Findlay was letting the ground-annual into arrear.

It was in these circumstances that the action was raised. The pursuer stated that he was entitled to rely on the defenders' care and skill as his agents; that it was their duty as such to make inquiries into the sufficiency of the security subjects, but they failed to do so; that they failed to give him particular and accurate information as to the re-letting at the term of Whitsunday 1879, which was the term next ensuing at the time of the transaction, obtained no valuation at the date of the loan, did not explain to him (pursuer) the great fall in the value of Glasgow property, of which he was not aware and they were; took a security which but for gross negligence they would have been aware was insufficient; moreover, that that which was assigned was only a portion of a security for £4000, and that he was thus not in a position without risk of loss and expense to realise, and that they had failed to explain that this would be the result of taking such a security. He offered to assign his right under the assignation on being paid back the £3000 he had lent with interest from Martinmas 1882.

The defenders, while denying these averments, maintained, *separatim*, that it was no part of their duty to make the inquiries as to the chances of the existing rental being reduced and part of the subjects being unlet the following year. Further, that the pursuer had taken the matter of judging as to the suitability or otherwise of the investment into his own hands.

The pursuer pleaded—"(1) The defenders having been employed as the pursuer's agents in the matter of the said loan, and having accepted the said employment, and being also agents for the borrower and for the said Investment Company, were bound to take all usual and proper measures necessary for the protection of the pursuer, and they are liable for their failure so to do. (2) The omission of the defenders to make, or cause to be made, all due inquiries as to the value and rental of the said subjects and their sufficiency as a security for the said loan, and their failure to inform the pursuer thereanent, and as to the fall in the value of heritable property in Glasgow, amounted in the circumstances to gross negligence and failure of duty towards the pursuer, for the consequences of which the defenders are liable. (3) The defenders having, while acting as the pursuer's agents, been guilty of gross negligence and want of skill in taking as a security a property which was, and still is, and which by ordinary care they would have known to be utterly inadequate, they are liable to make good to the pursuer the whole amount of the loan and the interest thereon as concluded for. (4) The pursuer having suffered loss and damage to the extent concluded for through the fault and gross negligence and want of skill of the defenders as condescended on, is entitled to decree against them in terms of the conclusions of the summons."

The defenders pleaded—"(4) The defenders having submitted to the pursuer a true statement of all the essential facts regarding the security subjects in question at the date of the transaction being entered into, they are not chargeable with misrepresentation. (5) The pursuer having taken the matter of judging of the soundness of the investment in question into his own hands, and, *separatim*, having led the defenders to believe that he had taken the matter into his own hands and was satisfied on the subject, he is not entitled to insist in the present action. (6) The defenders not having been guilty of negligence or want of skill in any professional duty undertaken by them on the employment of the pursuer or paid for by him, they are entitled to absolvitor with expenses. (7) A law-agent not being liable as guaranteeing the soundness or sufficiency of investments made by his client, the defenders are entitled to absolvitor with expenses."

A proof was led the import of which very fully appears in the Lord Ordinary's note.

The Lord Ordinary (Fraser) assoilzied the defenders.

"*Opinion.*—The pursuer seeks by the present action to make the defenders, his law-agents, liable for loss sustained in connection with a heritable security which they negotiated on his behalf. The ground of action is alleged gross negligence and want of skill, and also the non-communication of material facts.

"The pursuer and the senior member of the defenders' firm had been on terms of friendly intercourse for a number of years, and in consequence of this the pursuer exercised the privilege of consulting the defenders at various times as to investments of his funds. This correspondence has been produced, and certainly shows perfect intimacy with and knowledge of the Stock Exchange on the part of the pursuer. He asks for suggestions from his correspondents, the defenders, and he receives them. He judges of such suggestions with perfect good sense, great sagacity, and prudence, having at the same time a keen desire to get a security that would yield him 5 per cent. When examined as a witness the pursuer protested that he was not a business man—a protest, however, which cannot be accepted in the face of the letters which he wrote. In January 1876 he turns his attention to mortgages on house property, and requests information as to whether or not such an investment would be advantageous, and the defenders reply to him—'We think we might be able to place £3000 as a first mortgage on a good house and shop property in Ardrossan which has just been purchased by public roup for £4015.' On the 14th February 1876 the pursuer writes—'I find it difficult to come to a decision in any of the references, for which I have to thank you, in your letter of the 8th.' The pursuer in February 1878 sold United States Funded Bonds to the amount of £5651, which money he desired should be invested, and the mode of investment (hinted at at a persona]

interview between him and Mr Alexander, a member of the defenders' firm) is stated thus by Mr Alexander:—'What has now to be done is to secure investments for this money, and I think I gathered from you that you would like to have bonds on house property to yield 4½ per cent. At present it is somewhat difficult to negotiate investments of that kind with a due regard to safety and eligibility.' On 28th February 1879 the pursuer was again seeking investments, and in his letter of that date he says—'In fact, failing the possibility of depressed railway purchases, I must seek the best more permanent investment I can. They say property—I mean house property—is in a very bad way with you in Glasgow, and that great caution is necessary in regard to it. You see, then, that my idea is to do the best I can with the money, divided or undivided, and just in any way. I should be glad and grateful did you afford me the assistance of your advice, information, and negotiation on this occasion.' This letter produced an answer from the defenders, dated 14th March 1879, which is said to contain misrepresentation of material facts. But before referring particularly to this letter it will be convenient here to state some of the facts in connection with the security ultimately taken.—[*His Lordship here described the history of the bond for* £4000, *and its assignation to the pursuer to the extent of* £3000, *ut supra.*]

"Thus the pursuer became the preferable bondholder to the extent of £3000; and the Property Investment Company were made to hold, and still hold, a postponed security for £1000.

"Interest was paid upon the bond to the pursuer down to Martinmas 1882, but since that date he has received no return in the shape of interest. The whole of the rents have been swallowed up in the payment of a heavy ground-annual of £214, 17s., payable to the City of Glasgow Improvement Trustees, and which Findlay, the owner of the property, allowed to run into arrear to a very large extent. The amount of the arrear at present owing is £192. Owing to the depression in trade, which is common to the whole country, the rents of this property have fallen, and its value consequently has been diminished. What its real value is could of course only be ascertained if it were put up to auction—which has been already once done at the pursuer's instance, but no offerer appeared. James Sellars, an architect in Glasgow, one of the pursuer's witnesses, says,—'I consider the value of the property at present is about £2500 to £2800—that is, over and above the ground-annual.' There can be little doubt that if the property were sold to-day it would not bring a price to repay to the pursuer his principal sum of £3000 and unpaid interest, and therefore he now claims payment from the defenders of £3000, with interest at 5 per cent from Martinmas 1882.

"The letter of the defenders, on which the pursuer mainly relies as evidence of negligence, misrepresentation, and non-disclosure of facts, dated 14th March 1879, says as follows:—'What we had to propose to you was a loan on heritable property in Glasgow, bearing 5 per cent interest, which we consider a perfectly safe investment, and which is now available only because of the holders requiring for temporary purposes some funds.' The letter then goes on to state that the bond referred to 'is for £4000 over a property in Stirling Square, all let, rental of which is £581, 17s., and ground-rent £214, 17s.' Now, it is perfectly true that at the time when this letter was written all the property was let, and that the rental then was £581, but it is also the fact that one of the tenants had intimated that he would cease to be a tenant at the following Whitsunday, which he did; and further, that another of the tenants had obtained a deduction of his rent from £300 to £250, and these facts were not disclosed. I do not, however, consider that there was misrepresentation here, nor that there was withheld information that ought to have been given. The property was let, and if one of the tenants intimated that he would give up his lease at the following Whitsunday there was no reason to suppose the part of the property so left would remain unlet. The letter further states that 'the property was recently valued at £6500 over and above the ground-annual, and we know that the proprietor about a year ago refused £6000 for it. We are quite satisfied that the property is ample security for the £3000, and as the interest is ½ per cent. more than usual, the opportunity is a good one both as regards return and permanency of investment. In case you might still be open to think of the proposal, we send you a detailed rental and valuation of the property, and if you should think the matter worth consideration you can let us hear from you regarding it.' The statement that the property was 'recently' valued is giving a very wide meaning to the word 'recently.' The valuation which was sent to the pursuer was one made by Mr T. D. Smellie in 1875 on behalf of the Property Investment Company of Scotland, when they became creditors in the bond for £4000 over it. This valuation, however, carries along with it its date, and the pursuer had thus the opportunity of seeing when the valuation was made—25th May 1875. Now, on the following day after that valuation was made—viz., 26th May 1875—Messrs Mackay & Ferguson, who were tenants of the store and offices constituting part of the property, wrote to Mr John Findlay, the proprietor, a missive-offer for a lease at a rent of £300, and in this missive-offer they state as follows—'Further, we are to have the option of purchasing said stores and buildings, all as shown on allocated feuing-plans, being plot No. 1 of same, containing 871 6-9ths square yards, with a feu-duty of £214, 17s. 10d., at any time before 2d February next (1876), at the sum of £6500 sterling.' The rental which accompanied the valuation was returned by the pursuer to the defenders along with his letter of 15th March 1879, and has been lost; but it is proved that the sum in the rental was at the date of the defenders' letter as stated by them. The further statement that the proprietor Findlay had refused £6000 for the property is also proved by Mr Findlay, the proprietor, who at first did not remember the fact, but he finally gives it as his evidence, 'I have no doubt I got a verbal offer of £6000 for the property, but I don't know from whom.'

"Along with these statements of fact the defenders give an expression of very confident opinion. They state that they consider what they offer a perfectly safe investment, 'and ample security for the £3000.' This opinion may have been right or wrong, but I see no ground for holding that it was not honestly given and believed. The defenders no doubt stood in the

delicate position of acting both for the lender and the borrower. They were agents in Glasgow for the Property Investment Company of Scotland, who were creditors in the bond for £4000, and they were also agents for the proprietor Findlay. The Property Company were very desirous of obtaining money in order to meet calls upon them by depositors, and hence they gave instructions to call up this bond for £4000. Mr Couper, the manager of the Property Company, says—'I don't think our fears were particularly excited about that loan. We were merely desirous of getting money to meet depositors that were coming in upon us.' It was in consequence of the instructions to call up the bond that the defenders were induced to suggest this as a security to the extent of £3000 to the pursuer. Now, at the time when this suggestion was made, the evidence is all to the effect that it was a good security for £3000. The fall in the value of property which began by reason of the insolvency of the City of Glasgow Bank was not felt to any great extent in 1879, and it was only when the depression in trade went on continuing, and to get worse during the subsequent years, that all securities, even upon the best sites, became materially depreciated. The property in question is in the centre of Glasgow, in a good business quarter, and altogether an eligible subject for a security. Mr Thomson, an architect and valuator in Glasgow, says of it—'It is a capital site. I think there is a value in it other than the mere old buildings.'

"The unexpected fall in the value of property, and the consequent depreciation of securities, is a notorious fact to which all the witnesses speak, and the continuance of which they all also equally affirm to be unexpected. Findlay speaks of the matter thus—'I think the property in question was good security for £4000 at 15th March 1879. At that time neither I nor any other person anticipated that the depression of trade would be so great or so lasting as it has been. Property was at its highest point about the end of 1877 or beginning of 1878; after that it began to go down. I don't think there had been any serious fall up to March 1879.' This particular property also, in the estimation of some of the witnesses, had special advantages. Mr Smellie says—'We have been all very much disappointed since the crisis took place as to the expectations we had formed of this locality. I would not in 1879 have expected property in this locality to remain long depreciated. I would have expected the crisis to pass off within a few years.' And he goes on to make further explanations of an encouraging nature which, however, the continued depression has not confirmed. Mr Thomson says—'Property in that neighbourhood has been depreciated by the railway company having cleared away a great many premises and erected large stores. That cause has been operating I should say for eight years, but it did not develop a depression of other properties until about three years ago. I don't think it had developed a depression in 1879. If the property in question was rented in 1879 for £581, 17s., that would represent a rate of 13s. 4d. per square yard. That was a very moderate rental in 1879, looking to the situation of the property. If I had been asked to value the property in March 1879, the rental being £581, I would very likely have taken a discount of between 10 and 15 per cent.—say 12½—from the rental, and then valued it at so many years' purchase. I would have made that deduction because of the risk of that rental not being maintained. Striking off £72—12½ per cent. from the rental—would leave £509. I would have taken that at seventeen years' purchase at that date, which would bring out a valuation of £8653. From that I would have deducted the ground-annual £214, capitalised at twenty years' purchase £4280, leaving £4373 as the nett value. I think that would have been sufficient to secure a loan of £3000. If the loan had been at 5 per cent. I think that would have been a good and satisfactory security. I would have advised such an investment even at 4½ per cent. If this property had been good security for £4000 in 1875, no reason occurs to me why it should not have been good security in the spring of 1879.'

"But it is said that the defenders, instead of sending a valuation of the year 1875, ought to have got a new valuation in 1879 before suggesting the matter to the pursuer. In reference to this matter of the valuation, the peculiar circumstances of this case must be kept in view. The defenders were not asked to invest £3000 upon good security for the pursuer, leaving to them the selection of the security. In such a case it would have been their professional duty to have obtained a valuation as at the date when they made the investment. The agent in such a case stands in the position of a trustee, and would be responsible for the sufficiency of the security—*Smith* v. *Pococke*, 23 L. J., Chan. 545. But their position was not so. They were asked by a man who was studying the markets himself to suggest some investment, and the correspondence shows that they made many suggestions which the pursuer critically considered, and all of which he rejected except the security over the Stirling Square property. He asked for advice and he got it, and the defenders laid before him all the materials that were in their possession. For these letters of suggestion, recommendation, and advice no charge was made, and no commission was obtained from the pursuer for negotiating the transaction. Now, when the correspondence proceeded upon this footing there was no neglect of professional duty on the defenders' part in not obtaining a new valuation—which they were not authorised to get—it being doubtful, moreover, whether their suggestion in this case might not have the fate of their previous rejected suggestions. The valuation which they did send disclosed its date, and the pursuer took the matter into his own hands. He had in a previous letter expressed his opinion of the bad state of Glasgow property. The peculiarity of it was distinctly in his mind. It is impossible to read the correspondence without seeing that the pursuer here was judging for himself as to the nature and character of the security he was taking, and in this respect the case resembled one decided in the Chancery Court of England, the rubric of which is as follows (*Chapman* v. *Chapman*, L. R., 9 Eq. 276)—'Although relief may be given at the suit of a client against his solicitor for loss sustained by gross negligence, yet where the loss was in respect of a matter as to which the advice of the solicitor was founded on the opinions of competent surveyors as to the value of the property, and those opinions submitted to

the judgment of the client, the Court dismissed the bill; and as fraud and improper motives were charged without evidence to support those charges, the bill was dismissed with costs.' In giving judgment Vice-Chancellor Stuart said —'In a question between solicitor and client as to loss from negligence, there must be negligence of a gross and palpable kind to give a right to relief. But where as in this case the conduct complained of is more properly to be described as imprudent or indiscreet than as negligent, and every transaction was referred to the judgment of the client himself, who concurred in it, there seems to me to be no right to equitable relief. The advice which the defendants gave was founded on the reports of surveyors communicated to the plaintiff, and whatever may be said of the prudence or imprudence of the course advised by the defendants, I can see no reason to doubt the honesty of the advice. It was upon a matter which did not require professional skill, and the grounds upon which the advice was given were submitted to the plaintiff's judgment and approved by him.'

"The most recent case in our own Courts upon this subject is that of *Ronaldson and Others (Gray's Trustees)* v. *Drummond & Reid*, June 7, 1881, 8 R. 767, which was pleaded as an authority for the doctrine that a law-agent is responsible not merely for the validity of the title, but also for the sufficiency of the security. That case, however, is no authority for such a doctrine, and none of the Judges carried the responsibility of a law-agent to such an extent. There was in that case omission upon the part of the law-agent, who was himself one of the trustees who were the lenders, to give to his co-trustees such needful information about the nature of the property and the burdens upon it as was necessary to enable them to form a judgment as to the propriety of the intended loan. He possessed this information, but withheld it, a circumstance that cannot be said to exist in the present case, and which induces me to hold that the one judgment cannot be regarded as a precedent for the other. It cannot be said that in the month of March 1879 the loan of £3000 was an imprudent transaction, far less an act of gross carelessness, and the pursuer must bring it up to a case of that kind before he can fix down an agent's responsibility simply for a suggestion. A broker or a law-agent is the kind of person to whom people who have a little money to invest almost necessarily—at least naturally—resort for information and advice, and although the investment turn out to be unfortunate which they have suggested, there is no legal liability for the consequences resting on the professional man. He may perhaps from his knowledge of business more readily forecast the future, but his skill in this respect is very limited after all. No one in 1879 could have anticipated the tremendous fall in the value of property which took place at the end of that year and in the following years, and has continued ever since. If a law-agent were to be made responsible for giving a suggestion to his client, the result would be that no suggestions would ever be made, and a great part of the usefulness of an agent or broker would be destroyed. If an agent is liable there is no reason why a stockbroker should escape, and to quote the language of Lord Stair as to the responsibility of a judge for the soundness of his decision—'No man but a beggar or a fool' would be an agent if he answered inquiries as to investments with such responsibility for the consequences.

"I have not followed the course adopted by the Lord Ordinary in the case of *Ronaldson and Others* v. *Drummond & Reid* in delaying judgment until it be seen by a sale whether there be any loss. It is clear from the evidence that a sale at the present time would be a very imprudent proceeding, and would result in a loss. The rents of houses in the district have fallen off, and many of the houses and shops round about are unlet. Whether the hope expressed by some of the witnesses of recoverable value shall be realised must in the meantime be treated merely as a hope which may or may not come to pass. In some streets, such as Sauchiehall Street, there has been an increased value in house property since 1879, and as Stirling Square is in the very heart of the business portion of Glasgow it may also take a start. But of the prudence of retaining his security and losing his interest in the meantime till the arrear of ground-annual be cleared off, the pursuer himself must be the judge. The pursuer's case is no harder than that of the many thousands who invested in stocks and shares, and in house property and land property, during the period of prosperity of the country nine years ago, and he must submit, like all these people who invested at the prices of those days to the consequences of an unfortunate investment."

The pursuer reclaimed, and argued—1. The defenders had made false representations by stating that the property was a safe investment, that it was all let, that the proprietor had been offered £6000 for it, and by referring to a valuation which they spoke of as "recent," but which was really made in 1875. 2. They had concealed material facts, viz., that reduced rents had been accepted for the future for some of the shops, and that some of the tenants had given notice of their intention to leave. 3. They were guilty of negligence. They had failed to acquaint themselves with the true state of the property, or to take into account the falling market—*Ronaldson and Others* v. *Drummond & Reid*, June 7, 1881, 8 R. 767. A specially heavy *onus* lay on an agent who acted for more than one of the parties—*Stewart* v. *Maclure, Nasmith, Brodie, & Macfarlane*, July 7, 1881, 13 R. 1062—nor did a high rate of interest demanded by the client free the agent.

The defenders replied—Their relations with the pursuer were friendly relations, and not the ordinary relation of agent and client. But assuming that they were his agents in the ordinary sense, all the statements they made to him were true. The transaction was a reasonably prudent one at the time as matters stood, and inquiry into the nature of such a security was no part of their duty as agents—*Chapman* v. *Chapman*, L.R., 9 Eq. 276.

At advising—

Lord Rutherfurd Clark—In 1879 the pursuer invested £3000 on house property in Glasgow. The defenders were his agents in the transaction. The security has proved to be insufficient, and by this action the pursuer seeks to make the defenders responsible for the loss.

The grounds of action are—First, that the defenders made false representations to him;

second, that they concealed from him material facts; and third, that they were negligent.

The note of the Lord Ordinary gives a very full detail of the circumstances in which the case was entered into, and it is unnecessary to go over the same ground a second time. It is sufficient to consider the several grounds of action on which the pursuer relies.

1. I do not think that the defenders made any false representations.

The pursuer says that the defenders stated that the property was all let, when in point of fact it was not all let. But the statement of the defenders was true. The property was all let down to Whitsunday 1879, and I must take the statement of the defenders as referring to the period of time of which they were speaking. Their statement was made in a letter dated 14th March 1879, and at that time the property was all let.

The pursuer charges the defenders with having represented to him that the property was "recently" valued, when in point of fact it had not been valued since 1875. But the charge falls to the ground when it is considered that the defenders sent to the pursuer the valuation which was referred to in their letter. It bore the date 25th May 1875.

The defenders stated in their letter that they knew the proprietor had refused £6000 for the property. It was urged in the argument before us that this was a false statement to the knowledge of the defenders. I do not find any such allegation on record. But be this as it may, I do not think that the allegation has been proved. Mr Findlay, the proprietor, says—"I have no doubt I got a verbal offer of £6000 for the property, but I don't know from whom.' That he should, after so great a lapse of time, have forgotten the name of the proposing buyer is not at all surprising.

These are all the alleged misrepresentations.

2. The concealment of material information. This consists in the fact that at the time of the proposal for the loan some of the tenants had given notice to quit, and that the current rents had been considerably reduced for the future. But it was not maintained to us that these facts were within the knowledge of the defenders. Indeed no charge of dishonesty was made against them, and if made, no such charge could have been substantiated. But in the absence of such a charge the allegation of concealment is of no relevancy. The agents were of course bound to communicate to the pursuer every material fact within their knowledge, but they could not be guilty of any fraud in not revealing what they did not know. They might have been negligent in not acquiring the knowledge, but not fraudulent.

3. I come now to the last ground on which the pursuer relies—the alleged negligence of the defenders—and here there is room for more consideration and discussion.

The defenders maintained that they had no responsibility except as conveyancers, and that as no fault had been imputed to them in that respect they were entitled to our judgment. I cannot adopt this view. I think, on the contrary, that they were bound to take all reasonable care in seeing to the sufficiency of the security which they recommended to their client. The pursuer alleges that they failed in this respect, and it is on this question that the chief difficulty exists.

The subjects over which the loan was to be taken yielded a rental for the year ending at Whitsunday 1879 of £581 or thereabouts, but they were burdened with a ground-annual of £214, 17s. If that rental were maintained there was a surplus of £366 to meet the interest of the loan of £3000, and this would of course be amply sufficient. But the pursuer contends that if the defenders had made due inquiry they would have found that the rental of the following year would be materially reduced, and that there was a probability of a part of the subjects being unlet, as turned out to be the case.

The pursuer urges that the defenders were bound to make inquiries into the chances of the existing rental being reduced, and that they could readily have obtained the requisite information by going to the landlord or tenants, but I do not think that they were under a duty to enter into such an investigation. It is not usual for the agents of a lender to do so, and I do not see that the defenders were bound to follow an exceptional course. They had ascertained that the property was all let, and that the margin was a very ample one. They were entitled, I think, to conclude that the property in its actual state furnished a good security, and in consequence were justified in recommending the loan to their client.

In my judgment they were not guilty of negligence because they did not prosecute their investigation further. It is said that property in Glasgow was then falling in value. So it was. But the defenders saw that there was a large margin to cover contingencies, and were entitled to rely on it as sufficient to cover the risks to which a security of this kind is necessarily subject.

But there is another fact of great importance. The subjects were already burdened with a loan of £4000, and the transaction with the pursuer took the form of an assignation of £3000 of this loan under the condition that it was to be preferable to the remaining £1000. The property had been taken as sufficient for a loan of £4000, and the defenders were recommending as sufficient for £3000 only. It is said that the creditors in the existing bond wished to call it up. That is true. But it is in evidence that this desire was not due to any misgiving as to the sufficiency of the security, but to the fact that they required the money. It is further urged by the pursuer that the defenders were agents for the existing creditors and for the proprietors of the subjects. So they were, but this of itself cannot be a ground of liability. It will lead us to scrutinise the conduct of the defenders, and to inquire narrowly whether they omitted any reasonable precaution for the safety of their client. I am bound to say that I do not think that they did. The security seemed a very ample one, though of course subject to those risks which the pursuer was willing to incur.

Considering therefore that the property showed an ample rent to cover the loan and to meet contingencies, I am of opinion that the defenders were justified in recommending the loan to the pursuer, and that they were not guilty of negligence.

The security was one of a speculative nature. The pursuer desired such a security in order to obtain a high rate of interest. He has lost money because the security became insufficient. That was just the risk he voluntarily undertook. That he should lose is not the uncommon result of such an investment. He must blame himself for desiring to obtain a large return from a hazardous security. At least he cannot, I think, with justice blame the defenders, who in my opinion failed in no duty which they owed to him.

I think therefore that the interlocutor should be affirmed.

LORD YOUNG—I think this is a difficult case—at least I have had great difficulty about it. I think it very much on the border-line between such negligence (for I think there was negligence) as infers liability, and such negligence as is merely to be characterised as not good or zealous agency in the interests of the client. I do not think the interests of the client here were well protected. I think the reverse—that the interests of the client were not protected; but then, as I have indicated, the conclusion that there is legal liability for such negligence is another matter. I should not have been greatly surprised if the result arrived at by your Lordships had been otherwise—if it had been to the effect that there was legal liability for the loss sustained by the client on account of the want of these inquiries and communications which I think it was the duty of the agent to have made. But with the judgment of the Lord Ordinary in favour of the agents against liability, and the decided and clear views to the same effect entertained and expressed by my brother Lord Rutherfurd Clark, I could not bring myself to the conclusion that liability ought to attach to the agents. Therefore I may be held as concurring in the judgment. But I repeat that it is with difficulty, and with the conviction that there was not good agency here, and that the client has severely suffered in consequence.

LORD JUSTICE-CLERK—I share in the doubts Lord Young has expressed, but I think that in a case of this kind, where there is an attempt to make a law-agent responsible for negligence, the matter should be clearly established. I am of opinion with Lord Rutherfurd Clark, if your Lordships will allow me to repeat his opinion, that that has not been established, and therefore I concur in the result of his Lordship's opinion.

LORD CRAIGHILL was absent.

The Court adhered.

Counsel for Reclaimer — Mackay — Dickson. Agents—Davidson & Syme, W.S.

Counsel for Respondents—D.-F. Mackintosh, Q.C.—Jameson. Agents—F. J. Martin, W.S.

Wednesday, December 1.

SECOND DIVISION.

[Sheriff of Argyle.

HUNTER *v.* THE SCHOOL BOARD OF THE PARISH OF LOCHGILPHEAD AND OTHERS.

School—School Board—Power to Regulate Use of School Buildings—Ultra vires—*Sheriff—Jurisdiction—Education (Scotland) Act* 1872 (35 *and* 36 *Vict. cap.* 62).

Held (1) that a school board have power, due regard being had not to interfere with educational purposes, to grant the temporary use of one of their schools for a purpose not falling within the Education Acts; and (2) that the Sheriff has no jurisdiction to interfere with the mere discretion of the board in the use of their schools so long as such use is not illegal. *Held*, therefore, in a question between the majority of a board and the minority, that it was not *ultra vires* of the board to lend a school during part of the vacation for the use of a trip from a neighbouring city, and that a petition to the Sheriff for interdict against such use fell to be *dismissed.*

At a meeting of the School Board of Lochgilphead, held on the 4th May 1885, it was agreed by a majority of the members of the School Board to grant the use of the old school of Lochgilphead to the Glasgow Foundry Boys' Religious Society from the 17th to 22d July for their summer trip. Dr Hunter, a member of the board, was present at this meeting, and "on sanitary grounds" moved to the effect that the use be not granted, but on a division his motion was lost. The period from 17th to 22d July was part of the school vacation.

At another meeting of the board on 6th July Dr Hunter moved again that the school be not granted, but the board carried an amendment to adhere to their former decision. The amendment was only carried by the casting-vote of the chairman.

Dr Hunter then presented a petition in the Sheriff Court of Argyleshire to have the School Board interdicted from granting the use of the school for the "trip" in question, or for any purpose other than that authorised by the title to the site thereof and by the Education (Scotland) Act 1872. He averred that by a disposition dated 23d, 24th, and 28th April and 24th June 1851 Alexander Campbell of Auchindarroch had granted to the Presbytery of Inverary and to the minister and heritors of the *quoad sacra* parish of Lochgilphead a piece of land, to be held for the purposes specified in an Act intituled "an Act to facilitate the foundation and endowment of additional schools in Scotland 10th August 1838," as a site for a school for the education of poor persons in the said *quoad sacra* parish, and for the residence of schoolmaster and schoolmistress of the said school, and for no other purpose whatever; that the school in question which had been built upon the said piece of ground, and had a playground attached, was now vested in the School Board of the parish of Lochgilphead by virtue of the 23d section of the Education (Scotland) Act 1872, and that the dispositive clause of all charters and dispositions