to enter the sasine. Now that also is equivalent to the second category of which Lord Watson speaks, namely, that "where the superior feus out a considerable area with a view to its being sub-divided and built upon, without prescribing any definite plan but imposing certain general restrictions which the feuar is taken bound to insert in all sub-feus or dispositions to be granted by him." When once it is established—and I have pointed out that it is so established—that there is no difference between a feuar and a disponee that sentence directly applies. And there is more than that. When you come to a special condition that the restrictions shall be inserted in all subsequent transmissions and enter the sasine of all subsequent titles it is a great deal stronger, as regards the rights of the *tertius*, that the deed is a disposition instead of a feu. In the case of a feu there is necessarily *ex natura rei*, a continuing relation between the superior and his successors and the vassal and his successors; and accordingly when you find that the vassal is put under restrictions and told that he must always insert them whenever he comes to transmit the subjects, this stipulation may be adequately accounted for by the fact that the superior thinks that he or his successor will always be there to get the benefit of the restriction; and even if it were for nothing else—although of course there is the doctrine that the original charter must be the measure of the rights—still it would be quite right, even if it was only to save trouble, that the superior should see to it that the restriction put there for the benefit of successors should always find its way into the title of the vassal. But when you are dealing with a disposition the difference becomes at once apparent. The moment the disposition is granted the relationship between the disponer and the disponee ceases. And the disponer is not like a superior, a person who will have a successor in his land who will be in perpetual relationship with the possessor of the land. The disponer is gone and is gone for ever. He has no interest at all except the possible interest he may have if he happens to have some land in the neighbourhood which he has kept; and accordngly if you find a disponer stipulating that the disponee shall not only accept the restrictions at once but shall put them *in sæcula sæculorum* in all his transmissions, it surely points to this, that it has been put in not only for the benefit of the disponer but for the benefit of somebody else who will be in a position to take that benefit.

Now if this case had been properly prepared we might have saved the parties the trouble and expense of going back again to the Dean of Guild Court, and we might have given judgment once and for all upon the question of the title of these respondents to enforce the restriction against the petitioner. But in the present loose state of our knowledge on that matter I do not think it would be safe to do so. As, however, I wished to aid the Magistrates as much as I could, I have distinctly indicated the lines upon which they must proceed in their inquiries. There is enough here in the titles of the petitioner to allow of evidence being taken as to the matter. But what the precise community is for whose benefit those restrictions were inserted, that I do not think can be properly found out until we have in an intelligible form the history of the whole ground and the application of the various titles that have been granted. Also there is the question of acquiescence. That of course is a question of pure fact, the point to be discovered being not only whether there have been *de facto* deviations, but also whether there was at each particular time when the deviation was allowed a proper interest to support a complaint as to it. I need not dwell further upon that subject, because the whole matter was very carefully gone into and explained in our judgment in the case of *Mactaggart & Company* v. *Roemmele*, 1897 S.C. 1318, 44 S.L.R. 907. Therefore upon the whole matter I think the case must go back to the Magistrates in order that they may investigate it and then give judgment upon it. I may add that LORD KINNEAR concurs in this opinion.

LORD JOHNSTONE—I concur.

LORD MACKENZIE—I concur.

The LORD PRESIDENT then added that while he considered that the case had not been adequately represented he did not mean that in such cases it was necessary that every title should be printed, but that there should be at least a note regarding these not printed showing how the title stood.

The Court pronounced this interlocutor—

"Recal the interlocutors of the Magistrates dated 1st March 1910 and 20th January 1910: Remit the cause to them to proceed as accords: Find no expenses due to or by either party in this Court, and decern."

Counsel for the Petitioner and Appellant—M'Lennan, K.C.—Mair. Agents—Alex. Morison & Co., W.S.

Counsel for the Respondents—M'Clure, K.C.—J. H. Millar. Agents—Mackenzie & Kermack, W.S.

Thursday, December 8.

FIRST DIVISION.

[Lord Skerrington, Ordinary.

OSWALD *v.* FAIRS.

Process—Record—Amendment of Pleadings—Particular Fraud not Pleaded on Record but Disclosed at Proof—Court of Session (Scotland) Act 1868 (31 *and* 32 *Vict. c.* 100), *sec.* 29—*Act of Sederunt, 20th March* 1907, *sec.* 6.

The Court of Session (Scotland) Act 1868, section 29, enacts—"The Court or

the Lord Ordinary may at any time amend any error or defect in the record . . . in any action . . . in the Court of Session upon such terms as to expenses and otherwise as to the Court or Lord Ordinary shall seem proper. . . ."

The Act of Sederunt, 20th March 1907, section 6, enacts — "Where in any action a deed or writing is founded on by either party all objections thereto may be stated and maintained by way of exception without the necessity of bringing a reduction thereof, unless the Court or Lord Ordinary shall consider that the matter would be more conveniently tried in a separate action of reduction."

In an action for implement of a contract of sale the defender pleaded (1) that the pursuer had fraudulently dealt with the subject of the contract subsequent to the date thereof; (2) that he, the defender, had entered into a submission to valuators to fix the purchase price under essential error induced by the fraud of the pursuer. After a proof it was argued alternatively for the defender that the contract to purchase had been entered into under essential error induced by fraudulent misrepresentations by the pursuer as to the subject of the contract, and the Lord Ordinary then, without objection on the part of the pursuer, allowed the defender to amend his second plea accordingly. His Lordship subsequently found that the defender had failed to substantiate his original pleas, but sustained his second plea as amended, and granted absolvitor.

Opinion (*per* the Lord President and Lord Kinnear) that since the Act of Sederunt of 20th March 1907 did not alter the conditions upon which alone reduction could be sought, viz., that fair notice should be given of the ground upon which it was based, the amendment of the defender's pleas ought not to have been allowed.

Proof — Evidence — Admissibility of Evidence as to Representations—Evidence of a Party to whom Representations Made Similar to those Alleged to have been Made to Another.

In an action raised for implement of a contract for the purchase of the furniture of a hotel by the defender, an incoming tenant, from the pursuer, an outgoing tenant, parties gave conflicting evidence as to representations by the pursuer on the subject of the furniture. The Lord Ordinary preferred the evidence of the defender, finding it corroborated by the evidence of B, who acted for the proprietor of the hotel in finding a new tenant, and who deponed that with reference to the furniture he received from the pursuer a statement which coincided with the representations deponed to by the defender.

Opinion (*per* Lord President) that the evidence of B was inadmissible.

The Court of Session (Scotland) Act 1868 (31 and 32 Vict. cap. 100), section 29, and the Act of Sederunt, 20th March 1907, section 6, are quoted *in the rubric.*

David Oswald, Invercauld Arms Hotel, Spittal of Glenshee, brought an action against Alfred Fairs, hotel-keeper, Royal Hotel, Blairgowrie, for recovery of the purchase price of certain furniture in the latter hotel which the pursuer had agreed to sell and the defender to buy.

In his answers the defender averred as follows:—"(Ans. 1) . . . Explained that on 15th February 1909 the defender visited the said hotel, of which it was proposed that he should take a lease from the proprietrix, and examined the furniture which was then in the hotel. On that occasion the pursuer's wife, who showed the furniture to the defender in the absence of her husband, explained that when her husband had entered the hotel in 1904 the furniture had been valued at about £550, and that the whole furniture in said hotel was the same as that taken over by the pursuer in 1904, with the exception of the furniture in the commercial room, and one or two other articles which were her own private property and which she intended to remove. She further explained that a few articles had been renewed during the pursuer's tenancy of the hotel, but that these renewals together with the addition of the commercial room furniture would not affect the valuation made on pursuer's entry, as the whole furniture had depreciated since the said valuation was made. The defender was also shown a statement of the assets and liabilities of the Royal Hotel, as at November 1908, in which the value of the furniture, &c. (including omnibus £7), was entered at £561. Similar information regarding the value of the furniture was also given by Mrs Oswald to Mr R. R. Black, solicitor, Blairgowrie, the agent of the proprietrix, in order that he might communicate it to intending lessees, and Mr Black did communicate the said figures and information to the defender. The pursuer further confirmed this valuation by letter to Messrs Robertson & Black dated 23rd February 1909. Defender was informed that the whole furniture he would be required to take over at mutual valuation was the same as that which pursuer had taken over on his entry in 1904 (with the exception of a few articles specified in the correspondence between the parties, but with the addition of the commercial room furniture before-mentioned), and of the value as above stated. This is the furniture which the defender agreed to buy. (Ans. 2) . . . Explained that between the said 15th February and the valuation of the said furniture the pursuer caused a large quantity of the furniture which had been seen by the defender to be removed from the said hotel. The defender believes and avers that the pursuer used the said furniture to furnish another hotel which he had ac-

quired at the Spittal of Glenshee, and to furnish a house in John Street, Blairgowrie, rented by his wife from Mrs Meacher, Marlee House, Blairgowrie. In place of the furniture so removed pursuer substituted and added other and more valuable furniture which was not included in the said valuation in 1904, and which the defender had never seen and never intended to buy. The pursuer gave the defender no warning that he had done this. The defender entered into the said submission in the belief that the valuators were to value the said furniture which he had seen and bought. Had the defender been aware of the substitution and addition of the furniture before-mentioned he would not have entered into the said submission. The defender is and has always been willing to accept and pay for at a valuation the furniture which he bought, and to restore to the pursuer the said substituted and added furniture."

The defender pleaded—"(2) The defender having entered into the said submission under essential error, induced by the fraud of the pursuer, the defender should be assoilzied."

A proof was allowed and led.

The evidence is sufficiently disclosed in the Lord Ordinary's opinion, and the pursuer's letter of 23rd February 1909, referred to in answer 1, is there quoted.

After the proof was closed counsel for the defender presented an argument that the representations which he claimed to have proved that the pursuer's wife made when the furniture was viewed on the occasion referred to in answer 1, were false and fraudulent, and the Lord Ordinary without objection allowed him to amend his second plea to make it read—"(2) The defender having purchased said furniture, and having entered into the said submission under essential error induced by the fraud of the pursuer, the defender should be assoilzied."

The *facts* are narrated in the opinion (*infra*) of the Lord Ordinary (SKERRINGTON), who on 18th January 1910 assoilzied the defender.

Opinion.—"The pursuer Mr Oswald was tenant of the Royal Hotel, Blairgowrie, from Martinmas 1904 to 28th May 1909, when his lease ended, and the defender Mr Fairs entered as tenant. By letters dated 13th and 17th March 1909 the pursuer and the defender agreed that the defender should take over the 'furniture in the hotel at a price to be fixed by two arbiters mutually chosen.' . . . Thereafter, on 25th and 26th April 1909, the pursuer and the defender entered into an agreement and deed of submission by which they appointed two valuators as arbiters to fix the price of the furniture. In this deed the furniture is described as 'the furniture and articles in said hotel as per inventory annexed and subscribed as relative hereto.' The so-called inventory is a short list under eight heads of the furniture, including silver plate, cutlery, crystal, electroplate, napery, and crockery. The valuation was made on 26th and 27th May, and on the latter day the arbiters signed an award fixing the value of the furniture, &c., at £943, 14s. 1d., being the sum sued for. In his pleadings as originally framed the defender pleaded that he was entitled to be assoilzied, in respect (1) that the pursuer fraudulently substituted for the furniture which he showed to the defender other furniture which the defender never intended to buy; and (2) that the defender entered into the said submission under essential error induced by the pursuer's fraud.

"With reference to the defender's first plea-in-law, he avers that between 15th February 1909, when he visited the hotel and inspected the furniture, and the valuation, the pursuer removed a large quantity of furniture from the hotel and substituted and added other and more valuable furniture. After hearing the evidence, I am of opinion that the charge against the pursuer of having made fraudulent removals, substitutions, and additions has broken down, and that the defender's first plea-in-law ought to be repelled. I do not construe the pleadings as raising the question whether, without there being any fraud on the part of the pursuer, the inventory and valuation of May 1909 ought not to be rectified in respect that it omits certain articles purchased by the defender, and that it includes certain articles which he did not purchase. If that question had been properly raised I should have held that the inventory required some small corrections by way both of addition and of subtraction, and a remit to the valuators might have been necessary in order to fix the exact amount due by the defender after the inventory had been rectified by the Court. While I negative this charge of fraud, I do not wonder that the defender's suspicions were aroused as to the good faith of the pursuer and his wife, seeing that shortly before the valuation they were proved to have made certain removals, substitutions, and renewals of furniture, which, though not materially affecting the sum total of the valuation, were, in my opinion, not warranted by the terms of the contract between the pursuer and the defender. The conclusion that there had been fraudulent and wholesale removals, substitutions, and additions of furniture was an inference which the defender drew, and which his counsel asked the Court to draw, from the actings referred to, and also from a representation which the pursuer's wife is alleged to have made to the defender on 15th February 1909. If this representation was actually made, and if it was also true, it followed that wholesale additions to the furniture in the hotel must have been fraudulently made subsequent to 15th February 1909. The alleged representation (which Mrs Oswald of course denied having made) was to the effect that the furniture then in the hotel was the same as the pursuer had himself taken over from the former tenant in 1904 at a valuation of £554, with the exception of the furniture in the commercial room which the pursuer had brought with him to the hotel, and of any articles

which had been worn out or broken during the pursuer's tenancy and had been replaced. It was clearly proved, and is indeed common ground, that the furniture, &c., included in the valuation of 1909, but excluding the new commercial room furniture, was substantially greater both in quantity and in value than the furniture, &c., included in the valuation of 1904.

"If my judgment negativing wholesale substitutions and additions of furniture after 15th February 1909 is either acquiesced in by the parties or is adhered to on appeal, it follows that the alleged representation, if it was actually made by Mrs Oswald, was not in accordance with fact. The defender's pleadings are slovenly and obscure, but I do not think that they were intended to raise an alternative case to the effect that the defender was entitled to rescind the contract for the purchase of the furniture on the ground that it had been induced by false and fraudulent misrepresentation. The defender's second plea of essential error induced by fraud referred only to the submission, and was I think intended to meet the case of the alleged substitutions and additions having taken place between the date of the purchase in March and that of the submission at the end of April. Both the defender's pleas accordingly proceeded upon the assumption that the alleged representation was true in point of fact. The challenge of the submission was based not upon any fraudulent misrepresentation made on 15th February but upon an entirely different ground, which in my view of the evidence has failed. In short, the defender's position on the pleadings was the same as that which he had taken up from the time when he first saw the valuation, viz.—that the contract for the purchase of the furniture was valid and binding, but that owing to the pursuer's fraud the valuation was not in accordance with the contract. Though the defender on entering the hotel took possession of the furniture, and still remains in possession of it and uses it, I think that his solicitor sufficiently safeguarded his position by arranging with the pursuer's solicitor that the defender should consign £500 in their joint names 'to await the adjustment of the inventory and valuation.' This must mean the adjustment of the inventory in terms of the contract of purchase and sale which both parties regarded as valid and binding.

"I have explained all this in some detail, because at the beginning of his speech on the evidence the defender's counsel for the first time challenged the validity of his client's contract for the purchase of the furniture. He propounded the dilemma that either there had been fraudulent and wholesale substitutions and additions, or that the representation which he claimed to have proved that Mrs Oswald made to the defender on 15th February was false and fraudulent. This alternative line of defence was foreshadowed in the examination and cross-examination of the witnesses, and neither at the proof nor at the hearing was any objection stated by the pursuer's counsel to the effect that it was not within the pleadings, or that he had been prejudiced by want of notice. When I pointed out to the defender's counsel in the course of his speech that his second plea would need to be amended so as to make it refer to the purchase as well as to the submission, the pursuer's counsel did not object to the amendment being allowed, or argue that it was not an amendment which was necessary in order that the real question in dispute between the parties might be determined. He pointed out, however, quite rightly, I think, that as the defence was based entirely on fraud, it could not with justice to his client be converted into one founded upon essential error induced by innocent misrepresentation. It must be kept in view that the defender led in the proof, and that the pursuer thus had notice of the case to be made against him. Though the procedure has been irregular, I am satisfied that no prejudice has been thereby caused to the pursuer, and I am of opinion that it is my duty to consider on its merits a question of vital importance which arises on the evidence, and which was carefully debated by counsel on both sides. Prior to the Act of Sederunt of 20th March 1907 the defender might possibly have made good his alternative defence by bringing an action to reduce the contract for the purchase of the furniture even after it had been decided in the Outer House that the valuation was not disconform to the contract; but I doubt whether that procedure would have been permissible in the present case.

"I now proceed to consider the defender's claim to rescind the contracts which he made with the pursuer in March and April 1909, upon the ground that he entered into these contracts under essential error induced by a false and fraudulent representation made to him on 15th February by Mrs Oswald acting on the pursuer's behalf. [*His Lordship then dealt with a point which it is unnecessary to notice.*]

"As regards the question whether the representation complained of was in fact made to the defender by Mrs Oswald on the pursuer's behalf, the pursuer, who is very deaf, admitted that he left the negotiations to his wife. The defender and his agent Mr Sturrock both deponed that on their visit to the hotel on 15th February Mrs Oswald informed them that the furniture in the hotel which was offered for sale to the defender was exactly the same furniture as had been taken over by the pursuer from the former tenant in 1904 at a valuation of £554, with certain exceptions, viz., the furniture in the commercial room, some bedding which had been destroyed as unfit for use and replaced, and any articles which had been worn out or broken during the pursuer's tenancy and had been replaced. The defender and Mr Sturrock did not profess to reproduce Mrs Oswald's exact words, and the defender deponed that she also mentioned an eight-day clock as an addition to the inventory of 1904—a piece of furniture not mentioned by Mr Sturrock. It is common ground

on both sides that Mrs Oswald's private furniture was not to be taken over by the defender, and that it was not included in the 1904 inventory. The defender was made aware that Mrs Oswald valued it at £90. I have no doubt that both the defender and Mr Sturrock gave their evidence truthfully and to the best of their recollection. On the other side, Mrs Oswald deponed that on 15th February she had no conversation with the defender or Mr Sturrock with regard to the furniture, and she denied that she ever made any representation of the kind attributed to her. On the contrary, she and the pursuer deponed that on the occasion of an earlier visit to the hotel by the defender and Mr Sturrock on 23rd January they separately told the defender and Mr Sturrock that the hotel had not been fully furnished in 1904, and that large additions, which they specified, had been made to the furniture over and above what appeared in the inventory of 1904, and over and above the commercial room furniture. The defender and Mr Sturrock denied this. If the matter had depended on the evidence of these four persons, plainly the defender would have failed to prove his case. But he adduced a witness whose veracity, impartiality, and capacity as a man of business are beyond criticism, who deponed that during January and February 1909 Mrs Oswald gave him business instructions in which she made statements about the furniture substantially identical with those which the defender alleged that she made to him on 15th February, and essentially different from the statements which, according to her own and the pursuer's evidence, she and he made at or about the same time to the defender. This witness was Mr Black, a solicitor who was employed by the owner of the hotel to find a new tenant. He was not the pursuer's law agent, but was a person to whom Mrs Oswald would naturally give information about the furniture for communication to prospective tenants. As Mr Black's testimony related to the furniture in dispute in the present action, and as (according to his evidence) Mrs Oswald's information was intended to be handed on to prospective tenants, and was in part handed on to the defender, I consider it both competent and valuable. Though the evidence was not objected to, I should have disregarded it if it had related to a different though similar transaction (*Inglis* v. *National Bank of Scotland, Limited*, 1909 S.C. 1038, 46 S.L.R. 730). Mr Black deponed that in the beginning of 1909 he was employed to find a tenant for the hotel, that he advertised it, and that Mrs Oswald approached him and asked him to stipulate that any incoming tenant should take over the furniture. He adds—'I saw Mrs Oswald on several occasions in connection with that. I asked her what the value of the furniture was in her estimation, and she just said what was in this statement—£554. I said to her, if that was the valuation in 1904, would it not be considerably less now with depreciation, and she indicated that when she took over the furniture there were some mattresses and bedding that she had destroyed and that she had replaced, that she had in addition some extra furniture—the commercial room furniture; that there was an overmantel in one of the rooms, and I think a clock. Then she said that they had substituted a cabinet, I think in the drawing-room, but she would be quite pleased to replace the original, and consequently she thought the valuation of the furniture was about the same as it was when she went in. (Q) Did you understand that she authorised you to negotiate with the incoming tenant?—(A) Unquestionably; I was not acting as agent for her. (Q) But to try to induce them to take it over at this figure of £550?—(A) Yes. She telephoned me several times to go along, and that was always her explanation.' It is a proved fact that at a meeting in Mr Black's office, held on 15th February, he read over to the defender and Mr Sturrock a statement in Mrs Oswald's handwriting, prepared so recently as November 1908, to the effect that the value of the furniture, including linen, plate, glass, crystal, &c., was £554. He further told them that Mrs Oswald had authorised him to say to any inquirer that the value would not exceed £554. The holograph statement referred to was made up by Mrs Oswald in November 1908, with a view to a proposal that the owner of the hotel should either buy the furniture or lend money upon it. The figure in this statement was of course copied from the valuation of 1904. Mr Black deponed that Mrs Oswald told him in November that the furniture in the hotel was exactly what the pursuer had taken over in 1904 with the exceptions already referred to.

"Immediately after leaving Mr Black's office on the morning of 15th February the defender and Mr Sturrock inspected the furniture in the hotel, and then (according to their evidence) Mr Sturrock, in the defender's presence, had a conversation with Mrs Oswald, in which he stated that the furniture did not appear to them to be worth £550, and that, taking depreciation into account, it could not be worth that sum. In reply (as they say) Mrs Oswald made the representation complained of. Mrs Oswald meets this evidence with a denial. She further denies that she ever expressed by word of mouth any opinion whatsoever as to the value of the furniture which was in the hotel in 1909 either to Mr Black or to the defender or to Mr Sturrock. She explains that the statement in November 1908 was intended to be and was understood by Mr Black as a mere repetition of the amount of the 1904 valuation, and that it was not intended as an estimate of the value of the furniture, &c., as at November 1908. In this conflict of parole testimony the pursuer's counsel founded strongly upon a letter which was written by Mrs Oswald to Mr Black on 23rd February 1909, and of which the latter sent a copy to Mr Sturrock. In this letter Mrs Oswald wrote—'In reply to *yours of yesterday* we wish to say that we shall expect

Mr Fairs to take over at mutual valuation the same amount of furniture as we did on entering here, nothing more, the said amount being £554. Of course you understand that after the private articles which belong to me are removed there will still be more than that amount, and we should like if Mr Fairs could come and have a look over, and if any particular articles should be desired to be removed, we could then perhaps arrange to the satisfaction of both parties.' The position taken up by Mrs Oswald as stated in this letter is consistent with what she deponed to have been her position all along both towards the defender and Mr Sturrock and also towards Mr Black, and it is inconsistent with the attitude attributed to her by these gentlemen. It was therefore legitimately founded upon as important real evidence showing that, first Mr Black, and next the defender and Mr Sturrock, must have made a mistake when they understood Mrs Oswald to say that she estimated the value of the furniture, &c., in the hotel at £554, and that they must have been equally mistaken as to the reason which, as they say, Mrs Oswald gave for holding that opinion, viz., that the commercial room furniture was the only important addition to the inventory of 1904. There is, however, another view which may be taken of this letter, viz., that for some reason Mrs Oswald desired to correct any impression which she might have conveyed to the effect that the whole furniture, &c., might be bought for £554, but that she failed (either intentionally or unintentionally) to correct the statement which she is alleged to have made on 15th February as to what articles had been brought into the hotel since the inventory of 1904. If the defender had seen this letter at the time (which he did not), he would have learned that Mrs Oswald's opinion as to the value of the furniture was different from what he had understood her to express on 15th February, but he would not necessarily have learned that the quantity of furniture in the hotel was greater than he supposed it to be.

"Only two other letters need be referred to. On 18th March 1909 Mr Sturrock wrote to the pursuer's agents asking for a copy of the valuation of 1904 'with a view of seeing what is actually in the hotel.' On 22nd March the agents replied, sending a copy of the inventory, and adding—'In addition to the articles enumerated in it Mr Oswald mentions that he also took over at valuation the flagpole and front door lamp, which Mr Fairs will also take over. Further, some of the furniture detailed in the inventory was removed by Mr Oswald, who substituted his own furniture of better quality.' The flagpole and lamp were duly included in the inventory annexed to the submission. The last sentence of this letter referred, I think, to the commercial room, which the pursuer had furnished with superior furniture of his own, while the furniture formerly in that room had, as the pursuer deponed, been 'removed' to room No. 1. Mr Young, the writer of the letter, deponed that this letter reproduced the pursuer's exact words. The pursuer was not asked why he did not instruct his solicitor to point out to Mr Sturrock that the additions since 1904 were so important that any reference to the valuation of that year was misleading. I assume in his favour that the information which he actually communicated through his solicitors was not intended to mislead. But the incident bears out the view that, rightly or wrongly, Mr Sturrock regarded the inventory of 1904 as showing the furniture actually in the hotel in 1909, subject, of course, to certain specified additions and alterations.

"Upon the issue whether or not the alleged representation was made to the defender by Mrs Oswald on 15th February, my verdict is in favour of the defender, who, in my opinion, has in this matter discharged the heavy burden of proof incumbent on him, and has established his case. I cannot bring myself to believe that in a matter so simple Mr Black repeatedly misunderstood Mrs Oswald's instructions, nor can I accept the conclusion that by some coincidence the defender and Mr Sturrock have honestly but mistakenly come to believe that Mrs Oswald made to them on 15th February representations substantially identical with those which Mr Black also imagined that she had made to him on several previous occasions.

"The next question is, whether the representation if made was false in fact. As to this I have already said there can be no doubt. Further, as it cannot be suggested that Mrs Oswald believed the representations to be true, it cannot be excused as an innocent misstatement. Lastly, did the misrepresentation induce essential error? To a man of limited means it would be material to have some guide as to what he might be called upon to pay on a valuation of furniture and furnishings, the exact quantity of which it was impossible to ascertain by mere inspection without an inventory. No better guide could have been provided than the representation, if only it had been true. It made all the difference between a prudent and an imprudent contract. The error under which the defender laboured did not relate to the subject-matter of the purchase, which was the whole furniture, &c., of the hotel *per aversionem* (with certain exceptions). It related to the quality and quantity of the furniture included in the purchase, a matter which was in my opinion tacitly essential to the bargain. Accordingly the case falls within Mr Bell's definition—Prin., sec. 11. It also falls within the description given by Lord Watson in *Menzies* v. *Menzies* (1893), 20 R. (H.L.) 108, p. 142, 30 S.L.R. 530, seeing that the defender deponed that he would not have bought the furniture if he had not known the actual facts.

"Accordingly I sustain the defender's second plea-in-law as amended, but reserve consideration of the question whether as a condition of obtaining absolvitor he must give back to the purchaser the share in the coaching adventure. If neither party

desires to be heard on this point I shall find that before decree of absolvitor is pronounced the defender must tender to the pursuer an assignation of said share and payment of any profits received by him, in return for repayment by the pursuer to the defender of the sum of £60, with interest thereon at 5 per cent. since 26th May 1909."

The pursuer reclaimed, and argued—The Act of Sederunt of 20th March 1907 had been invoked too late to admit by way of exception what would have required an action of reduction. The record was not the basis of the Lord Ordinary's judgment, and the Act of Sederunt had been wrongly applied. The alleged misrepresentation could not be founded upon to rescind the contract, and it was not proved.

Argued for the defender—The defender had no means of knowing prior to the proof the precise nature of the fraud by which he had suffered. It was then ascertained that fraudulent misrepresentation had induced the contract. Where fraud appeared from the evidence of the party suing, the Court would decide the case on the evidence independently of the record—*Bile Beans Manufacturing Company* v. *Davidson*, July 20, 1906, 8 F. 1181, 43 S.L.R. 827. The evidence of the pursuers in the present case on the subject of representations had to be considered along with the evidence of the witness Black, which affected the pursuer's credibility.

At advising—

LORD PRESIDENT — This is an action which proceeds upon an award in a submission as to the value of certain furniture in the Royal Hotel, Blairgowrie. The pursuer is the quondam tenant of that hotel, and the defender is the present tenant, and the defender entered into possession of the hotel at Whitsunday 1909, and has been in possession since and has used the said furniture since. Now the contract as to the buying of the furniture was contained in two letters of date 13th March and 17th March. The letter of the 13th March was written by a Mr Sturrock, who was agent for the defender here, and in it he says—"As I have already intimated to you . . . my client Mr Fairs is prepared to take over your furniture in the hotel at a price to be fixed by two arbiters mutually chosen." And the answer to that is upon the 17th March, on which date Messrs Panton, Noble, & Young, who were solicitors for the pursuer, wrote—"Our client now agrees to your offer that your client will take over the hotel furniture at mutual valuation." And nobody denies that that is, upon the face of it, quite a good contract for the sale of the furniture at a valuation. Following upon that a submission was entered into, which submission detailed that the parties had come to this agreement, and submitted to the gentlemen named to value the furniture as per an inventory attached to the submission. That was done, and the arbiters pronounced a decree which brought out the value of the furniture at the sum sued for in the summons.

The defence which was put in set forth that at preliminary meetings which the defender had with the pursuer's wife—who really was the person who acted in this matter, for it has been explained that the pursuer himself was so deaf that it made it difficult to carry on business with him—that at interviews with the pursuer's wife she had said that the furniture in the hotel had been valued in 1904 at about £550, and then the defence went on to say that the furniture which had been valued by the valuators was not the same as the furniture which was in the hotel, which had been included in the valuation of 1904, and which the defender intended to buy. The defence is really so expressed as to leave no doubt as to what it is, and I only read one portion of the defence to make that quite clear—"Explained that beween the said 15th February and the valuation of the said furniture the pursuer caused a large quantity of the furniture which had been seen by the defender to be removed from the said hotel. The defender believes and avers that the pursuer used the said furniture to furnish another hotel which he had acquired at the Spittal of Glenshee, and to furnish a house in John Street, Blairgowrie. . . . In place of the furniture so removed pursuer substituted and added other and more valuable furniture which was not included in the said valuation in 1904, and which the defender had never seen and never intended to buy." And the plea-in-law appropriate to that is—"The pursuer having fraudulently substituted for the furniture which he showed to the defender other furniture which the defender never intended to buy, the defender should be assoilzied."

Now parties went to proof upon that matter and the whole case was directed to that, and what was said about the valuation of 1904 only came in at the proof in a manner ancillary to the averment which I have just read. What happened afterwards was this—it is detailed perfectly plainly by the Lord Ordinary in the judgment which he delivered. At the end of the proof, when the defender's counsel came to speak, he suddenly started an entirely new plea—an entirely new view of the case. He contended, of course, for the case which had already been made; but he also added that he considered that he was entitled to resist the payment upon the ground that the contract itself was bad because it had been induced by misstatement of the pursuer, or at least of the pursuer's wife (for whom the pursuer was responsible), and that that misstatement induced essential error on the part of the defender, which essential error went to the root of the contract.

Now the Lord Ordinary in his judgment, which is before us, says first of all perfectly clearly that the original defence has not been made out—and before your Lordships, indeed, there has been no attempt to show that the original defence has been made out. The Lord Ordinary then, having quite clearly said that this new view was stated for the first time in the speech of

the defender's counsel, and after having taken the case to avizandum, puts it out again, allows the defender to open up the record and to alter his second plea and make it read, "The defender having purchased said furniture and having entered into the said submission under essential error induced by the fraud of the pursuer, the defender should be assoilzied," and upon that plea has given judgment for the defender.

In order to do that the Lord Ordinary took advantage, first of all, of the provision of the Court of Session Act which allows pleas to be amended, if it is necessary to amend them in order to bring out the true point of contention between the parties; and secondly of the recent Act of Sederunt which makes it no longer necessary to raise actions of reduction, but provides that where there is ground for an action of reduction that defence may be made good by way of exception. I confess that I think that the Lord Ordinary in allowing this amendment really strained the Court of Session Act and the Act of Sederunt beyond the point which it is right that they should go. And I think it is impossible to hold, as he held, that by doing so he did not subject the pursuer to prejudice. The provision in the recent Act of Sederunt is a very valuable one in the way of dispensing with useless process—that is to say, instead of having to sist an action in order that an action of reduction may be raised as a separate process, it is now possible to make good a defence which depends upon reduction at once; but the Act of Sederunt was never meant to alter the true conditions upon which alone reduction could be sought, and one of the conditions on which reduction can be sought is certainly that you are to give your opponent fair notice of the ground upon which the reduction is based in order that he may meet the matter in Court at the time of the proof. But that is a very different thing from taking a proof upon another matter altogether, and then, by suddenly putting in a plea which goes to reduction, entirely altering the character of the action. I am very clearly of opinion that in the circumstances here the amendment of the plea by the Lord Ordinary on 15th December ought not to have been allowed. I think it is straining, as I said, a very useful provision, and straining it in a way that would be productive of the very gravest injustice. It simply meant that the pursuer here was allowed to lead the whole of his proof in utter ignorance of the case that was being made against him, and it is impossible, as I have said, that no prejudice was done him.

But while I say that, it would be to a certain extent unsatisfactory to have to decide the case upon a ground of pleading alone, and I am glad to be able to say that I have come to the conclusion that, even taking this as a reduction properly intended, the reduction is not made out, and I do so upon this ground. I shall assume in my judgment that the judgment of the Lord Ordinary is right in holding that the original statement made by Mrs Oswald was that the furniture in the hotel was the furniture which had been valued in 1904. I should be sorry to have to come to a different conclusion there, because it being mainly a question of credibility, one is of course inclined to bow to the view of the Judge who saw the witnesses. But I am bound to add one thing—that the Judge who saw the witnesses has upon this matter quite clearly indicated that he might have come to the conclusion that the statement was not proved as against the pursuer's wife if it had not been for the evidence of Mr Black. Now I think that the evidence of Mr Black was really inadmissible. The question being whether A said a certain thing to B, I do not think that it is relevant evidence upon that question—where there is controversy between A and B—to show that A said something of the same sort upon another occasion to C. The question is what did A say to B, not what did he say to C, and the fact that he said the same sort of thing to C does not seem to me to prove that he said it to B. But however that may be, I am content to take the Lord Ordinary's findings upon the fact,

[*His Lordship then dealt with points which it is unnecessary to notice for the purposes of this report.*]

LORD KINNEAR—I agree with your Lordship on all points.

LORD JOHNSTON—I have the utmost sympathy with Mr Fairs, who appears to me at some point, on which I cannot with certainty put my finger, to have suffered injustice. But I agree with your Lordship that the circumstances under which he negotiated, and the terms of the contract to which he ultimately came, preclude him from now obtaining any redress at law.

LORD MACKENZIE—I am of the same opinion, and as the Court is differing from the view of the Lord Ordinary on a question of fraud, I think it right to state shortly the grounds upon which I have come to be of a different opinion from the Lord Ordinary.

The case is in this peculiar position, that the defence as originally stated rested upon the position that the alleged representation said to have been made on the 15th February was true. That was the representation by Mrs Oswald that the furniture then in the hotel was the same as the pursuer had taken over from the former tenant in 1904 at a valuation of £554, with the exception of certain articles in the commercial room and other things to replace what was broken. The fraud as alleged consisted in subsequent conduct on the part of the pursuer, that is to say, that there were substitutions and additions to the furniture, and that what the defender was afterwards asked to take over at a valuation was not the furniture that he had seen in the hotel on 15th Feb-

ruary, but was furniture of a different and greater value.

The case so made has been negatived by the Lord Ordinary, and the case that we have to consider is of a different character; and in regard to the impossibility with justice to the pursuer of looking at the case from that point of view, I agree with the observations which your Lordship in the chair has made. The result is this, that we are now asked to look at the representation which the defender originally said was true as a statement which was false, that is to say, that the furniture he was induced to purchase was not the furniture which had been taken over by the pursuer from the previous tenant at £554, but was substantially different as regarded the articles which composed the furniture.

[*His Lordship then went into the merits.*]

The Court recalled the Lord Ordinary's interlocutor, and granted decree in terms of the conclusions of the summons.

Counsel for the Pursuer and Reclaimer—G. Watt, K.C.—Mitchell. Agents—Winchester & Nicholson, S.S.C.

Counsel for the Defender and Respondent—Morison, K.C.—Ballingall. Agent—John Sturrock, Solicitor.

Friday, December 23.

FIRST DIVISION.

[Sheriff Court at Glasgow.

ALEXANDER MUNRO & COMPANY *v.* A. BENNET & SON.

Sale—Breach of Contract—Rejection—Timeous Rejection—Delay in Rejection Caused by Misrepresentations of Seller—Measure of Damages—Expenses of Buyer's Action against Sub-Vendee—Sale of Goods Act 1893 (56 *and* 57 *Vict. cap.* 71), *secs.* 11 (2), 35, *and* 56.

M. contracted to supply a pump for an artesian well bored by him for a County Council. M. contracted to buy the pump from B., who were aware of the purpose, the specification in the sub-contract being in conformity with the requirements of the County Council. M. set up the pump in May 1907. Complaints were made by the County Council that the pump was not working satisfactorily, and these complaints were made known by M. to B., who replied on 21st May 1907 that if the pump was fitted up properly it would be all right. B., on M.'s request, went himself to inspect the pump, and on 5th June 1907 wrote to M. that he had put the pump all right. Further complaints were made by the County Council, who declined to pay, and eventually M. raised an action against the County Council for payment of the price. In January 1909, while M. was preparing for the proof in this action, he was informed by B. that the pump was not performing certain of the requirements, and further, that it was impossible for these requirements to be fulfilled. M. thereupon dropped the action against the County Council and raised an action against B. for damages for breach. B. retorted by raising an action for the price, and maintained that the rejection was not timeous.

The Court, who were of opinion that M. had not the scientific skill to know whether the pump could be made to do the work required and was entitled to rely on the skill of the seller, *held* (1) that the rejection was timeous, and (2) that the expenses of M.'s unsuccessful action against the County Council arose directly from B.'s breach of contract and fell to be included in the damages arising therefrom.

The Sale of Goods Act 1893 (56 and 57 Vict. cap. 71), enacts—Section 11, sub-section 2—"In Scotland, failure by the seller to perform any material part of a contract of sale is a breach of contract, which entitles the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim for compensation or damages." Section 35—"The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them." Section 56—"Where by this Act any reference is made to a reasonable time, the question what is a reasonable time is a question of fact."

A. Bennet & Son, millwrights and engineers, Foundry Street, Dunfermline, of whom Alexander Bennet junior was the sole partner, raised in March 1909 an action in the Sheriff Court at Glasgow against Alexander Munro & Company, artesian well engineers, Bothwell Street, Glasgow, of whom the sole partner was Alexander Munro, "for payment of the sum of £44, 10s. sterling for goods sold and supplied to the defenders."

Alexander Munro & Company in May 1909 raised a cross action against A. Bennet & Son "for payment of the sum of £152, 7s. 9d. sterling, being amount of loss and damage sustained by the pursuers through the defenders' breach of a contract entered into between the parties in or about January 1907 for the supply by the defenders of a deep-well pump and gearing to the pursuers."

Munro & Company averred that the pump and gearing were disconform to contract, and made up their claim for loss and damage sustained by them as follows:—