the case to the Inner House printed the record as it originally stood, *i.e.*, without the amendments.

On the case appearing in the Single Bills counsel for the pursuer objected to the competency of the reclaiming note, on the ground that the amendments allowed in the Outer House had not been printed.

Argued for pursuer—The provisions of the Act of Parliament and of the Act of Sederunt were imperative—*Williamson* v. *Howard*, May 18, 1899, 1 F. 864, 36 S.L.R. 645. The note was therefore incompetent.

Argued for defenders—*Esto* that the amendments were on the record when the reclaiming note was taken, they were the pursuer's own amendments, and he was therefore fully aware of them. That being so, the objection was purely technical. The omission to print them was excusable, for they had only been put on on the last day of the proof. The case was then taken to avizandum, and judgment was pronounced in vacation. The rule laid down in *Williamson* (*cit.*) had been departed from in the later cases of *Burroughes & Watts, Limited* v. *Watson*, 1910 S.C. 727, 47 S.L.R. 638, and *Henderson* v. *D. & W. Henderson*, 1912 S.C. 171, 49 S.L.R. 101, for these cases decided that section 18 of the Judicature Act was not imperative but directory. That being so, the Court had power—where, as here, the omission to print was excusable—to allow the reclaiming note to be received.

The opinion of the Court (the LORD PRESIDENT, LORD JOHNSTON, and LORD SKERRINGTON) was delivered by

LORD PRESIDENT—We shall allow the reclaiming note, and of course the reprinting must be done in order to put the matter in proper form. We shall find Mr Constable's client entitled to the expenses of this discussion, modified to five guineas.

The Court repelled the objection.

Counsel for Pursuer (Respondent)—Constable, K.C.—Wilton. Agent—C. Clarke Webster, Solicitor.

Counsel for Defenders (Reclaimers)—Morison, K.C.—Hon. W. Watson. Agents—Auld & Macdonald, W.S.

Tuesday, May 21.

FIRST DIVISION.

[Lord Cullen, Ordinary.

TAYLOR *v.* WYLIE & LOCHHEAD, LIMITED.

Contract — Construction — Hire - Purchase Agreement—Clause Permitting Hirer to Become Purchaser of Article Hired.

A hire-purchase agreement between A and B provided that A should let to B certain articles of furniture enumerated in an inventory annexed thereto. On this inventory the cash prices of the articles were endorsed, the summation of these prices being £7543 odd. In return for the use of the furniture B agreed to pay certain yearly instalments down to 15th May 1913, these instalments being so calculated as to provide for interest on so much of the principal as remained unpaid. The sum of these instalments was £8649 odd. The agreement contained a clause providing that the hirer might at any time become purchaser of the furniture "by payment in cash of the hereon endorsed price under deduction of the whole sums previously paid by the hirer to the owners." After paying instalments up to and inclusive of 15th May 1910, amounting to £4966 odd, B claimed right to purchase the furniture on payment of £2577, 4s. 6d., being the difference between the sums paid by him and £7543 16s., the price endorsed on the inventory.

Held that on a fair construction of the agreement the words "whole sums" meant sums previously paid towards capital, exclusive of interest, and that accordingly B was not entitled to become the purchaser of the furniture on the terms proposed by him.

William Smart Taylor, hotel-keeper, Glasgow, *pursuer*, brought an action against Wylie & Lochhead, Limited, furniture dealers, Glasgow, *defenders*, in which he sought declarator that certain articles of furniture enumerated in an inventory annexed to a hire-purchase agreement between him and the defenders were his absolute property. He also craved interdict against the defenders interfering with his possession thereof.

The agreement provided, *inter alia*:—"*First*—The hirer agrees to pay the owners an advance hire of the sum of One thousand pounds sterling on fifteenth May Nineteen hundred and six, notwithstanding the date hereof, and thereafter to pay the owners as follows:—(First) the sum of Six hundred and fifty pounds at fifteenth May Nineteen hundred and seven; (Second) the sum of One thousand and forty-four pounds, thirteen shillings and tenpence at fifteenth May Nineteen hundred and eight; (Third) the sum of Eleven hundred and seven pounds, three shillings and tenpence at fifteenth May Nineteen hundred and nine; (Fourth) the sum of Eleven hundred and sixty-four pounds, thirteen shillings and tenpence at fifteenth May Nineteen hundred and ten; (Fifth) the sum of Twelve hundred and seventeen pounds, three shillings and tenpence at fifteenth May Nineteen hundred and eleven; (Sixth) the sum of Twelve hundred and sixty-four pounds, thirteen shillings and tenpence at fifteenth May Nineteen hundred and twelve; (Seventh) the sum of Twelve hundred and one pounds, and fourpence at fifteenth May Nineteen hundred and thirteen. . . . *Seventh*—The owners agree that the hirer may terminate the hiring by delivering up to the owners the furniture and plenishings, and that

the hirer may at any time become the purchaser of said furniture and plenishings by payment in cash of the hereon endorsed price, under deduction of the whole sums previously paid by the hirer to the owners."

The pursuer made the payment stipulated for in article 1 of the agreement up to 15th May 1910 amounting to £4966, 11s. 6d. He then intimated his intention to purchase the furniture in exercise of his right under article 7, and tendered to the defenders the difference between the sum already paid and £7543, 16s. 6d.—the price endorsed on the inventory—being £2577, 4s. 6d. The defenders having refused to accept the sum tendered the pursuer brought the present action.

He averred:—"(Cond. 4) Under the seventh article of said agreement it is provided that the pursuer may at any time become the purchaser of said furniture and plenishings by payment in cash of the thereon endorsed price under deduction of the whole sums previously paid by the pursuer to the defenders. The price endorsed on said agreement is £7543, 16s., and the whole sums paid to date by the pursuer to the defenders under said agreement amount as before set forth to £4966, 11s. 6d. The pursuer has intimated to the defenders his desire to become purchaser of said furniture and plenishings, and has tendered to them payment of the sum of £7543, 16s., being the price endorsed on said agreement, under deduction of £4966, 11s. 6d., being the whole sum previously paid by him to the defenders, but they refuse to accept of said difference, being £2577, 4s. 6d., or to give him a discharge for the price of said furniture, and the pursuer has accordingly consigned in bank in joint names of himself and the defenders said sum of £2577, 4s. 6d., conform to copy deposit-receipt produced herewith. The pursuer is willing to endorse and hand over said deposit-receipt to the defenders on receiving a valid discharge, but they refuse to grant him same, and the present action has thus been rendered necessary. The statements in answer are denied. (Ans. 4) Admitted that the pursuer desires to become purchaser of said furniture and plenishings, that he has tendered to the defenders the sum of £2577, 4s. 6d., and that the defenders refuse to accept same as the whole balance due by him in order to entitle him to said furniture. The agreement and deposit-receipt are referred to for their terms. *Quoad ultra* denied. Explained that the net or cash price of said furniture and plenishings was £7543, 16s. 6d., but the pursuer not being in a position to purchase same on a cash basis, arranged with the defenders to acquire them on the hire-purchase system by graduated payments in instalments, with interest at the rate of 5 per cent. on said price from and after the termination of the first year, all as stipulated for in article first of said agreement. The instalments agreed on, including interest at 5 per cent., are set forth in article first of the agreement, and the total price amounts to £8649, 9s. 6d., which is the price referred to in article seventh. . . . The pursuer has paid the instalments of principal and interest to 15th May 1910 as follows:—

	Principal.	Interest.
1906. May 15 .	£1,000 0 0	——
1907. May 15 .	650 0 0	——
1908. May 15 .	750 0 0	£294 13 10
1909. May 15 .	850 0 0	257 3 10
1910. May 15 .	950 0 0	214 13 10
Total	£4,200 0 0	£766 11 6

To enable him to become purchaser at Whitsunday 1911, there is due the balance as follows:—

Principal sum . . .	£7,543 16 6
Paid to account . . .	4,200 0 0
	£3,343 16 6
Interest due at Whitsunday 1911	167 3 10
Total balance due at Whitsunday 1911 . . .	£3,511 0 4

The pursuer is thus relieved of the interest which has not yet accrued, and this is deducted from the total price and interest, as follows:—

Total price including interest		£8,649 9 6
Paid to account . . .		4,966 11 6
		£3,682 18 0
Less interest to Whitsunday 1912	£114 13 10	
Interest to Whitsunday 1913	57 3 10	
		171 17 8
		£3,511 0 4

If the pursuer elects to become purchaser as at Whitsunday 1911, he should accordingly pay to the defenders the sum of £3511, 0s. 4d., with interest at 5 per cent. thereafter. If he should not elect to become purchaser, he is due to the defenders the instalment of £1217, 3s. 10d., payable at Whitsunday 1911."

The pursuer pleaded—"(1) The pursuer having the right under said agreement to become purchaser of said furniture and plenishings on payment of the sum of £2577, 4s. 6d., is entitled to decree of declarator as craved for, with expenses. (2) The defences are irrelevant."

The defenders pleaded, *inter alia*—"(3) Interest on the price of said goods at 5 per cent. having been agreed to and paid, as condescended on, the pursuer is not entitled to become purchaser except upon payment of the sum of £3511, 0s. 4d., and the defenders should be assoilzied from the conclusions of the summons, with expenses."

On 27th July 1911 the Lord Ordinary (CULLEN) granted decree as craved.

Opinion.—"By minute of agreement, dated 15th and 20th June 1906, entered into between the pursuer and the defenders, the defenders agreed to let to the pursuer the furniture and other plenishing enumerated in an inventory thereto annexed. In this inventory the various articles are priced, and it is summed up at the end to £7543, 16s. 6d. In consideration thereof the pursuer (article 1) agreed to pay to the defenders 'an advance hire' of £1000 on 15th May 1906, and thereafter to pay to them certain stated sums on 15th May in each year up

to and including 15th May 1913. The *cumulo* amount of these payments is £8649, 9s. 6d. Articles 2 and 3 relate to obligations of the pursuer as to the mode of keeping the hired furniture, &c. Article 4 provides that if the hirer do not duly perform the agreement, the defenders may (without prejudice to any right they may have to recover arrears of rent and damages for breach) summarily terminate the hiring and take back the furniture. Article 5 provides that if the hiring is terminated otherwise than by purchase, as provided for under the seventh article, the hirer shall not be entitled to any allowance, credit, return, or set-off for payments previously made. Article 6 provides for possible giving of time, &c., by the defenders.

"So far the agreement proceeds as one for hiring of the furniture. The seventh article, however, gives to the hirer the right to terminate the hiring and to purchase the furniture on certain terms. It is this article which gives rise to the present question. It is in the following terms—'The owners agree that the hirer may terminate the hiring by delivering up to the owners the furniture and plenishings, and that the hirer may at any time become the purchaser of said furniture and plenishings by payment in cash of the hereon endorsed price under deduction of the whole sums previously paid by the hirer to the owners.'

"The parties are agreed that the words 'the hereon endorsed price' refer to the £7543, 16s. 6d., which is the summation of the prices in the inventory annexed to the agreement.

"The pursuer made the payments stipulated for in article 1 up to 15th May 1910, amounting to £4966, 11s. 6d. He thereafter intimated his intention to purchase the furniture in exercise of his right under article 7, and tendered to the defenders the difference between this sum and the £7543, 16s. 6d. (as the 'hereon endorsed price'), being £2577, 4s. 6d. This is *prima facie* in accordance with the terms of the agreement. It provides for a sum being paid annually as hire, and then gives the hirer right to purchase on paying the £7543, 16s. 6d. under deduction of the 'whole sums previously paid' by him. And these can only be the sums for hire which he had paid under article 1. No other sums are mentioned in the agreement.

"The defenders refuse to accept the £2557, 4s. 6d. tendered by the pursuer, and maintain that the sum which he is bound to pay on purchase is £3511, 0s. 4d. Now this is a sum which cannot be arrived at within the four walls of the agreement. It is not the amount of the annual sums payable as for hire after 15th May 1910. These come to £3682, 18s. What the defenders say is that the annual sums for hire under article 1 include (1) instalments of the price of £7543, 16s. 6d., and (2) interest at 5 per cent. running on the price, as reduced from time to time by the annual payments, so far as these payments are attributable to price and not to interest on it already accrued. They aver that the figures in article 1 were adjusted on this basis with the pursuer prior to being embodied in the agreement. Now this may very well be so. Indeed, one would expect that a hire purchase agreement would probably proceed on such lines. The difficulty is that the agreement, which supersedes any prior communings, does not express such a bargain as the defenders maintain. The payments stipulated for in article 1 are stated simply as lump payments for hire, and nothing is said as to how they are arrived at or as to their including interest, and if so, how the interest was calculated. Under article 7, what falls to be deducted from the total cash price is 'the whole sums previously paid by the hirer to the owner.' These can only be the whole sums paid under article 1. The defenders say it is not the whole sums paid under article 1 which fall to be deducted, but only the portions thereof ascribable to the principal of the price, and exclusive of interest on the unpaid balances of the price, according to the calculations which they allege preceded the agreement, whereby the sums in article 1 were arrived at. This may have been what they intended to bargain for. But, unfortunately, it is not what is said in the agreement, which is the only repository of the meaning of the contracting parties. The words of the seventh article; 'whole sums previously paid by the hirer,' seem to me plainly and unambiguously to refer to the whole sums paid by him under article 1. There are no other sums defined in the agreement to which they can be referred. The defenders' argument, I think, really implies that the agreement as it stands does not truly express the bargain which the parties intended to make. That may be so, but I can only construe the agreement as it stands, and cannot reform it.

"Following these views I shall grant decree in terms of the conclusions of the summons."

The defenders reclaimed, and argued—This was a hire-purchase agreement under which the purchaser was to pay periodical instalments representing (1) capital, and (2) interest on the price so far as remaining unpaid. That being so, it was obvious that "whole sums" meant sums paid to capital, for otherwise the purchaser would escape payment of interest, which was not the intention of parties. *Esto* that the language of article 7 was ambiguous, the Court had power—where, as here, the words used conflicted with the rest of the deed and with the obvious intention of parties—to construe it—Dickson on Evidence (3rd ed.), section 1041; *Marquess of Queensberry* v. *Scottish Union Insurance Company*, July 10, 1839, 1 D. 1203, *aff.* March 8, 1842, 1 Bell's App. 183; *Lee* v. *Alexander*, August 3, 1883, 10 R. (H.L.) 91, 20 S.L.R. 877; Pollock on Contracts (8th ed.), p. 268, foot.

Argued for respondent—The Lord Ordinary was right. Article 7 was plain in its terms—"under deduction of the whole sums previously paid." "Whole sums"

meant the addition of the sums in article 1. Nothing was said as to interest in the agreement and the agreement was the measure of parties' rights. The agreement must be construed according to its terms, and not by what the Court might think was the intention of parties — *Smith* v. *Cooke*, [1891] A.C. 297, *per* Halsbury, L.C., at p. 299. Where, as here, the language of the deed was in its primary meaning unambiguous and not excluded by the context, that meaning must be taken, and evidence that the writer used it in another sense was inadmissible—*Shore* v. *Wilson*, [1839] 9 C. and F. 355, at p. 525.

At advising—

LORD PRESIDENT—In June 1906 an agreement was entered into between Wylie & Lochhead, furniture dealers in Glasgow, and Mr Taylor, hotel proprietor, the pursuer in this action, with regard to furniture which was supplied by Wylie & Lochhead for the Adelphi Hotel. The agreement is of the character, well known to us, of a hire-purchase agreement for furniture, and although every agreement must be construed by its own terms I think it is clear that we have judicial knowledge of the general scope of such agreements. The idea of a hire-purchase agreement is that instead of the price for furniture which is supplied being paid in one sum, that price should be paid by instalments, in respect of those instalments the intending purchaser having the use of the furniture in the meantime, and the matter being so calculated that when the last instalment is paid the furniture then should become the property of the hirer and purchaser. It is quite evident that, according to the ordinary business view, the instalments will be so calculated as to provide for interest on so much of the principal as is not paid. All that I think may be taken to be common judicial knowledge of this class of agreement.

But, as I said before, the particular rights of parties must be judged upon the agreement which is in question.

Now the agreement here was embodied in a minute, and this minute we have before us. The present question arises upon what is the proper construction of one of the articles of this agreement. The first head of the agreement is that "the hirer agrees to pay to the owners an advance hire of the sum of one thousand pounds sterling on fifteenth May nineteen hundred and six," and thereafter to pay various sums. All these sums are payable on 15th May, and the payments begin on 15th May 1907 and they end upon 15th May 1913. They are of varying amounts Then, after certain clauses which provide for insurance and bind the hirer to keep the furniture in his hotel and not to take it away, and also deal with the question of what will happen if he does not pay up the instalments he has bound himself to pay, we come to the seventh clause, upon which the whole matter turns. The seventh clause is this—". . . [*quotes, v. sup.*] . . ."

Now what happened was this—the hirer paid his various sums duly and properly upon each 15th May down to and inclusive of the 15th May 1910. He then intimated that he wished to take advantage of the seventh clause and become owner of the furniture "by payment in cash of the hereon endorsed price, under deduction of the whole sums previously paid by the hirer to the owners." Now the endorsed price, which is upon the back of the agreement, is an addition sum coming out at the sum of £7543, 16s. 6d., and is arrived at by the simple addition of the detailed cash prices of the various articles of furniture which were hired.

Accordingly what the hirer says is that he is entitled to get the furniture upon payment of the difference between the summation of the five sums which he paid, namely, the £1000—the first sum—and then the four sums payable in 1907, 1908, 1909, and 1910 respectively, the difference between the summation of these sums and the £7543, 16s. 6d. It is of course obvious that, if his reading is correct, he practically is allowed to pay cash now, and is not charged any interest or any other hire payment for the time during which he has enjoyed the furniture—from the beginning of the arrangement up to the present time. And accordingly the owners of the furniture, Wylie & Lochhead, say that that is not the true construction of the agreement, but that the true construction is that he must pay (if he wants to get the furniture) the difference between what he has paid and the sum which the whole sums in article 1 amount to, under deduction of that part of the payments yet to come which represents interest. The difference in tender is that the hirer offers to pay £2577, 4s. 6d., whereas the owners of the furniture say that he ought to pay £3511, 9s. 4d.

Now the question is, What is the meaning of the agreement? The Lord Ordinary, whatever views he may have on what the parties intended, has considered that they have expressed themselves in such a way that he cannot get beyond the expressed term of the bargain, and that inasmuch as "the hereon endorsed price" undoubtedly is the sum of £7543, 16s. 6d., "the whole sums previously paid" mean—and can only mean—the sums which have been paid under article 1 of the agreement. I do not think that one is driven to that construction, which obviously would be against the fair meaning of the bargain. The absurdity of the construction is probably best illustrated thus—If the pursuer chose to exercise his option under section 7 on 14th May 1913, he would have to pay only a sum of some £95; whereas if he waited until the next day he would get precisely the same result, but he would have to pay £1201, 0s. 4d.—a very curious result.

It seems to me, in the first place, that if you take the agreement literally the only way in which the hirer can become the proprietor of the furniture is by exercising the option under article 7. There is no provision in the agreement (as there might have been) for the furniture becoming *ipso facto* the property of the hirer upon the payment of the last instalment under article 1.

Well, if one therefore reflects that article 7 is to be called in aid, that seems inevitably to point to the conclusion that "the whole sums" must really mean the whole sums previously paid towards capital with the exclusion of interest. It is quite evident that you cannot take the expression absolutely literally, because you could not suppose that if there had been some completely different transaction between the parties, that a sum paid by the hirer to the owner under the other transaction would have entered into computation at all. The expression must refer to sums in connection with this agreement; and, for the reason I have already given, I think it can only be the sums paid to capital, and not the whole sums, including interest.

Now, if that is so, you are set to find out what sums have been paid to capital. Article 1 by itself is not so explanatory, and if one was going absolutely strictly, I think it would be necessary to have a proof in order to find out how the sums provided in article 1 were made up. That is quite unnecessary, because it is set out before us—and it is really admitted by both parties—that the figures in article 1 are arrived at by taking a five per cent. interest upon the amount that still remains unpaid and deducting the instalments, as is set out in answer 4. It would be quite useless to have a proof about that, because there could only be one result. But the proof admitted would be required and admitted not in order to show what is the meaning of the agreement. I think one is bound to take the question of the construction of article 7 without any idea that one has had proof before one in the figures which are set forth in answer 4. It is only after I have come to the conclusion, taking the agreement by itself, for the reasons that I have already stated, that "the whole sums" means the whole sums previously paid to capital, that then I think proof is allowable—not to construe the meaning of the agreement, but simply to find out what is the true arithmetical calculation upon which these figures are based, so as to find out what has been paid to capital and what to interest.

The result of the whole matter, in my judgment, is that the Lord Ordinary's judgment ought to be recalled, and inasmuch as the action is brought by the hirer, and the conclusions are so framed that they can only confirm his view of the agreement, I think the proper judgment is absolvitor.

Lord Johnston—I entirely agree with the judgment your Lordship proposes, and I should add nothing if it were not for an argument which was strongly maintained on behalf of the defenders, and which I think is unsound. We were asked to intervene in this matter, on equitable considerations, to obviate what was represented as an injustice and a hardship upon the defenders if a literal construction was given to a certain section of the agreement. Now I think that argument is without foundation. We cannot interfere. To do so would be to make a new contract. I think it is worth while comparing the situation under article 4 and that under article 7 of this agreement.

Under article 4, if the hirer fails to make the continuous payments stipulated for he forfeits not only the furniture but all that he has already paid. That undoubtedly would be a great hardship on him and may be represented as inequitable, but the hirer has unqualifiedly and unambiguously agreed to it. If we were to do anything in the way of modifying the conditions of that section we should certainly be re-writing the contract for him.

Under article 7 the matter is quite different. It is not a question of remodelling an unambiguous contract. It is a question of construing an ambiguous one. No one can read article 7 with the knowledge which we are entitled to bring to a case of this sort as to what hire-purchase means without seeing that there is a manifest ambiguity, because if it be taken, as contended by the pursuer, literally, there comes a period of time at which the sum to be deducted exceeds the sum from which it is to be deducted. That certainly cannot be intended. But I do not think there is much difficulty in understanding what the parties meant. The ambiguity lies in the words "by payment in cash of the hereon endorsed price, under deduction of the whole sums previously paid;" and it is perfectly clear that to make this consistent —because we know what the payment in cash is to be, and we know what, taken literally, the sums previously paid would be—it is necessary to give some intelligible construction to the words "the whole sums previously paid." Now we know—or I should rather say we are entitled to know —that the sums previously paid consist of principal and interest. Although we do not really know how much is principal and how much interest, the parties do. The persons who lent on hire drew the contract and arranged these figures and must clearly understand them, and the person who took on hire must be assumed to do so also. If, then, these sums are partly principal and partly interest, it does not require very much intuition to see that "under deduction of the whole sums previously paid" must mean under deduction of the whole sums previously paid so far as those sums consist of capital.

For these reasons, I entirely agree with the judgment which your Lordship proposes.

Lord Skerrington—I concur.

Lord Kinnear and Lord Mackenzie were sitting in the Extra Division.

The Court recalled the Lord Ordinary's interlocutor and assoilzied the defenders.

Counsel for Pursuer (Respondent) — Blackburn, K.C.—J. A. Christie. Agent—E. Rolland M'Nab, S.S.C.

Counsel for Defenders (Reclaimers) — Horne, K.C.—T. G. Robertson. Agents—Whigham & MacLeod, S.S.C.