MARCH 10, 1868.

MACFARLANE AND CO., *Appellants*, *v.* TAYLOR AND CO., *Respondents.*

Sale—Warranty—Sample—Whisky Coloured with Innocent Material—*M. supplied to T.'s order for whisky coloured with burnt sugar or other innocent material an article which was coloured with logwood, and caused disagreeable effects to the consumer. The whisky was known to be intended for the natives of Africa. In an action for breach of contract, and with an issue "whether the whisky was disconform to order and coloured with material not innocent:—"*

HELD (affirming judgment), *The Judge was not bound to direct the jury, that "innocent" meant not dangerous to life or health; and that he was right in leaving it to the jury to say if the whisky, according to the ordinary sense of the word, was innocent.*

SEMBLE, *The proper issue would have been, whether the whisky supplied was fit for human use and consumption, or "whether it was disconform to order," without more.*[1]

This was an action raised by Messrs. Taylor and Co., merchants, Leith, against Messrs. Macfarlane and Co., distillers in Glasgow, for supplying them with whisky which was intended for the African market, mixed with some colouring material, not innocent.

The issues were—"Whether the defenders, on the order of the pursuers, agreed to supply to them a quantity of whisky coloured with burnt sugar or other innocent material, similar to a sample of Mackenzie and Co's whisky then shown to the defenders? whether the defenders delivered to the pursuers a quantity of coloured whisky amounting to 20,554 proof gallons or thereby, for which the pursuers duly paid the stipulated price? and whether the coloured whisky so delivered by the defenders to the pursuers was disconform to the said order, inasmuch as it was coloured with some colouring matter not being burnt sugar or other innocent material similar to said sample, to the loss, injury, and damage, of the pursuers?"

At the trial before Lord Kinloch, his Lordship told the jury, that the word "innocent" was not a legal term, and that it was for the jury to say, whether the whisky was innocent within the ordinary sense of the word. His Lordship also refused to tell the jury, that the pursuer was bound to prove, that the colouring was injurious to the marketable quality of the whisky, and to health. The jury found a verdict for the pursuers; damages, £3000.

On argument the First Division disallowed the bill of exceptions, and discharged the rule for a new trial.

The defenders then appealed, and in their *printed case* stated the following reasons for reversing the interlocutors:—1. The issue was not proper, because it did not direct the jury to inquire, whether the alleged insufficiency of the whisky sold was known to the defenders, because it assumed, that there was an express warranty or agreement to colour with a material such as Mackenzie used; because it put the question in the alternative as to burnt sugar or an innocent material; and because the issue is indefinite, and might include matters extraneous to the record. 2. It was the duty of the Judge to direct the jury to exclude from their consideration such results of the evidence as were not within the case stated in the record, and because the record ought to have been received when tendered by the appellants for the purpose of excluding such extraneous matter. 3. Because the Judge erroneously directed the jury, that the sense in which the word "innocent" was used in the issue was not a matter of legal construction, but was to be judged of by themselves upon the evidence. 4. Because the Judge refused to direct the jury, that the pursuer must prove, that the whisky was injurious to the marketable quality of the whisky, or was injurious to health; and that there was no warranty as to the colouring material, but simply a warranty as to the colour.

The respondents in their *printed case* stated the following reasons for affirming the interlocutors:—1. Because the issue was adjusted by the Court with the consent of the appellants. 2. The issue was well adapted to the trial of the case. 3. Because it was incompetent for the appellants to put in evidence the condescendence to prove what the respondents stated therein, or to put in evidence the whole record. 4. Because the directions of the Judge were right. 5. Because he did not omit to give any direction which he ought to have given.

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[1] See previous reports 6 Macph. H. L. 1; 39 Sc. Jur. 396. S. C. L. R. 1 Sc. Ap. 245; 6 Macph. H. L. 1: 40 Sc. Jur. 300.

Anderson Q.C., *Mellish* Q.C., and *M'Laren*, for the appellants.—The issue was not properly framed, and introduces irrelevant topics. It does not shew distinctly, whether the sale was one by sample, or a sale by descriptive order. It puts an alternative undertaking to use burnt sugar or other innocent material, whereas the record made no averment, that there was any contract to use an innocent material. The issue is not supported by the record, which, if well settled, controls the meaning of the issue. The only proper form of issue was this, "whether the defender sold to the pursuer certain goods warranted equal to a sample then delivered to the pursuer; and whether he furnished goods which were disconform to the said sample?" The first and second exceptions are not relied upon. As to the third and fourth, the Judge improperly refused to admit the condescendence to be given in evidence to explain the meaning of the word "innocent." It is well settled the record controls the issue—*Mackintosh* v. *Smith*, 2 Macph. 1261. The fifth and sixth exceptions ought to have been sustained. The meaning of the word "innocent" was a question of legal construction for the Judge, and ought not to have been left to the jury without any definite direction. According to the real meaning of the issue, the Judge ought to have told the jury, that it was for the pursuer to make out that the colouring was injurious to the marketable quality or to health, and he ought to have directed the jury, that all the defenders contracted to do was, to supply a colour resembling Mackenzie's, without any undertaking as to the nature of the material: therefore the interlocutors ought to be reversed.

Sir R. Palmer Q.C., *G. Young*, and *S. Will*, for the respondents, were not called upon.

LORD CHANCELLOR CAIRNS.—My Lords, the merits of this appeal were very fully and clearly laid before your Lordships yesterday by the learned counsel for the appellants, and after the consideration which your Lordships have been able to give to the case, I venture to think, that you will concur with me in the opinion, that it is unnecessary for us to call upon the counsel for the respondent.

The facts of the appeal which require to be adverted to lie in an extremely small compass. The respondents here, who were the pursuers in the Court of Session, are the firm of Taylor and Company, merchants at Leith, who carry on trade with the west coast of Africa. The defenders in the Court of Session, who are the appellants here, are the firm of Macfarlane and Company, who are distillers or rectifiers at Port-Dundas, Glasgow.

The pursuers stood in need of a certain quantity of spirits for the purposes of their trade with the west coast of Africa, that is to say, for the purpose of bartering these with the natives in exchange for the productions of the country. They applied to the appellants, Messrs. Macfarlane and Company, and entered into a contract with them, (the terms of which I shall have afterwards to advert to,) for the supply of those spirits. So far as regards quantity, the spirits, whenever ordered, were supplied, and a bill of exchange was drawn for the purchase money, accepted by the pursuers, and paid at maturity. And there the case would have ended but for this, that when the spirits reached the coast of Africa and were used for the purpose of barter there, they were found, as the pursuers allege, to be unmerchantable in their quality, and consequently an action was brought against the appellants, Messrs. Macfarlane and Company, by Messrs. Taylor and Company, for damages in respect to the quality of the spirits.

In that action the record was closed in the usual way, and the parties not being able to agree upon the form of an issue, an issue was settled by the First Division of the Court of Session, and went to trial. That trial occupied several days, and in the result the jury found a verdict for the pursuers, with damages to a large amount, namely £3000.

The whole case is now brought up before your Lordships mainly upon two objections to those proceedings—the first objection going to the form of the issue which was settled by the Court, and challenging that form of issue, and the second being an exception to the ruling of the learned Judge at the trial, as regards the law which he laid down to the jury, and as regards an alleged omission on his part to state to the jury what the appellant contended, that he ought in addition to have stated.

In order to appreciate the argument upon the first of these questions, namely, the form of the issue, it is necessary to advert to the averments in the record with regard to the contract. And I cannot help noticing, here (I hope with no undue prejudice in favour of the course which is pursued in this country,) the inconvenience of the form adopted in Scotland as compared with the form which we now adopt in this country in an action of this description. In this country the habit is, under the recent changes in the procedure, for the plaintiff to aver what he considers to be the legal result of the evidence which he will be able to adduce as regards the form of the contract, and then, if those averments are challenged, to go to trial upon them, and if in the course of that trial the evidence which he adduces, while it maintains in substance his averments, should differ from them in minor details, the Judge at the trial has the power to permit amendments of those averments, and thus to prevent any unnecessary expense or any failure of justice. In Scotland, on the other hand, there is in the pleadings a considerable amount of narrative leading up to the averment of the concluded contract, and upon those averments the issue is agreed upon by the parties, or settled by the Court in default of agreement, and becomes as it were the stereotyped issue upon which the trial must be conducted; and if, as must constantly

happen in the course of the trial, minor details appear,which in some degree produce a variance from the averments upon the record or from the issue as thus settled, there is always a danger of criticism and cavil as regards the question whether the issue on the one hand properly represents the point to be determined between the parties, and whether, upon the other hand, the evidence sustains the issue as thus settled.

I will not pursue this matter further than to say, that I feel persuaded that it would be your Lordships' view upon all occasions of this kind, that while, on the one hand, you would not be disposed to maintain an issue which in consequence of its form had failed to determine the real question between the parties, so, on the other hand, your Lordships would be unwilling, at this stage of the proceedings, to allow mere criticism as to the wording of the issue, mere observation as to want of felicity of expression in framing the issue, to become the means of overthrowing the proceedings, if your Lordships were satisfied, that the real justice of the case had been tried between the parties.

For the purpose of examining the form of the issue, it will not be necessary to do more than to refer your Lordships to the fourth and fifth heads of the condescendence, in which we find a statement of the contract as alleged by the pursuers. These have been so recently before your Lordships' eyes, that I do not propose to read them at length, but your Lordships will not fail to observe, that, under the fourth head of the condescendence, there is a distinct averment by the pursuers, and a distinct admission on the part of the defenders, that the pursuers stated, and the defenders were aware, that the pursuers required the spirits in question for the African trade, that is to say, for the purpose of that trade, which I just now described, a trade in which spirits are bartered with the natives of the coast of Africa for their consumption, and in return for the productions of the country.

Passing from the fourth article of the condescendence, and going on the fifth, we find in the fifth these statements, that there were upon the occasion of making the contract certain samples then before the parties, and which to a certain extent were referred to. There is a sample, which is called the sample of the Macfarlanes, which was referred to, and which was adopted for the purpose of indicating the strength of the spirits, for the purpose of defining the flavour which the spirit was to have, and for the purpose of settling the price. For those three purposes, strength, flavour, and price, the sample produced by the Macfarlanes was adopted, and was satisfactory to the pursuers.

If that had been all, and if the question now had arisen as regards either strength or flavour, I should have been of opinion, and I think your Lordships would have concurred with me, that all that would have been necessary would have been to determine the question of fact, what was the strength and what was the flavour of the sample produced by the Macfarlanes. But the matter did not end there. The desire of the pursuers was to have spirits coloured in such a manner as to represent as nearly as possible the colour of rum.

The sample produced by the Macfarlanes was too light in colour for that purpose. It appears that there was in the room of the parties a sample of spirits produced by another house, the house of Mackenzie, darker in colour, and of a colour which represented the shade which the Messrs. Taylor desired to have upon this occasion. That sample of Mackenzie's was referred to for the purpose of defining the shade of colour, and the agreement of the Messrs. Macfarlane was, that they would colour up (if I may use the expression) the spirits which they would supply, so as to bring them to the same colour as the sample of the Mackenzies.

These facts which I have thus stated are averred in substance in the fifth head of the condescendence, and then that fifth head concludes with this statement: "The defenders knew, and were expressly informed of the purpose for which the spirits were wanted, and that they were intended for human consumption; and that, while colouring was required, the colouring matter must be such as in no degree to impair the quality of the whisky, or render it unfit for use." It was contended by Mr. Mellish, that this was in substance a sale of spirits by sample. It was a sale by sample to a certain extent, but only to a certain extent. It was a sale by sample so far as regards strength and so far as regards flavour, but as regards colouring it was not a sale by sample, beyond this, that a shade of colour which might just as well have been represented upon paper, or upon wool, or upon any other material, was produced in a sample of coloured whisky, which was to be the shade of colour adopted as a pattern by the Messrs. Macfarlane. But the question how that colour was to be produced by one device, or by another, so far as the averments I have read are concerned, was not a matter of definition or statement between the parties.

It is proper that I should, at this stage of the case, remind your Lordships of the Act of Parliament that was passed in the year 1856, termed "An Act to amend the Laws of Scotland affecting Trade and Commerce." By the fifth section of that Act an enactment was made for the purpose of assimilating, as far as possible, the law of Scotland upon this subject to the law of England. The fifth section declares, that the vendor of goods, as a general rule, "shall not be held to have warranted their quality or sufficiency; but the goods with all their faults shall be at the risk of the purchaser, unless the seller shall have given an express warranty of the quality

or sufficiency of such goods, or unless (which is more material to the present case) the goods have been expressly sold for a specified or particular purpose, in which case the seller shall be considered without such warranty to warrant, that the same are fit for such purpose."

Now I think your Lordships will be of opinion beyond all doubt, that these goods were sold for a specified and particular purpose, namely, for the purpose of trade and barter upon the west coast of Africa; and if that is so, and if the operation of this enactment is not excluded by anything which passed in this case, the result is this, that the law steps in and says, that, with regard to the goods so sold for such specified and particular purpose, there is implied a warranty that the goods are fit for that purpose.

With these observations I think your Lordships will have no difficulty in dealing with the form of the issue which, upon these averments and with reference to the state of the law, was settled by the Court between the parties. The issue consists of three questions. The second may be put out of the case, for no difficulty arises as to that—the difficulty which arises has been made by the first and third of the questions.

The first question is this, "Whether, on or about September 1862, the defenders, on the order of the pursuers, agreed to supply a quantity of whisky coloured with burnt sugar or other innocent material similar to a sample of Mackenzie and Co.'s whisky then shewn to the defenders?" The burden of the objection, as was very properly stated by Mr. Mellish, to the issue, was with regard to the word "innocent." I certainly am not at all of opinion, that this issue might not have been expressed more happily. I think that words more appropriate to the averment and more appropriate to the state of the law might have been introduced into the issue. But the question which I think your Lordships will be disposed to consider is, Was there in this form of issue anything which was so wrong, so much at variance with what was the real question to be tried, that your Lordships should now refuse to maintain it? Looking at it in that point of view, I cannot think there is anything in this issue which could have misled the jury, or could have failed to express to them the question which had to be tried. The word "innocent" is no doubt a word of many meanings, but in this particular context it is used in connexion with a commodity which is referred to, burnt sugar; and the meaning obviously is this: The whisky, it is suggested, was to be coloured either with burnt sugar, which was itself a material which could produce no ill effect upon the spirit, or else with some other innocent materials, that is to say, some other material *ejusdem generis*, which would be equally free from any charge of injuring the material into which it was introduced. In other words, the term "innocent" would correctly represent a material which would not be injurious to the commodity by rendering it unfit for the purpose for which it was intended, which, in other words, is exactly expressing what the Act of Parliament lays down as the implied warranty in the case of such a sale of goods.

If that is so, then I cannot think that any reasonable objection can be made to the third head of the issue, although as to that I may say again, that I should have been well content if it had stopped very much short of the extent to which it had gone—if it had simply proposed the question, whether the coloured whisky delivered by the defenders was disconform to the order. I believe, that would have expressed all that is necessary to be determined; but it has gone on to say, inasmuch as it was coloured with some colouring matter not being burnt sugar or other innocent material similar to said sample, to the loss, injury, and damage of the pursuers.

I certainly admit, that these words are somewhat involved in their form, but I read them as saying, inasmuch as it was coloured similar to the sample, but the colouring matter was not burnt sugar or other innocent material, referring the jury back therefore in substance to the first head of the issue, and asking them whether the contract was as averred in the first head of the issue, and whether the spirits which were delivered were or were not in accordance with that contract. Upon this issue, therefore, I should humbly venture to advise your Lordships, that there is no ground at this stage for finding fault with the form in which it is now brought up before us.

I pass on to the next part of the case, which deals with the charge of the learned Judge, the objections to which charge are expressed in the fifth and sixth exceptions. For reasons which will be obvious, I propose to ask your Lordships to consider the sixth exception before the fifth. The sixth exception suggests what the learned Judge ought to have directed the jury in point of law, *first*, that in order to entitle the pursuer to a verdict on their issue, it is not sufficient for them to prove, that the material with which the whisky was coloured was injurious to the marketable quality of the whisky; *secondly*, that in order to entitle the pursuers to a verdict on the issue, it is necessary for them to prove, that the material with which the whisky was coloured was injurious to the health of the consumer.

Now there is no doubt that this expresses very clearly and distinctly what it is that the appellants contend for, and what it was that they desired to submit to the jury, and I am not at all surprised at this contention, because in it there is the only possible chance of the appellants succeeding upon this trial. The appellants knew very well, having regard to the evidence that was led, that whether you take the medical evidence adduced by the appellants, who were the defenders, or the medical evidence adduced even by the pursuers themselves, the state of facts that was brought before the jury was this, that the colouring matter introduced into this

spirit being logwood, it would be correct, with regard to it, to say, that it was not such a material as that its introduction into the spirit would endanger life or perhaps seriously endanger health, but that, on the other hand, it would beyond all doubt be productive of symptoms and effects upon the human frame which would be in the highest degree unpleasant and alarming to the person who was taking the spirit, and would be such as to a certainty would prevent either him or any other person, knowing of those effects, from dealing any further with regard to that spirit. Therefore it was, that the appellants were naturally anxious that there should go to the jury the question touching the effects of this coloured spirit upon health and upon life, and not a question touching its fitness for the subject for which it was intended, namely, as a merchantable spirit for the coast of Africa; but that exception being taken, I venture to think, that your Lordships will have no difficulty at all in agreeing with me in saying, that, if the learned Judge had given this direction to the jury, it would have been a distinct and palpable miscarriage upon his part. An express warranty that the spirit should not endanger life is nowhere suggested to have been given; an implied warranty that the spirit should not endanger life is not the implied warranty which is defined by the Act of Parliament. The Act of Parliament defines the implied warranty to be this, that the spirit should be fit for the purpose for which it was intended, and I apprehend it would have been an error on the part of the learned Judge, if he had in any way departed from those expressions, and had told the jury that, under the term "innocent," they were to consider not whether the spirit had been coloured in a way rendering it unfit for the purpose for which it was intended, but whether it had been coloured in a way rendering it dangerous to life or to health.

Therefore, taking the first and sixth exceptions, I own I cannot myself entertain any doubt, and I think your Lordships will not entertain any doubt, but that the issue tendered here by the appellants is an erroneous one, and that the Judge is not in any way to be found fault with because he did not give this direction to the jury.

Then that being so I turn now to the fifth exception. The fifth exception complains, that Lord Kinloch directed the jury that the word "innocent" as contained in the issue, was not a legal term, nor one on which it was necessary that he should put a legal construction, and that it was for the jury to say, upon the evidence, whether the thing was "innocent" or not, in the fair and reasonable sense of the word as employed in ordinary language. Now I say again here what I took leave to say with regard to the former issue: I should have been well satisfied if the learned Judge had thought it right to go somewhat further, and to have directed the jury what I apprehend would have been entirely correct, that by the term "innocent" their minds must be led to consider whether anything had been done to the spirit which had rendered it unfit for the purpose intended. But what I apprehend your Lordships have to consider here is, Was this statement which is expressed in the fifth exception erroneous so far as it goes? and in respect, that the learned Judge did not go further, was there any failure of stating matter of law to the jury which has led to a miscarriage, or may fairly be supposed to be calculated to lead to a miscarriage, on the part of the jury?

So far as the charge of the learned Judge goes, I think no exception can fairly be taken to it. It appears to me to be not inaccurate so far as it is set out upon the bill of exceptions. Is it the case, that the jury might have been misled by the learned Judge not going further? Now I own I was struck by what was said by one of the learned Judges in the Court below, which appears to have a material bearing upon the case. A learned Judge (I think it was the Lord President) said, that the jury really knew, that there really were two questions between the parties, whether the pursuers were right in saying it was enough to prove that the spirit was unfit for what it was intended, or whether the defenders were right in contending, that the proof ought to shew that the spirit was dangerous to life or to health. The jury (as was observed by, I think, the Lord President) heard the learned Judge asked to give the direction which is indicated in the sixth exception; they heard that direction refused to be given, and they could not but have been aware, that that left one and only one point for the jury to determine, namely, whether the spirits had been coloured with colouring matter which was innocent, that is to say, colouring matter which would not be injurious to the spirit, having regard to the purpose for which it was intended. And if that is so, then I apprehend, that the jury could not in any way have been misled; and if they were not misled, then I apprehend that, upon a question, not of misdirection, but of non-direction, your Lordships will indeed be slow to hold, that, merely because the Judge might have gone further, and might with propriety have stated more to the jury than he did state, although anything more which he could properly have stated would have been in favour, not of the appellants but of the respondents, yet the appellants were entitled to object to that failure on the part of the learned Judge to go further, and ought to have been allowed to upset the proceedings upon the ground of the absence of an additional statement which, if it had been present, must have been even more injurious to the argument for which they contended.

Upon these grounds I have no doubt at all, that the satisfactory conclusion to arrive at is this, that these exceptions were properly disallowed by the Court below, and that neither to the form of the issue nor to the charge of the learned Judge has any objection been shewn to your Lordships which ought to lead you to disturb the interlocutors of the Court below. I therefore

venture to advise your Lorships to confirm those interlocutors, and to dismiss the appeal with costs.

LORD WESTBURY.—My Lords, if your Lordships are satisfied, that substantially the real question is embodied in the issues, and that it has been tried in a satisfactory manner, you will, I feel certain, be most unwilling to interfere with the form of the issues, although you may be of opinion, that the issues have not been skilfully extracted, and are expressed in a prolix and perhaps awkward manner. Nothing could be simpler than the original transaction, or more plain than the question which arose out of the circumstances that occurred.

The pursuers were desirous of buying a quantity of coloured whisky, to be sent to West Africa as a commodity to be sold or bartered to the natives. The defenders tendered to supply the whisky, and produced to the pursuers a sample which was approved as to price, flavour, and strength, but not as to colour, which was required to be deeper, and the defenders then agreed to make the colour equal to that of another sample of coloured whisky, which the pursuers produced to them as a standard of colour, and to deliver the whisky accordingly. The contract was thus complete. Nothing passed as to the colouring matter which should be used, but underneath this contract of course lies the implied general engagement, that the article sold should be fit for use, that is, for human consumption, being the purpose for which it was sold.

The whisky was taken to the coast of Africa, and part of it having been supplied to the natives it was found to produce very unpleasant, and alarming if not injurious, effects on the bodies of those who drank it, and the whisky thereby became unmarketable. It was ascertained, that these effects on the body of the consumer, being such as ordinary whisky or whisky coloured with burnt sugar does not produce, were due to the colouring matter that had been used by the defenders. It would seem that whisky had been commonly coloured by burnt sugar, and that the defenders had used logwood, or a decoction or extract of logwood, for the purpose of producing the colour required, and which material, according to the evidence, does not appear to have been previously used for such purpose.

Under these circumstances, the question that arose in fact was, whether there had been a breach of the implied contract, or in other words whether the whisky which the defenders had coloured with logwood was fit for use, and human consumption. It was a fit question for a jury, as the law now stands, although I venture humbly to think, that if the question had been argued, and the witnesses examined before Lord Kinloch sitting alone, a satisfactory conclusion would have been arrived at without any charge of miscarriage in procedure, and with an infinitely less expenditure of time and money. The parties could not agree as to the form of wording the issues, which were accordingly settled by the Inner House, and the issues as settled, though unnecessarily long and cumbrous, in effect amounted to this: Was the whisky supplied by the defenders coloured by means of an innocent material?

The trial lasted five days, and the evidence shewed, that logwood colouring produced effects on the body of the consumer, which to say the least were very disagreeable and alarming; it had an astringent effect; it affected the saliva and the secretions from the kidneys, converting them into the colour of blood, and changed the colour of the skin down to the fingers and nails. I cannot conceive a more alarming picture to be presented to an Edinburgh or Glasgow jury, where toddy is supposed to be in great esteem. The jury found unanimously a verdict for the pursuers, thereby in effect finding, that the colouring material was not innocent, and that the whisky was not fit for use.

The contention by the appellants at the trial was, that the learned Judge ought to have given to the jury an explanation of the meaning of the word "innocent;" and to have in effect told them that, although it appeared that the whisky was unmarketable, yet that it did not follow that the whisky was not innocent. I think the learned Judge was right in declining to do any such thing. The word "innocent" was used in the issues in its ordinary popular sense, and it was for the jury to find upon the evidence, whether the colouring matter, or the whisky as coloured by it, was "innocent," that is to say, harmless in use; and the jury had nothing to do directly with the question whether the whisky was or was not marketable, otherwise than as that might be the result of finding, that the colouring matter was not harmless, that is, not an innocent thing.

I therefore entirely approve of the manner in which the case was left to the jury by the learned Judge, which is thus stated in the bill of exceptions: "Lord Kinloch directed the jury, that the word 'innocent,' as contained in the issue, was not a legal term, nor one on which it was necessary that he should put a legal construction, and that it was for the jury to say upon the evidence whether the thing was innocent or not, in the fair and reasonable sense of the word as employed in ordinary language." I think, having regard to the issues and the evidence, that this was a proper mode of leaving the case to the jury, and it was certainly a mode more favourable to the appellants than to the respondents.

I therefore entirely agree with my noble and learned friend upon the woolsack, that the appeal should be dismissed with costs, so far as it is an appeal from the interlocutors settling the terms of the issues, and that the exceptions should in like manner be overruled.

LORD COLONSAY.—My Lords, the views which I entertain upon this case both as regards the true meaning and construction of these issues, and as regards the exceptions which have been taken to the charge of the learned Judge, have been so fully stated by my noble and learned friends who have preceded me, that I do not think it necessary to make any addition to their statement. I think that, as regards the exception, the moment it is held, that the fourth exception must be disallowed, it follows almost of necessity from that itself, that the fifth exception cannot be maintained, because in that case the appellants would be required to shew what directions should have been given, that would be consistent with their contentions in this case. Any directions that could have been given consistently with the views which have been expressed by my noble and learned friends, and in which I entirely concur, must have been directions to the jury, not tending in favour of the appellants, but additional directions leading towards the verdict which the jury did find. I therefore concur entirely in the affirmance of the interlocutors complained of.

Interlocutors affirmed, and appeal dismissed with costs.

Appellants' Agents, White-Millar and Robson, S.S.C.; Simson and Wakeford, Westminster. —*Respondents' Solicitors*, Henry and Shiress, S.S.C.; W. and H. P. Sharp, Gresham House, London.

MARCH 30, 1868.

J. A. G. C. CAMPBELL of Glentalloch, *Appellant*, *v.* The EARL OF DALHOUSIE, and Others, Trustees of the late Marquis of Breadalbane, *Respondents*.

(*Two Appeals.*)

Entail — Improvements — Montgomery Act — Rutherfurd Act — Election — Signature of Heir's Accounts by Executors — Form of Decree — *B., while heir of entail in possession, expended moneys in improvements amounting to £25,000, and obtained decrees in his lifetime against the next succeeding heir; but whereas in 1859 he charged £20,000, part of the amount, by bond of annualrent on the estate, under the Rutherfurd Act, he had taken no steps to charge the remaining £5000, when he died three years afterwards.*

As to another expenditure for improvements, amounting to £3891, between 1861 and 1862, B. had not subscribed the accounts so as to charge the next heir, and B. died three days before Martinmas 1862. His executors then subscribed the requisite accounts and took the usual steps under the Montgomery Act.

In actions of declarator to ascertain the rights of parties:

HELD (partly varying judgment), (1.) *Where the next collateral heir has been duly called in the action raised by the heir in possession for a decree to charge improvements, all the heirs of entail are thereby bound, and the decree is final;* (2.) *where the decree on the face of it shews, that it is for entail improvements, conform to the Act 10 Geo. III. c. 51, it cannot be afterwards impeached on the ground, that the nature of the improvements is not set forth in such decree;* (3.) *if the heir in possession has, under the Rutherfurd Act 11 and 12 Vict. c. 36, charged part of the sums on the estate, he has thereby made his election, and cannot afterwards resort to the aid of the Montgomery Act to complete his claim against the next heir; but the sole remedy for the balance must be sought under the Rutherfurd Act;* (4.) *where the heir in possession, in the course of making improvements, has died before Martinmas without subscribing the accounts for improvemente, his executors may do so after his death, and recover the amount from the next heir.*[1]

First Appeal.

This was an action by the executors of the late Marquis of Breadalbane against the next succeeding heir of entail (1.) for a sum of £5202 16*s.* 2*d.*, being the balance of a total sum of £25,202 16*s.* 2*d.*, contained in five decrees under the Montgomery Act; (2.) for a sum of £21,354 16*s.*, being the amount of a sixth decree.

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[1] See previous reports 4 Macph. 775, 790; 38 Sc. Jur. 414-7. S. C. L. R. 1 Sc. Ap. 259; 6 Macph. H.L. 43; 40 S. Jur. 446.