Judges—Lords Benholme and Neaves, of the Second Division, and Lord Gifford (Ordinary)—and heard counsel on the reclaiming note for John James Hope Johnstone, Esq. of Annandale, Sir Robert Preston's trustee, against Lord Shand's interlocutor of 10th June 1873: After consultation with the said other Judges, and in conformity with the opinion of a majority of the seven Judges present at the said hearing, adhere to the interlocutor reclaimed against, and refuse the reclaiming note, and remit to the junior Lord Ordinary to proceed further."

Counsel for Petitioner--Solicitor-General (Clark) and Mackay. Agents—Murray & Falconer, W.S.

Counsel for Respondent--Lord Advocate (Young) and Balfour. Agents—Dundas & Wilson, C.S.

I., clerk.

Friday, February 13.

FIRST DIVISION.

[Lord Mure, Ordinary.

TENNANT *v.* FYFE.

Writ—Construction (contra preferentem)—Jus quæsitum tertio—*Essential Error—Obligation to Assign—Conditional Obligation—Duty of Disclosure.*

1. Circumstances in which a party *held* not entitled to construe a writ, of doubtful import, in his own favour, against a second party—said first party having himself selected the terms of the document.

2. Where a proof was held to have established (1) that the defender in subscribing a document founded on by the pursuer had done so under essential error as to his legal rights; and (2) that the pursuer was aware of the error on the part of the defender—*held* that the pursuer could not in law avail himself of said error, but was bound to disclose the true state of matters to the defender.

3. Circumstances in which obligations alleged to have been undertaken by the defender *held* not to be inforceable by the pursuer,—he having failed to perform the counter obligation incumbent on him, and which was the condition of the undertaking on the part of the defender.

Process—Expenses.

Opinion as to expenses of reclaiming note (against an interlocutor dismissing action as irrelevant) in which reclaimer was successful, though ultimately unsuccessful upon the merits.

This was an action of declarator, implement, and damages at the instance of Robert Tennant of Scarcroft Lodge, near Leeds, sometime proprietor of the lands and barony of Tranent, in the county of Haddington, against James Fyfe, lime and coal merchant, residing at Sunnybank, Shipley, near Leeds, and one of the tenants of Tranent Colliery, part of the said estate of Tranent.

On 18th March and 2d April 1870 the pursuer entered into a lease of the colliery and other subjects on the estate of Tranent, with certain parties, and the survivors and survivor of them, and their heirs or assignees. The lease was for nineteen years from Candlemas 1870, and the yearly rent was £600, or, in the option of the landlord, certain lordships therein specified. The defender became security for payment of the first three years' rents, conform to tested obligation endorsed on said lease, of date 8th April 1870. After the lease was granted, a company was formed for the purpose of working the said colliery, under the name of the Tranent Coal Company; and under that social name or firm the colliery was worked, and the whole business thereof carried on from the commencement of the lease. The partners were the four lessees, one of whom superintended the working of the colliery, while another had the charge of the mercantile and shipping department of the business of the company. The defender alleged that he had no control of, or interest in, the business of the colliery or of the company, other than as cautioner to a limited extent. The lessees purchased the plant at the colliery, agreeing to pay the value thereof, £1226, 12s. 6d., in August 1870. They also entered on possession of the subjects. It soon appeared, however, that they were without sufficient capital, and had got into difficulties. Their cautioner, Mr Fyfe, had to make considerable advances on their behalf, and in August or September 1871 he came to Scotland and examined the condition of their affairs, which were found to be in such a state that it was quite apparent that the colliery could not be carried on by them. The said James Fyfe, with a view to some arrangement for bringing his liabilities to an end with as little loss as possible, had meetings with Mr Tennant, who at the time was endeavouring to negotiate a sale of the estate, and also with his agent, Mr Duffield, and his law agents in Edinburgh, Messrs Macrae & Flett, Writers to the Signet. The result of these meetings was that the defender, relying, as he alleged, upon the representation of Messrs Macrae & Flett, and in consequence thereof, formed the opinion that the best course for all parties was a transfer to himself of the interest of the three non-resident partners in the said lease and colliery, so as to enable him and the resident partner to carry on the colliery; and he accordingly had sundry negotiations with the Tranent Coal Company, which resulted in a minute of agreement, dated 23d September 1871, being entered into between the said three partners on the one part, and the defender on the other part (the fourth partner being a consenting party to the transaction), whereby the first parties engaged to retire from the said coal company on receiving payment of their respective interests therein, as specified in the company's ledger and in the said minute; and the defender agreed to pay the said sums to the said first parties, who further consented to their respective interests in the leases of the said colliery being assigned to the defender, with entry at 30th September 1871, he relieving them as partners foresaid, and as individuals, of all claims or demands in relation to said coal company competent against them, either under said leases or otherwise, prior and subsequent to the said term of entry. By the sixth article of the said minute of agreement, it was provided that, in the event of the landlord not consenting to relieve the said retiring partners of their obligations under the lease, the agreement should become null and void. The defender alleged that at the date of this agreement he erroneously believed that assignees without the

consent of the landlord were expressly debarred by the lease, although, in point of fact, the lease bore to be in favour of assignees without restriction or qualification, and that the lessees themselves were also at that time under the same erroneous impression; that he (the defender) was confirmed in that erroneous impression by the representations of Messrs Macrae & Flett; and that, had they been aware that the landlord's consent to an assignation was unnecessary, they would not have inserted that article in their said agreement.

After farther communings between the parties, the defender—still under the erroneous impression above-mentioned—copied and subscribed a letter addressed to the pursuer (the draft of which had been prepared by the latter) in these terms:—"Leeds, Oct. 24/71.—Robt. Tennant, Esq.—Dear Sir,—In the event of your selling the Tranent estate, and of my not being able to come to terms with the purchaser for taking on the colliery, I should feel obliged by your making it a condition on the sale that I am to be paid by the purchaser all my advances on account of the colliery, which amount to about £1800, and to relieve me from liabilities I am under in colliery affairs—I, of course, transferring to them, so far as I have power, all the plant of the colliery, and taking such other steps for putting them into possession of the colliery as they may desire.—I am, yours respectfully,—(signed) James Fyfe."

The pursuer alleged that, acting on the faith of this letter, he concluded a sale of the estate to a Mr Robertson, undertaking to transfer to the latter the colliery—that having been made a stipulation of the agreement between them. He farther alleged that he intimated what he had done to the defender by letter dated 8th November 1871, which was delivered the following day. On 9th November, however, the defender wrote a letter to the pursuer, in which he stated that he enclosed a note withdrawing his letter of the 24th October, and containing, *inter alia*, an intimation that an agreement to assign had been completed in accordance with the terms of the lease, and that the defender trusted that the withdrawal of the letter, as he concluded no sale had been effected, would not prove disadvantageous to the pursuer. The enclosed note, which was also dated 9th November 1871, was in the following terms:—"Dear Sir—Tranent Colliery—When at your request I wrote out again the letter at our meeting on the 24th ult. in regard to this colliery, I had not seen the lease, and, like yourself, I was under the impression that, without your consent as landlord, the lessees had no power to make a valid assignment of it in my favour. I have since seen the lease, however, and find that I was mistaken in supposing that your consent, or that of a purchaser of the estate, was necessary. I accordingly hereby withdraw my letter to you of the 24th October last."

These letters were both posted and on their way to Leeds before the pursuer's letter intimating his agreement with Mr Robertson was delivered, and while, as the defender alleged, that letter was still in the hands of the pursuer or his agents, and under his control.

The statement of the pursuer on this point was to the effect that the defender's statements, as to his being under a mistaken impression with respect to the terms of the lease, were a mere pretext, the fact being that a change had taken place in the prospects of coal working. He accordingly intimated to the defender that his withdrawal had arrived too late, as the estate had already been sold under the conditions authorised. The latter adhered to the position assumed in his letter of 9th November, and, accordingly, the pursuer raised the present action of declarator, and for implement by the defender of the obligations alleged to have been undertaken by him by his letter of 24th October; he farther claimed damages, on the ground that, owing to the failure of the defender to implement his said obligations, he (the pursuer) had been prevented fulfilling the obligations come under by him to the purchaser of the estate, in consequence of which he had incurred certain penalties stipulated in the agreement of sale, and other serious responsibilities and injuries.

On 30th January 1873 the Lord Ordinary dismissed the action on the question of relevancy. The pursuer reclaimed to the First Division of the Court, and on 5th June the Court recalled the Lord Ordinary's interlocutor, and remitted to him to allow a proof before answer, reserving all questions of expenses.

A lengthened proof was accordingly led, and on 2d December the Lord Ordinary pronounced the following interlocutor:—"The Lord Ordinary having heard parties' procurators, and considered the closed record, proof adduced, and whole process: Finds, 1st, That when the defender signed the letter of the 24th of October 1871 he was aware that it was the intention of the pursuer to sell the estate of Tranent as soon as he could come to terms with a purchaser, and that the estate might be sold to a purchaser who might require possession of the colliery, and would not deal on any other terms; and that the defender did not stipulate that he should have an opportunity of communicating with the purchaser before the sale was completed: Finds, 2d, That a few days after the letter was signed by the defender he was informed that the lease of the colliery could be assigned without the consent of the landlord, and was advised to withdraw his letter, but declined to do so, and that the letter was not withdrawn until after the pursuer had effected a sale of the estate: Finds, 3d, That relying upon the obligation undertaken by the defender in the letter, the estate was sold on the 7th of November 1871 to a party who required possession of the colliery, and that this was communicated to the defender on the 8th of November 1871 by a letter, in which he was informed that as the purchasers preferred possession, the pursuer had made such terms as would secure to the defender what had been expressed in his letter of the 24th, and that the pursuer considered himself bound to see the defender protected from loss upon his advances: Finds, 4th, That upon receipt of this letter the defender did not make any application to the purchaser with a view to endeavour to come to terms with him for taking on the colliery, nor did he avail himself of an offer made to him by the pursuer by a letter dated on the 11th of November 1871, to apply to the purchaser to that effect on his behalf: Finds, 5th, That the colliery has not since then been worked under any arrangement made between the defender and the purchaser of the estate: Finds, 6th, That the defender has failed to prove that the letter in question was impetrated from him by the pursuer by false and fraudulent representations to the effect that the lease excluded assignees without

the consent of the landlord; or that the letter was written by the defender under essential error, induced by the pursuer, as to the provisions of the lease regarding assignees: Finds, in these circumstances, in point of law, that the defender, upon being paid the advances made by him on account of the said colliery, and relieved of all his liabilities connected therewith, is bound, in so far as he has the power, to transfer to the purchaser the plant of the colliery, and to take such other steps as may be necessary for putting the purchaser in possession of the colliery: Therefore, and to that extent, repels the defences, and decerns and declares in terms of the declaratory conclusion of the summons; and before further answer on this branch of the case, appoints the pursuer to put into process the draft of a transference framed so as to carry out the above findings: And as regards the conclusion for damages, Finds that the pursuer has failed to prove that he has sustained loss and damage as claimed, owing to the failure of the defender to implement his obligation; and reserves in the meantime all questions of expenses."

The defender reclaimed, and argued—"(1) The defender should be assoilzied, in respect that according to the sound construction of the letter of 24th October 1871, the obligations respectively undertaken by the pursuer and defender were expressly made contingent on the event of a sale of the estate taking place and of the defender not being able to come to terms with the purchaser for taking on the colliery, and in respect that under the lease the defender was entitled to take on the colliery without making any terms with the purchaser. (2) On the assumption that the letter of 24th October 1871 bears the construction sought to be put upon it by the pursuer in the summons, the pursuer is not entitled to decree, in respect (1) the said letter was impetrated by the pursuer from the defender upon false and fraudulent representations by the pursuer to the defender, to the effect that the lease excluded assignees without the consent of the landlord, whereas in point of fact it was conceived in favour of assignees; (2) that the said letter was written by the defender under essential error as to the provisions of the lease regarding assignees, and the pursuer, when he prepared that document for the defender's signature, and accepted delivery of it, was aware of the defender's error and did not point it out to the defender; (3) that in either case the pursuer was not entitled to rely upon the defender's letter in making his bargain with the purchaser; and (4) that in respect of the communings between the defender or his partner, on the one hand, and the pursuer or his agents, Mr Duffield and Messrs Macrae & Flett, on the other, which took place between the date of the said letter and the date of the alleged sale to Mr Robertson, any authority to sell which may have been contained in said letter was withdrawn by the defender; and further, the pursuer was not after said communings entitled to rely upon said letter, and was not acting in *bona fide* in transacting with the alleged purchaser on the footing averred in the summons. (3) The defender is entitled to absolvitor, in respect that the pursuer, when bargaining for the sale of the estate did not communicate to the purchaser the defender's letter of 24th October 1871; did not give the defender an opportunity of arranging terms with the purchaser: did not implement the obligations undertaken by him in the said letter; and did not conform to the terms of the said letter."

At advising—

LORD ARDMILLAN—Notwithstanding the extent of the volume before us, this case is by no means complicated, nor does it require any elaborate exposition. In my opinion it depends, first, on the construction of the letter of 24th October 1871, by the defender to the pursuer,—reading that document fairly, and endeavouring to ascertain its true and honest meaning; and, secondly, on the effect of that letter, thus construed, on the relations and the rights of the parties to this action.

I do not think that there is any question of law —or at least of disputed law—raised in this case. Of course I assume the principle of construction applicable to such a letter, as on the admitted facts we have now before us. I take it to be clear law that a letter prepared, composed, and written in draft by the pursuer for the defender's signature, to promote the pursuer's interest, and now produced as the foundation of the pursuer's action, must be construed so as to give effect to its honest meaning, and if there is dubiety, then against the pursuer.

If there is obscurity or dubiety—if, out of the ascertained relation of the parties to each other, viewed in reference to the expressions in the letter, there is evolved some doubt and difficulty in regard to the meaning of the letter, then it must be construed *contra proferentem*, and most especially against the man who composed the letter and selected the expressions. On this point I have no doubt. Whatever difficulty there may be in the case, there is no difficulty here. It is according to the well recognised principles of equity that no man entering into a transaction with another shall compose a letter for the other party's signature—shall select his own language and hide his meaning in obscurity—and then produce that letter in Court, and endeavour, by ingenious construction of indefinite or dubious terms to elicit a meaning which he did not think fit plainly to express.

The letter which is the foundation of this action was written under the following circumstances:—The Tranent Colliery, then the property of the pursuer Mr Tennant, was in April 1870 let to certain persons, Snowdoune, Stevenson, and others, for nineteen years from Candlemas 1870, at the fixed rent of £600, with an option to the landlord of certain lordships. This lease is granted to the tenants, their heirs and assignees. There is no doubt that in law, and according to the knowledge both of the landlord and his agents, and probably some of the tenants, the lease was assignable without consent of the landlord.

The defender Mr Fyfe, who resides near Leeds, became security for the rent for the first three years of this lease. He was not a tenant, but was to a limited extent cautioner for the tenants. It appears from the documents and proof before us that Mr Fyfe was called on to pay, and did pay as cautioner, certain sums to account of the rent; and after some negotiation an agreement was entered into in September 1871, by which the tenants engaged to retire from the Tranent Coal Company, and to assign the lease and their respective interests therein to the defender Mr Fyfe. In this agreement it is by clause sixth declared, that in the event of the landlord not consenting to relieve the cedents of their obligation under the lease the agreement shall be null and void. But that condition, only introduced into an agreement betwixt the tenants and Mr Fyfe, has no force or effect in a question between Mr Fyfe and the landlord.

The agreement is entirely between the lessees and Mr Fyfe, their cautioner. It contains an obligation to assign—it is indeed equivalent to assignation—and the assignation was effectual, because the lease was assignable without consent of the landlord.

Now the sixth clause of this agreement, on which in the argument at the bar the landlord founds strongly, was not introduced for his benefit or his protection. He was no party to that agreemen, and had no right under that clause. It was a condition only between the cedents and the assignee. It was absolutely and entirely between themselves. It could be cancelled at any time by them, and it was cancelled. But further than that, and apart from any cancelling, the condition could only be pleaded or enforced by the parties to that agreement, and it never was so pleaded. The landlord was no party to the agreement. As in a question with the landlord, the tenants never surrendered their right to assign. As at the date of this agreement, in September 1871, and up to the date of the letter of 24th October 1871, the tenants retained without surrender or qualification their undoubted legal right to assign the lease without the landlord's consent, and the communicated right of the assignee was equally clear. The pursuer had no right whatever to prevent assignation apart from this agreement, and he acquired no right under the agreement. No *jus quæsitum tertio* in his favour was created by this agreement. That is quite out of the question. Some such plea was suggested in the beginning of the argument; but I think it was not maintained by the Solicitor-General, and I am clearly of opinion that it has no foundation whatever. The lease remained, up to the date of the letter of 24th October, with eighteen years of currency before it, and it remained assignable without the landlord's consent, and it was assigned.

This being the actual position and relation of the parties, it is obvious that if either party believed that the landlord's consent to assignation of the lease was indispensable, and believed that the landlord could prevent assignation, that was a serious error, and an error in an essential matter. If both parties laboured under that erroneous belief, then, as the Lord Advocate contended, there was a mutual error in an essential matter. If the letter of 24th October 1871 was written by the pursuer and subscribed by the defender under such mutual and essential error, then it would be free from the imputation of unfairness, and would be quite innocent, but it would lack the element of intelligent consent, and it could not be enforced.

If, on the other hand, Mr Fyfe was really and honestly under the belief that the lease was not assignable without the landlord's consent—if he believed that the landlord could withhold his consent and render an assignation null and void—then Mr Fyfe certainly was under a serious and essential error in regard to his legal rights, and in regard to his true position, and his signature to the letter of 24th October was given under essential error. Then, if the pursuer knew that the lease was assignable without his consent, and knew at the same time that the defender believed and was acting on the contrary and erroneous belief—and if, in this state of their respective knowledge, the pursuer wrote for the defender's signature this letter, selecting the terms in which he chose to express it, that fact must materially influence the Court in construing and enforcing the letter. In ascertaining the true meaning of the letter we must have regard to these facts. Now, after very careful perusal of the whole of this correspondence and proof, on the details of which I do not now propose to enter, I am clearly of opinion, 1st, That the pursuer did know that the lease was assignable without his consent; 2dly, That Mr Fyfe did not know that fact, but believed the contrary, and thought himself "entirely in the power" of the pursuer; and 3dly, That the pursuer knew before and on the date of the letter of 24th October that Mr Fyfe erroneously thought that he was in the pursuer's power, and erroneously believed that the lease was not assignable without the pursuer's consent. I am also quite satisfied that out of the agreement betwixt the lessees and Mr Fyfe no *jus quæsitum tertio* arose to the pursuer. I further think that the pursuer, having an interest in terminating the lease, and desiring to do so, is proved to have contemplated various proceedings for getting rid of Mr Fyfe's right as assignee by pressure on Mr Fyfe as in the landlord's power, and even by driving to bankruptcy one of the original tenants, Snowdoune, for whom Fyfe was cautioner. The letters between the pursuer and his agents, and the admissions of both as witnesses, leave no doubt of this in my mind.

I do not desire to dispose of this case on the ground of fraud. But in construing the letter we must not forget the history of the case. Now, at the close or outcome of the history up to this point, it appears that in this position of matters the letter founded on was written by the pursuer, and subscribed at his request by the defender. The object of it is explained by both parties to have been to enable the pursuer to sell the estate, just as if the colliery was unlet. The pursuer wished to do so, and Mr Fyfe believed that he could not prevent it. Coals had risen in the market, and were continuing to rise, and the pursuer, dealing with a man who erroneously believed that he was not in right of the lease as assignee, but was "entirely in the hands of the landlord," selected the expressions in the following letter:—"*Leeds, 24th October* 1871. Robt. Tennant, Esq.—Dear Sir—In the event of your selling the Tranent estate, and my not being able to come to terms with the purchaser for taking on the colliery, I shall feel obliged by your making it a condition on the sale that I am to be paid by the purchaser all my advances on account of the colliery, which amount to about £1800, and to relieve me from liabilities I am under in colliery affairs—I, of course, transferring to them, so far as I have power, all the plant of the colliery, and taking such other steps for putting them in possession of the colliery as they may desire.—I am, yours respectfully—(Signed) James Fyfe."

It must occur to any one knowing the facts which I have now stated, and then perusing this letter, that some dexterity has been used in framing the expressions, and that the position of Mr Fyfe, as assignee, does not appear. The word "assign" is not in the letter, nor any equivalent word. The word is, I think, advisedly and dexterously left out of view. To introduce it would have informed Mr Fyfe that he was really assignee. In point of fact he was; but the pursuer knew that Mr Fyfe believed the contrary. Even the word "lease" does not occur in the letter. The pursuer has more than once said that the defender's interest in the lease was only that of

"an unsecured creditor." He states on record that his consent to assignation has never been given; and the argument of the Solicitor-General was, that unless given by the acceptance of this letter, no consent to assignation was ever given by the pursuer. But in this letter, signed only by defender though written by the pursuer, there is and can be no consent, and no obligation to consent, and there is no recognition whatever of the defender's position as assignee. The lease itself, though eighteen years were yet to run, is never mentioned in the letter.

Yet now it is maintained in this action that the defender is by this letter bound to assign the lease, and all right, title, and interest which the defender can claim in the colliery. The conclusion of the summons is, that the defender be decerned to execute and deliver a valid and sufficient assignation of all right, title, and interest which he has or can claim in or to the lease of the colliery, the said assignation containing all clauses usual and necessary for putting the pursuer in place of the defender.

Such obligation to assign is rested entirely on the terms of this letter. The pursuer has no other claim to such assignation. Now, as I have already said, the letter must be read in the light afforded by the ascertained position and relations at the date of the letter of the pursuer, who composed, and the defender, who signed it; and if there is any dubiety, it must be construed *contra proferentem*, and interpreted against the party who was the author of the dubious language. So reading it, I am of opinion that, according to the honest interpretation of the letter, it does not express or imply an obligation on the part of the defender to surrender his right as holder of a valid and effectual assignation. If that was not the meaning which the pursuer meant the defender to put on it at the time when he signed it, then it cannot be honestly suggested as the true meaning of the letter. (See opinion of Lord Campbell in *Mowatt* v. *Lord Londesborough*, 23 L. J., Q. B. 177 and 184.) On the other hand, if that is what the pursuer meant when he composed that letter, then he, knowing that the defender was in error on the subject, should have explained his meaning clearly, and expressed the obligation in plain words. The pursuer, knowing that he had not the power to withhold consent to assignation, and knowing also that the defender believed erroneously that the pursuer had such power, and could ruin him by exercising it, I hold that the pursuer could not equitably or honestly, and therefore could not lawfully, use that supposed power to enforce terms on the defender. Still more clear is it to my mind that the pursuer could not legally select and adjust the language of a letter written by himself so as to make it susceptible of a construction which he did not venture to express, and which he knew the defender would not have accepted.

On these grounds, I am of opinion that the pursuer cannot succeed in this action. The obligation of Mr Fyfe to transfer his right as assignee of the lease is not expressed, and cannot be implied.

But the pursuer makes a further demand. He desires to enforce the alleged obligation in the letter without having fulfilled the conditions which the letter contains.

If the letter is to be enforced, it must, in the circumstances which have been explained, be enforced according to its terms, and these terms read strictly against the pursuer. Whatever obligation the defender undertook by that letter was on the footing, 1st, that he should have an opportunity of coming to terms with the purchaser for taking on the colliery, and 2dly, that payment by the purchaser of his advances, amounting to £1800, and relief from liabilities in the colliery affairs, should be made "a condition on the sale."

I do not dwell, nor do I wish to rely, on the defender's plea, which, however, is not without force, that the meaning of the letter is, that an opportunity of coming to terms with the purchaser should be afforded Mr Fyfe prior to the completion of the sale. At all events, the defender was entitled at some time to such an opportunity, and entitled to make such terms as he could with the purchaser, on the footing of its being made by the pursuer a condition of the sale that the purchaser should pay the defender's advances to the amount of £1800, and should relieve the defender of his liabilities in regard to the colliery. These conditions are, I think, expressed in the letter, and the pursuer cannot enforce the obligation, if an obligation there be, without fulfilling them. The defender was entitled to insist on them. The pursuer was bound to fulfil them. The pursuer certainly has not fulfilled them. He has not given the defender an opportunity of making terms with a purchaser, on whom he, the pursuer, had laid the obligation as a 'condition of sale" that he should pay the defender his advances and relieve him of his liabilities. There is no such condition on the sale as was stipulated in the letter. Yet the insertion of such condition on the sale was itself a condition precedent of any obligation undertaken by the defender in the letter. It is no answer to this to say that the pursuer would guarantee the payment and the relief from liability. It is not even an answer for the pursuer to say now that he will procure the concurrence of the purchaser. The pursuer is here demanding, as I think, an enforcement of the letter contrary to the honesty and equity of the transaction, and he cannot complain if the law of conditional obligation be strictly applied to his demand. He has not fulfilled the conditions which are precedent to the defender's obligation, and according to law he cannot enforce that obligation.

Therefore, 1st, on the ground of error in the one party, known to the other and lying at the root of the transaction; 2dly, on the equitable construction of a letter for the language of which the pursuer is himself responsible; and 3dly, on the separate and special ground that the expressed conditions of the letter qualifying and preceding any obligation by the defender have not been fulfilled by the pursuer, I am of opinion that we ought to recal the Lord Ordinary's interlocutor and assoilzie the defender from the conclusions of the action.

Lord President—I concur entirely in the result at which my brother Lord Ardmillan has arrived, and very much also in the grounds of judgment which he has assigned.

When this case originally came before us it was upon a reclaiming note against an interlocutor of the Lord Ordinary, by which he dismissed the action, finding that the allegations of the pursuer were not relevant and sufficient to support the conclusions of the summons. And his Lordship then expressed an opinion that the terms of the letter. upon which the whole case depends, although not

very clearly worded, appeared to bear distinctly "to have been written on the understanding that the defender was to have an opportunity of endeavouring to make his own arrangment with the purchaser for carrying on the colliery after or at the time of the sale, as it was only in the event of the defender not being able to come to terms with the purchaser for taking on the colliery that he requested the pursuer to stipulate that he should be paid his advances and relieved of his liabilities upon transferring to the purchaser his interest in the colliery; and such being in the opinion of the Lord Ordinary the fair import of the letter, it was, he conceives, the duty of the pursuer to have secured for the defender an opportunity of making his own terms with the purchaser if he intended to endeavour to enforce obligations which were contingent upon such an opportunity being afforded; or, if the intended purchaser declined to accede to this, the pursuer ought to have at once intimated the declinature to the defender, in order that he might consider what course it would then be prudent for him to adopt in the matter. But it is not alleged by the pursuer that he ever proposed to the purchaser to give the defender an opportunity of entering into negotiations on the subject, or ever communicated to him the terms of the defender's letter. At that stage of the cause I felt very much inclined to construe this letter as the Lord Ordinary did, but at the same time I was very willing to concur with all your Lordships in allowing a proof before answer, because the letter itself, being upon the face of it a somewhat ambiguous document, I thought an investigation of the whole circumstances of the case would enable us in the end to pronounce a more satisfactory judgment. In construing the letter, therefore, we have now the benefit of a very complete and satisfactory investigation into the circumstances in which both the parties stood at that time—the pursuer, on the one hand, as the landlord of this colliery, and the defender, on the other, as being under very considerable liabilities arising out of his cautionary obligation for payment of the first three years' rent of the colliery by the lessees. The lease was for nineteen years from Candlemas 1870, and the fixed rent was £600; so that the liability with which the defender started was a liability for £1800 in all. But being under this liability, he was induced by the lessees,—perhaps through friendship for them, perhaps also in the expectation that he might thereby extricate himself from his liability for the rents, he had advanced money to these parties to enable them to carry on the colliery, and by the end of the year 1871 he was in advance to a very considerable extent. The lessees, or at least three of the four lessees, had agreed by a minute of agreement, which is dated 23d September 1871, to give him an obligation to assign their interest in the colliery, and the fourth lessee, James Snowdowne junior, had become a party to that agreement to the effect of consenting to the arrangement. And the effect of it was that by its being carried into execution by the assignation which was undertaken to be given, Mr Fyfe and Mr Snowdowne would have been joint-lessees of the colliery,—Mr Fyfe to the extent of three-fourths, and Mr Snowdowne to the extent of one-fourth. But there was a clause introduced into that agreement which, I think, led to a good deal of misunderstanding on the part of Mr Fyfe. The 6th clause was, that in the event of the said Robert Tennant not consenting to relieve the said first-mentioned parties of their obligations under said leases, the agreement shall become null and void. Now, if this consent of Mr Tennant had been confined entirely to what is here expressed, and if Mr Fyfe had known that Mr Tennant's consent was not necessary for any other purpose than to relieve the cedents, or proposed cedents, of their obligations under the lease, I believe that this dispute and difficulty never would have arisen. But most unfortunately, as I think, it has turned out that Mr Fyfe was under an erroneous impression in this respect. He believed that the lease, which I suppose he had never seen, was not assignable, and therefore he conceived that Mr Tennant's consent was necessary, not merely to relieve the parties who were going out of the colliery from their obligations under the lease, but that his consent was also necessary to the making of an assignation of that lease at all. On the other hand, I think it is very clearly proved that Mr Tennant, the landlord, was quite aware and quite alive to the fact that the lease was conceived in favour of assignees. and that his consent was not necessary to the carrying through of the arrangement between the lessees and Mr Fyfe unless the lessees insisted upon the 6th article of the agreement,—that there should be an obligation by Mr Tennant to relieve them of their liabilities under the lease. Further, I think that Mr Tennant in his conferences with the defender became aware—whether he had been so originally or not, he must have become aware from Mr Fyfe's conversations—that Mr Fyfe was labouring under that erroneous impression. The evidence leaves no doubt in my mind upon that point, and while the pursuer was aware of the erroneous impression on the mind of Mr Fyfe. he himself was fully alive to the true nature of Mr Fyfe's position, and of his rights and powers. In the 4th article of the condescendence he says "At the date of the said letter, and subsequently, the said James Fyfe had full power to effect a transfer of the plant, and to procure possession of the colliery for a purchaser. He had, by agreement with Messrs Stevenson, Ressich & Russell, and to which the said James Snowdowne junior was also a consenting party, obtained right to their whole interests in the colliery lease. He also had it in his power to control the said James Snowdowne junior, who was unable to carry on the colliery without his assistance." Now, the importance of these facts, in dealing with this letter, must be very obvious. According to Mr Tennant's allegation, and according to the state of his knowledge at the time, he was dealing with a party who he knew had power to assign the lease. Is it possible to say that Mr Fyfe was in that knowledge, or had the least notion that he had the power to assign the lease? The whole evidence in the cause, parole and documentary, negatives any such supposition. Instead of Mr Fyfe believing that he had power to assign the lease, he was from the beginning to the end of these negotiations under the distinct impression that he was entirely in the power of the pursuer—that he had no rights and no powers at all, and that it depended very much on the pursuer whether he was ever to get out of his liabilities in connection with it. And now this letter, written by a party in that state of knowledge, and taken from him by a party in the full knowledge of the true state of the facts and of the rights of parties, is sought to be enforced as an obligation to grant an assignation of that lease. That is to

say, its terms are so to be construed as to import an obligation upon the part of Mr Fyfe to grant an assignation of the lease, when while he wrote that letter he was under the impression that he had no right or power of the kind. I don't think, in these circumstances, even if the letter were capable of the interpretation which is thus sought to be put upon it, that the pursuer could in good faith enforce it to that effect. But still the proper question here is, whether that is the meaning of the letter as granted by Mr Fyfe in his then state of knowledge and belief, to the pursuer. There is no doubt that at this time the defender Mr Fyfe was very willing to have taken up the colliery and to have carried it on, and taken his own risk to the extent of three-fourths of the concern; and his object in consenting to write this letter was that he might if possible get into the position of a lessee with the purchaser to whom Mr Tennant might sell the estate. And accordingly, the very first thing that occurs on reading this letter is the suggestion of the idea that he may be able to come to terms with the purchaser for taking on the colliery. Suppose he had written that letter himself, it would have been certainly a very important observation that this is put foremost as the first idea in his mind in connection with the subject with which he is dealing. And that the letter was composed by the pursuer does not take away from the force of that observation. It only shows that the pursuer was well aware of that desire on the part of Mr Fyfe, and therefore put into his mouth the expression of that desire. His object is to come to terms with the purchaser for taking on the colliery; and what does he do? Or what does he authorise to be done in consequence of this desire? "I should feel obliged by your making it a condition of the sale that I am to be paid by the purchaser all my advances on account of the colliery, which amount to about £1800, and to relieve me from liabilities I am under for the colliery affairs—I, of course, transferring to them so far as I have the power all the plant of the colliery, and take such other steps for putting them into possession of the colliery as they may desire." That was at the very outset an authority or mandate given to the pursuer in dealing with a purchaser of the estate. There is not in this letter any obligation undertaken by Mr Fyfe to be performed to the pursuer. There is nothing of the kind from beginning to end; and there is not any obligation undertaken by the pursuer to the defender. All that it contains is a request—but a request which I admit may be construed into a mandate or authority—that in making a sale of the estate such and such things may be done by the pursuer for behoof of the defender. Now, to say the least of it, this is a letter which, if the pursuer is to found upon it, and particularly is to found upon it as containing obligations undertaken by the defender, he must show that he has acted strictly according to its terms. He must show, before he can ask that the defender shall transfer to the purchaser the plant, and take steps for putting him in possession of the colliery, that he (the pursuer) has fulfilled the conditions upon which alone he can possibly ask that to be done. Now, has he done so? Certainly not. He has not fulfilled any of the conditions undertaken in that letter. That is matter of the most clear and distinct evidence. The agreement of sale between the pursuer and Mr Robertson, the purchaser, contains these two clauses,—the 4th and 5th, "Fourth the said first party (*i.e.* Mr Tennant, the seller) shall do what is necessary to put an end to the present leases of the colliery, first held by James Snowdowne junior, and others, so as to give the second party possession of the subjects thereby let at the term of Martinmas next, or as soon thereafter as practicable, but in the event of its being found impracticable to accomplish this by said term, the second party shall be entitled to an allowance from the first party at the rate of £100 per month for the time that shall elapse from said term until possession is given, as well as any excess of lordship above fixed rent of £600—the seller, on the other hand, having right to said £600 until possession is given. Fifth, the second party, as purchaser of the said estate, shall be bound to purchase the whole machinery, horses, and waggons of every description, and plant of every description at the colliery, or on the lands, or at harbour belonging to the present tenants of the colliery, at valuation by parties mutually chosen or oversman to be named by them in case they differ in opinion; and the first party shall be bound to procure and sell the same to the said second party." Now there is not a word there about Mr Fyfe or his interests, or his obligations or liabilities; and in the evidence of Mr Robertson, the purchaser, we have again a very clear and distinct statement to this effect—"Mr Tennant, Mr Flett, Mr Miller, and I, were present at the meeting when the sale was agreed to. I remember Mr Tennant taking a document out of his pocket at that meeting. He mentioned that he thought he had got everything right now with the coal tenants, that they had agreed to go out, that he had seen the gentleman who lived near his own place, and that the letter which he produced was from him, authorising Mr Tennant to take his place. I did not wish to have anything to do with that gentleman. It was pressed upon me a little that I should, but I declined. I did not wish even to take the plant at a valuation. I stipulated for possession of the colliery, Mr Tennant taking Mr Fyfe and the tenants into his own hands. I threw the whole responsibility upon him." About what the pursuer did, therefore, in selling the estate, to secure to Mr Fyfe what he had stipulated for in that letter, there can be no doubt he did nothing. Now it was certainly the basis of the whole arrangement that was contemplated in the letter of 24th October that Mr Tennant should make it a condition of the sale that the purchaser should become liable to relieve Mr Fyfe of his whole liabilities and losses, and, on the other hand, it was likewise clearly a condition that he should give Mr Fyfe an opportunity of coming to terms with the purchaser, if possible, to take on the colliery. It appears to me that the advantage stipulated to Mr Fyfe was not by any means a small or unimportant one. I think he would have approached the purchaser in this way—"I am in possession of this colliery under an arrangement with the lessees, because I have advanced money for them, and you are taken bound to pay me out that money and to relieve me of all liabilities connected with this colliery, past, present, or future, and that I am entitled to demand as the condition of my giving up to you any right I may have. Now, it will be for your consideration whether it would not be much better for you to come to terms with me, and allow me to become the lessee of this colliery and carry it on." Such

would have been the alternative which Mr Fyfe would have been in a position to present to the pursuer. He is completely deprived of that opportunity. It was suggested indeed by the pursuer's counsel that the pursuer might have cheated him out of that opportunity in a different way, by making a private arrangement with the purchaser that he, Mr Tennant, should relieve the purchaser of that obligation to pay £1800 and the relief of liabilities. I do not think that is a good argument in the pursuer's mouth. I think he would not have been entitled, acting upon this letter, to have made such an arrangement as that, because I think it would not have been a fair carrying out of the arrangement embodied in this letter, that arrangement being, as I said before, that Mr Fyfe should be in a position of presenting this alternative to the purchaser—"Either you must pay a large sum of money and incur a very heavy liability, or you must let me go on and work this colliery." Now, it appears to me that the entire failure of the pursuer to do what is undertaken here as the condition of Mr Fyfe transferring his interest to the purchaser deprives him of all right to raise action upon this letter. In so far as it can be construed into a contract or agreement between the pursuer and the defender, which the pursuer wishes to make it, there is an entire breach of contract on the part of the pursuer—that is to say, an entire failure to fulfil the conditions upon which alone Mr Fyfe was bound to do anything. On the other hand, I think that, properly construed, there are no correlative rights and obligations under this letter between the pursuer and the defender at all. If this ever was to come into operation, it was to be by means of an agreement made in the contract of sale, by which the purchaser and Mr Fyfe would have been brought together to deal with one another. I am therefore clearly of the opinion which the Lord Ordinary originally entertained in this case, and my opinion has become a great deal more clear after reading the evidence than it was when we had the record and nothing else; and therefore I am a little surprised, I must say, that the Lord Ordinary should have arrived at an opposite construction of this letter to what he adopted before he had heard the evidence.

One other argument was maintained upon the part of Mr Tennant, to which it is desirable to advert before concluding. He says that so long as Mr Fyfe is completely relieved of all his liabilities by anybody, he has nothing to complain of; and he says, "I am willing to take upon me all those obligations which I undertook to lay upon the purchaser, and if he gets these obligations duly fulfilled to him he is bound, on the other hand, to do what he undertook by this letter." Now, I think that is an entire mistake in regard to the construction of the letter, for reasons which I have already assigned. There is no obligation by Mr Fyfe to Mr Tennant. The only obligation that he ever undertook, or ever dreamt of undertaking, was an obligation to the purchaser—an obligation that never could be created by this letter, but which Mr Tennant, as the seller of the estate, was entitled under the authority of this letter to create in the contract of sale. And therefore I don't think that the defender is by any means bound to accept as an equivalent for that which he was to obtain, the obligation of the pursuer, or even the payment of money by the pursuer. This letter, I think, in the circumstances in which it was written must be subjected to strict construction; and, construing it in that way, I can arrive at no other conclusion than that it does by no means justify the demand contained in this summons. The position of Mr Fyfe now is undoubtedly a much more favourable one than he believed he was placed in when he wrote that letter; and that is very fortunate for him. But that is no reason why he should be made to perform an obligation which he never intended to undertake, and which upon the terms of this letter I think he has not undertaken.

Lord Deas—This case has been very fully discussed at the bar, as it deserved to be. I find upon my papers a very full and ample record of the whole argument. I have read the whole papers before us very carefully, and I was quite prepared to give my opinion and reasons for my opinion, if that had been necessary. But upon listening to the carefully prepared written opinion of Lord Ardmillan, and to the supplementary observations of your Lordship, I so entirely concur, not only in the result, but in all these observations, that I should only be repeating them if I were to go at any length into the grounds upon which I arrive at the same conclusion. I can have no doubt at all that, in the circumstances, this letter of 24th October 1871 must be construed strictly in so far as it is said to import upon the part of Mr Fyfe the obligations of which implement is here demanded, and I agree with your Lordship that when so construed it does not import the obligations which are sought to be enforced. I have only to make this additional remark, that supposing the letter could admit of a different construction, and one more favourable to the pursuer, I should then hesitate, to say the least of it, very much before I would not come to the conclusion that the letter was to be held ineffectual in respect of essential error induced by the pursuer. I don't say that essential error which is not induced by the pursuer would do; but there can be no doubt, in point of law, that essential error induced by the pursuer would be sufficient. That Mr Fyfe was under essential error, however induced, there can be no doubt at all; and that the pursuer had the full means, if he had chosen, of relieving him of that error is equally undoubted. It may be said that Mr Fyfe ought to have known that the lease was assignable. He had become cautioner in the lease. But the fact is that he did not know, and the fact is also clear, as your Lordships have pointed out, that the pursuer did know. He did know that the lease was assignable; he did know that the defender was under that error, and he did not undeceive him in regard to that error. All that is clear. The only difficulty or hesitation there would be, is whether there was upon the pursuer in that state of matters any duty of disclosure—whether he was entitled to hold his tongue. I think that a very nice question in point of law; but if it were necessary to go into it, I should rather be inclined to think that there was enough here to have laid upon the pursuer the obligation of undeceiving Mr Fyfe in regard to that error. It was not a bargain entered into upon equal terms. It was not like the purchase of an estate for a full price. Mr Fyfe had come into this concern by being cautioner for the lessee. That had brought him into a position of embarrassment. But the state of the coal market had changed. It was a

rising market. That was very plainly known to the pursuer, whether it was known to Mr Fyfe or not. At the time it would have been very much to Mr Fyfe's advantage if he had known that the lease was assignable, to take and stand by his assignation. And it was a great advantage for the pursuer to get rid of the lease. It put him in a far better position in selling the estate. It enabled him, as we see on the face of the minute of sale, to get much better terms from the purchaser—to get a much larger price; because it is stipulated in the minute of sale that until he should put the purchaser in possession of that colliery in his own right, either as assignee to the lease,—and then he would have been both landlord and tenant,—or by the renunciation of the lease,—until that should be done he bound himself to pay to the purchaser £100 a month; in other words, that is, to double the fixed rent, which was £600,—to pay at the rate of £600 a-year to the purchaser until that could be accomplished. There is no room therefore for doubt about the advantage which the pursuer was gaining, and no doubt about the advantage which Mr Fyfe was throwing away in making that bargain. All that was perfectly well known to the pursuer. It cannot be said to have been altogether gratuitous on the part of Mr Fyfe. On the other hand, he certainly was not getting a *quid pro quo* of anything like the value of that which he was giving up. It was an agreement between these two parties in the capacity of landlord and tenant. Mr Fyfe had got an obligation from these other lessees to give him an assignation, and, as your Lordship has well pointed out, the pursuer was proceeding on the footing that there was a perfect right on the part of Mr Fyfe to get that assignation. In that state of matters, and with that bargain between the landlord and the tenant, I rather incline to think that the pursuer was not entitled in point of law, as he certainly was not entitled in point of good faith, to take advantage of that error, under which he saw that Mr Fyfe laboured. I incline to think that he was bound to undeceive him; and if he was bound to undeceive him, then there can be no doubt that the essential error under which Mr Fyfe laboured was induced by the pursuer. I agree with your Lordships that in the way your Lordships have construed the document the result would be that in respect of essential error, induced by the pursuer, that document could not be enforced.

Lord Jerviswoode—This is a case of very great importance to the parties and to the law. I have listened to what your Lordships have said, and anything I could say might weaken but would not add to the force of your Lordships' observations. I concur in the judgment proposed to be pronounced.

Lord President—Then we recall the interlocutor and assoilzie.

Mr Marshall—And find the defender entitled to expenses.

Mr Lee—Does my learned friend ask the expenses of the reclaiming note against the Lord Ordinary's first interlocutor?

Mr Marshall—I ask expenses from the beginning of the action.

Mr Lee—I ask the expenses of the first reclaiming note.

Lord President—You may make a point on that to the Auditor.

Lord Deas—The Auditor will not allow any expenses to the other party in a matter in which they were unsuccessful.

Mr Lee—The only question is whether the expenses of the first reclaiming note should not be given to the reclaimer?

Lord Deas—Given to you? Explain the ground of that.

Mr Lee—The Lord Ordinary found the action irrelevant; we reclaimed, on the ground that inquiry was desirable, and we were successful in that reclaiming note. We required to come here to get quit of an interlocutor which was admittedly erroneously pronounced at the instigation of the defender, who at first resisted all inquiry; and I submit that the pursuer ought therefore to get the expenses of that reclaiming note.

Lord Deas—I have great doubt about the effect of that, even in the auditing, but that will be for the Auditor.

Lord President—The interlocutor we pronounced on that reclaiming note was not an interlocutor to the wide effect of that which the Lord Ordinary had pronounced. We did not sustain the relevancy. On the contrary we allowed a proof before answer.

Mr Lee—Which was all we asked before the Lord Ordinary.

Lord President—It may be so, but that was a mere matter of expediency in the conduct of the process; and when we reserved by that interlocutor all questions of expenses, it did not mean that the pursuer, even in the event of his being unsuccessful in the end, was to obtain these expenses, because if that had been so we should have awarded them then.

Lord Deas—The substance of it was, that the action was not so clearly irrelevant upon its face but that the facts might show that it might be sustained to some effect; and on the question of expenses on the other side, it comes very near the care of *C.* v. *Small*, in which the whole expenses were given, notwithstanding the failure on one branch of it. It is all caused by the bringing of an action by the pursuer which never should have been brought.

The Court accordingly recalled the interlocutor of the Lord Ordinary, and assoilzied the defender from the conclusion of the action.

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