questions do not seem to have been settled by any decided case, or by any authority of which I am aware, and I desire to reserve my opinion. I think the questions are attended with great difficulty.

Probably it may be proper in the interlocutor about to be pronounced to make it clear that, while the respondent is not entitled to go to arbitration or to claim as tenant under his lease, his whole claims as assignee or implied assignee of his landlord are reserved entire. The nomination of the arbiters is in general terms, and a simple suspension and interdict might possibly be held to exclude him altogether, which of course is not intended.

LORD NEAVES was absent.

The Court pronounced this interlocutor—

"Recal the interlocutor complained of; sustain the reasons of suspension; suspend, prohibit, interdict, and discharge, in terms of the note of suspension and interdict; find the reclaimers entitled to expenses, and remit to the Auditor to tax the same and to report, and decern."

Counsel for Suspenders — Dean of Faculty (Watson)—Balfour—Strachan. Agents—Dalmahoy & Cowan, W.S.

Counsel for Respondent—Fraser—Robertson. Agents—Morton, Neilson, & Smart, W.S.

Thursday, December 2.

FIRST DIVISION.

GILMOUR AND OTHERS (STEUART'S TRS.) *v.* HART.

Contract—Disposition—Essential Error—Restitution.

A entered into a contract of sale of property to B, under burden, as A understood, of a feu-duty of £9, 15s. The disposition omitted mention of the burden, and on proof it was found that in granting it A laboured under essential error, of which fact B was aware.—*Held* (1) that reduction of the disposition and claim for *restitutio in integrum* was competent, and was the proper remedy, and decree given accordingly; and (2) that the remedy of varying the disposition so as to constitute the feu-duty a real burden on the subjects for the future, and ordaining B to pay arrears, was in the circumstances incompetent.

Evidence—Proof by Parole.

Held that parole proof was competent to show the existence of error on the part of A, and of knowledge of the error on the part of B, but not for the purpose of interpreting the contract.

The pursuers of this action were Mr Allan Gilmour of Eaglesham and others, trustees of the deceased John Steuart, writer in Pollokshaws, and the defender was Thomas Hart, mill-manager, Pollokshaws.

The action concluded *inter alia* (1) for reduction of a disposition dated January 1873, by the pursuers to the defender, disponing for the sum of £75 a property known as the Cogan Street property, Pollokshaws, or (2) for a declarator that the defender was bound to free and relieve the pursuers of the sum of £9, 15s. sterling of the *cumulo* feu-duties of £16, 14s. 11½d. sterling, payable from the said subjects, with corresponding casualties, and that the sum of £9, 15s., and corresponding casualties, were real liens and preferable burdens upon the property, and the defender should be decerned to free and relieve the pursuers of the same from Martinmas 1873 inclusive, and for all time coming. And further, that warrant should be granted to have such decree recorded in the appropriate register of Sasines.

Mr Steuart, at his death on 2d February 1871, owned amongst other properties one known as the Cogan Street property, built upon a portion of the Printfield Lands, situated in Pollokshaws, belonging to Mr Steuart, and held partly of Sir William Stirling Maxwell, and partly of another superior. The feu-duty payable to the former was £13, 14s. 11½d.; of this sum £4 was allocated on some portion of the lands not belonging to Mr Steuart, the balance only of £9, 14s. 11½d. having been in use to be paid by him. Mr Steuart's trustees on entering upon the management of his estate, and with a view to the sale of his heritable properties, had these valued by Mr Thomas Binnie, land valuator in Glasgow, and their agents in a letter to Mr Binnie, dated 9th February 1871, informed him that Mr Walter Steuart, agent of the City of Glasgow Bank, Pollokshaws, and the testator's brother, and Mr Brown, the late Mr Steuart's managing clerk, would furnish him with any assistance he might require. Mr Brown at the time of this action carried on business as a writer in Pollokshaws, and was the sole partner in the firm of John Stewart & Brown, and was the defender's law agent. A rental was sent to Mr Binnie by Mr Brown, in which, after a statement of the rents of the Cogan Street property, there was this note—"feu-duty, £9, 14s. 11½d., Sir W. Maxwell, Bart.;" and it was upon the footing that the property was burdened with this feu-duty that it was accordingly valued by Mr Binnie at £111, 18s. 4d.

The property in question was afterwards extensively advertised for sale, and was exposed three times without there being any offerer. The Cogan Street property alone was put up at the first exposure; but at the two subsequent exposures, the other portions of the Printfield Lands, which were in the trustees' keeping, were also included. The first advertisement was in the following terms:—"To be sold by public roup, upon Wednesday, the 1st of May 1872, within the Faculty Hall, St George's Place, Glasgow (unless previously disposed of by private bargain), all and whole, that plot of ground lying on the south-west side of Cogan Street, Pollokshaws, containing 1 rood, 5½ poles, or thereby, and adjoining Messrs Lochart & Arthur's pottery. Feu-duty, £9, 15s. The situation is very suitable for the erection of workmen's houses."

The second advertisement was in the following terms:—"Properties in New Street and Cogan Street, Pollokshaws. To be sold by public roup, within the Faculty Hall, St George's Place, Glasgow, on Wednesday, 11th September 1872, at 2 p.m. (unless previously disposed of by private bargain):—

"1. That plot of ground fronting New Street (off Cogan Street), Pollokshaws, extending to 2 roods 18 6-10ths poles, with the four tenements of working-men's houses erected thereon. Rental, £237, 3s. 2d. Feu-duty, nominal. Upset price, £2,900.

"2. That plot of ground lying on the south-west side of Cogan Street, Pollokshaws, containing 1 rood 5 5-10ths poles, or thereby, and adjoining Messrs Lochart & Arthur's pottery. Feu-duty, £9, 15s. The situation is very suitable for the erection of workmen's houses.

"For further particulars apply to Walter Steuart, City of Glasgow Bank, Pollokshaws; or to W. J. B. & J. Kidston, 50 West Regent Street, Glasgow, who will exhibit the titles and articles of roup."

The third advertisement, which had reference to the exposure to sale on 25th September 1872, was in precisely similar terms with the second above quoted. A hand-bill in the same terms was also extensively posted in Pollokshaws.

On 4th December 1872 the pursuers' factor, the said Walter Steuart, received from John Steuart & Brown an offer in the following terms:—

4th December 1872.

"Dear Sir—We have been instructed by Mr Thomas Hart, mill-manager, to offer the trustees of your late brother the sum of £75 sterling for the old property in Cogan Street of this place, *lately advertised by them for sale*, on condition that the duplication of the feu-duty does not become payable until the year 1879. The entry to be at the date of the disposition, and the price to be paid as soon as the deed is signed, the expense of which is to be paid mutually. With regard to the duplication, we may remark that before making this offer we applied to Messrs Kidston, the trustees' agents, for a note of the date when it was payable, and they told us that from the terms of the deeds they thought the first payment was in 1881.

"We should be glad that you submit this offer to the trustees for their consideration, and that you favour us with their determination as soon as possible. Yours truly,

JOHN STEUART & BROWN.

Walter Steuart, Esq., Banker,
Pollokshaws."

This offer was accepted by the pursuers' agents in the following letter:—

"Messrs John Steuart & Brown,
Writers, Pollokshaws.

50 *West Regent Street, Glasgow.*
"12*th December* 1872.

John Steuart's Trust, Cogan Street.

Dear Sirs,—Your letter of the 4th curt. to Mr Walker Steuart has been submitted to the trustees, and we have been authorised to accept the offer therein contained.

We shall be glad that you send for the titles when convenient; and we are yours truly,

W. J. B. & J. KIDSTON."

The pursuers averred that Mr Brown, the defender's agent, had had meetings with Mr Walter Stewart and with the pursuer's agents Messrs W. J. B. & J. Kidston, prior to the date of the offer, and that it was part of the bargain that the property was burdened with a feu-duty of £9, 15s.; that Mr Brown assigned the fact of the feu-duty being so great in amount as a reason for the smallness of the price.

The disposition to Mr Hart was prepared by Steuart and Brown, and revised by the pursuers' agents. There was no subdivision or allocation of feu-duty, and it was alleged by the pursuers that this omission had escaped the notice of their agents.

The following was the clause in the deed which had reference to feu-duties:—"And we bind ourselves as trustees foresaid, and the said trust-estate under our management, to free and relieve the said disponee and his foresaids of all feu-duties, casualties, and public burdens; and in particular, in the event of a duplication of the feu-duty payable for the subjects hereby disponed becoming payable, and notice thereof being sent to us by our said disponee before the term of Martinmas 1879, then we bind and oblige ourselves as trustees foresaid, and the said trust-estate under our management, to make payment of the said duplication to the superiors, or to the said Thomas Hart, or his heirs and successors, and free and relieve the said Thomas Hart and his foresaids thereof." The property then came into the hands of the defender, and upon Mr Steuart the factor calling on Mr Brown for payment of the feu-duty of £9, 15s., it was refused, the defender asserting that he was only liable for a proportionate part of the whole feu-duty payable for the Printfield lands—a merely nominal sum. The pursuers alleged that their object in selling the property, which was reported ruinous and worthless, was to get quit of the feu-duty of £9, 15s, and that Mr Brown knew this.

The defender denied the pursuer's averments, and alleged that it was not contemplated to impose any additional feu-duty upon the subjects to that originally imposed by the titles, when there was no allocation such as was now proposed.

The pursuers offered to cancel the sale, which was declined, and in the record expressed themselves willing to further reimburse the defender as follows:—The pursuers are willing, and hereby offer, on the said subjects being restored to them, to reimburse the defender of his said expenditure, but that only provided it be found that the enhanced value of the property arising therefrom is equal to the amount of the sums expended; and if it does not reach that amount, then the pursuers offer to pay to him the amount of such enhanced value, all as the same may be ascertained, in such manner as may be agreed upon by the parties, or failing such agreement, as may be judicially ascertained in the course of the present process, reserving to the pursuers, in the event of the above offer not being immediately accepted, to maintain their right to have the property restored to them without any payment in respect of the foresaid alleged expenditure.

The defender pleaded, *inter alia*—"(1) The pursuers have not set forth facts relevant or sufficient to warrant the conclusions of the action, and the same should be dismissed with expenses. (2) There being no good grounds either in fact or law for setting aside the disposition sought to be reduced, or to entitle the pursuer to decree in terms of the alternative conclusions of the summons, the defender should be assoilized. (3) The transaction in question having been concluded by formal deed, it is not competent to modify or contradict the same by extrinsic evidence."

The pursuers, on the case coming before the Lord Ordinary, moved for a proof, which was

allowed by the following interlocutor and note, which latter further explains the facts of the case:—

"*Edinburgh*, 22*d February* 1875.—Having considered the cause, repels the third plea in law stated for the defender, and allows the pursuers a proof of their averments, and to the defender a conjunct probation: Appoints the proof to be taken before the Lord Ordinary on a day to be afterwards fixed.

"*Note.*—The defender maintains, in terms of his first and third pleas in law, that the pursuers' statements are not relevant, and that the action should be dismissed; and alternatively, that the transaction in question having been concluded by formal deed, it is not competent to modify or contradict the same by extrinsic evidence.

"In the most favourable view that can be taken of the defender's position he is endeavouring to gain an advantage at the expense of the pursuers, which, to the knowledge of his agent, it was obviously not intended by the pursuers that he should obtain when the contract between the parties was entered into.

"When the negotiations for the purchase of the property in question were in progress, and at the date of the sale, the pursuers were proprietors of several acres of what are known as the Printfield Lands. The Cogan Street property purchased by the defender was part of these lands, but a small part only, for its extent is little more than a rood. The whole of the Printfield Lands belonging to the pursuers were liable to payment of an annual feu-duty of £9, 15s., and a proportional allocation of this sum would give about from 3s. to 4s. as the payment applicable to the Cogan Street property. The payment of the full sum of £9, 15s. appears to have been practically regarded by the pursuers, and their author Mr Steuart, as having been made on account of the Cogan Street property, as appears from their statement, and the rental, which it is said was the basis of a valuation of the different properties made for the pursuers by Mr Binnie of Glasgow.

"The pursuers state that they became desirous of selling the Cogan Street property because of the feu-duty payable on account of it, and as it yielded only a small return it was advertised for sale repeatedly under burden of £9, 15s. of feu-duty. In the same advertisement latterly certain of the pursuers' other Printfield Lands were also exposed for sale, with a statement that the feu-duty was nominal only. No sale having taken place, the defender opened negotiations for a purchase, and employed as his agent Mr Brown, now of the firm of John Steuart and Brown, writers, Pollokshaws, but who had been managing clerk to the late Mr Steuart, the pursuers' author, and who, it is alleged, after Mr Steuart's death furnished Mr Binnie, with a view to his valuation of the Cogan Street property, with a memorandum, in which he stated the feu-duty at £9, 15s. Mr Brown acted for the defender throughout the negotiations, and in the completion of the purchase and of the title, and, as appears from the correspondence, also acted for the defender in correspondence before the action was raised, in which he maintained that he was entitled to retain the property with a right of relief of the whole feu-duty of £9, 15s., except to the extent of 3s. or 4s.

"The case of the pursuers is that the true contract between them and the defender was that the defender should take the Cogan Street property subject to a burden of £9, 15s. of feu-duty, to the effect of relieving the remaining portion of the Printfield Lands belonging to them of any part of that burden. They allege that not only was this their understanding of the agreement entered into, but that the defender's agent, who acted for them throughout the transaction, was fully aware of this, and both in letters and at meetings with the pursuers' agents urged the pursuers' acceptance of a small price for the property because of the burden of £9, 15s., which the defender recognised as affecting the property, and thereby reducing its value, with the effect, of course, of relieving the pursuers' remaining properties of any part of that sum. The letters to which the pursuers specially refer are (1) Mr Brown's letter of 8th October, containing the defender's first offer for the property, in which Mr Brown mentions the subject thus—'The feu-duty for which the subjects are liable being about £37, 10s. an acre,' which is another way of stating the feu-duty at £9, 15s.; and (2) his letter of 4th December 1872, in which the duplication of the feu-duty is referred to in terms which clearly enough show that this was the sum the defender had in view, and not a nominal feu-duty merely. The pursuers allege (Cond. IX.) that their chief object 'in selling the property, which was ruinous and yielding no income, was to get quit of this payment of £9, 15s. of feu-duty, and of this Mr Brown, who negotiated the purchase for the defender, was, at the time of the alleged sale, and at the date of delivery of the disposition to him for the defender, well aware.'

"The defender maintains that the averment of the alleged contract, so far as regards the feu-duty, is not relevant, and that all inquiry is excluded (1) by the fact that he has obtained a disposition of the property in implement of the contract; and (2) because the letters of 4th and 12th December, 1872, being the offer and acceptance for the property, can alone be looked at as evidence of the contract entered into, and that, as the titles give him a right to be relieved of the feu-duty, the pursuers must themselves continue to pay the feu-duty of £9, 15s. (less 3s. or 4s.) as a burden properly affecting their Printfield Lands.

"I am of opinion that these pleas are not well-founded. If the contract really entered into between the parties was that the property purchased by the defender should bear the burden of the whole feu-duty of £9, 15s., to the effect of relieving the remaining lands belonging to the pursuers of any part of it, I do not think that the circumstance that the pursuers' agent omitted to give effect to this by a clause in the disposition in the defender's favour will enable the defender to obtain the advantage which he seeks to gain. The pursuers allege that it was by mistake that the deed did not contain a provision on this subject, and the defender does not allege that at the time when the disposition was granted there was any transaction by which the parties agreed to alter the terms of the contract they had entered into, and the pursuers gave up their right to have the feu-duty made a burden on the Cogan Street property exclusively. If in a contract of sale a seller stipulated that in the conveyance by him

a servitude should be created over the property sold in favour of other property belonging to him, and by mistake it was omitted to insert in the disposition the necessary clause to give effect to this, I cannot suppose the right to have the servitude created would thereby be lost. If it be necessary, in order to correct the mistake which is said to have here occurred, that the disposition granted should be rescinded, the reductive conclusion of the summons would enable the pursuers to rescind the deed, they of course granting another conveyance giving effect to what was the contract between the parties.

"As to the competency of allowing parole proof, it appears to me that the pursuers are not precluded, as the defender pleads, from referring to anything beyond the letters of 4th and 12th December. In the first place, these formed only part of the correspondence, and I think that for the purpose of showing what was the real contract between the parties in regard to the feu-duty or burden in question,—the capitalised value of which is more than three times the price paid for the property,—the pursuers are entitled to have the whole correspondence before the Court, and the advertisements to which the letter of 4th December refers, as well as to prove the circumstances in which the letters were written, and the knowledge which Mr Brown, the defender's agent, had, and the representations made to and by him in the course of the transaction. The Court, in order to reach the true intention of the parties and the real transaction between them, has repeatedly refused to sustain a plea such as that now stated by the defender in seeking to limit the pursuers to the letters of 4th and 12th December.—*Scottish Union Insurance Company* v. *Marquis of Queensberry*, 1842, 1 D. 1284, affirmed 1 Bell's App. 183; *Carricks* v. *Sanders*, 1803, 12 D. 812; *Lindsay* v. *Barncote*, Feb. 19, 1851, 13 D. 718. In the first of these cases Lord Cottenham observed, in language which is, I think, quite applicable to this case,—'If it were not competent for a court of equity to give effect to a transaction different from what the deeds executed represented to be the character of it, one of the most important branches of its jurisdiction would be cut off, and a security would be afforded to frauds which are now easily detected and defeated. The only question is the intention of parties. In ascertaining such intention it is competent for the Court to form its judgment upon the whole transaction, and upon which, *de hors* the deed, such evidence being used not for the purpose of putting a construction upon the deed, but of superadding an equity controlling the estate and interests given by the deed.' And in the case of *Carricks* v. *Sanders* parole evidence was admitted for the purpose of ascertaining the real nature of the transaction and intention of the parties, although letters had passed between them recording the terms of the order or instructions given, and of the execution of the order or instructions by the pursuer of the action. In the case of *Russell* v. *Freen*, 13 S. p. 752, the Court, in ascertaining the true contract between the parties, proceeded to some extent on an advertisement which was not even referred to in the writings which passed between them, and the opinion of Lord Corehouse especially appears to me to be of value in the present question.

"In the present case, assuming evidence to be competent, the parties may obviate the necessity of proof by admissions, but in the meantime even the alleged correspondence stands on the pursuers' statement, and the admissions in reference to Mr Brown's knowledge and actings are given in very limited terms.

"There may be difficulty in determining the particular form of remedy to which the pursuers are entitled, assuming their case to be made out. It appears the defender has made considerable expenditure on the property, and it may be found that restitution is impracticable. The nature of the remedy may, however, to some extent depend on the result of the proof, for if the expenditure was made in the knowledge of the true nature of the contract as alleged by the defender, it cannot, I think, preclude them from obtaining the remedy to which they would otherwise be entitled, or at least from obtaining in some form relief from so much of the feu-duty of £9, 15s. as now affects the properties belonging to them."

The proof was taken, and its import is made clear in the following interlocutor:—

"*Edinburgh, 5th April* 1875.—Having considered the cause, Finds that at the date of the sale of the Cogan Street property mentioned on record by the pursuers to the defender, the pursuers were proprietors of twelve acres or thereby of land, called the Printfield Lands, of which the Cogan Street property formed part, and which were held of the same superior, for payment of a *cumulo* annual feu-duty of £9, 14s. 11½d.: Finds that at that time the pursuers' agents, who had charge of the negotiations and sale, were under the belief that the amount of this feu-duty had been allocated on the Cogan Street property, and that thereby the remaining parts of the Printfield Lands belonging to them, including parts thereof which had been sub-feued, had been freed and relieved of any part of said feu-duty, while in point of fact no such allocation had been made: Finds that in fixing the upset price of said property, when it was offered for sale in terms of the advertisements mentioned on record, and in accepting the price of £75 offered by the defender, the pursuers acted in the belief that the property was burdened with the whole of said feu-duty, and that the purchaser would undertake the sole liability therefor, and have no claim to be relieved of any part thereof against them as proprietors of the remaining Printfield Lands, and that they were induced to accept the price of £75 under that belief; while if they had understood that the property was ultimately liable to a feu-duty of 3s. only, with a right of relief against the Printfield Lands belonging to them for the remainder of the *cumulo* feu-duty, they would not have sold the property without providing for the allocation of the whole feu-duty thereon, or otherwise obtaining a price of £285 or thereby, which was in their view the value of the property if burdened with a nominal feu-duty only: Finds that the defender and his agent at the time of the negotiations for the purchase and the agreement to purchase were fully aware of the essential error under which the pursuer's agents were acting, and concluded the contract with the intention of taking advantage of that error: Finds that the disposition granted by the pursuers in fulfilment of the contract of sale was so granted under the same error on their part, and in the knowledge on the part of the defender

and his agent that they were acting under that error: Finds that the defender, in the same knowledge, made considerable alterations and expenditure on the property, and that consequently *restitutio in integrum* cannot now be given by him: Finds, in point of law, that the contract of sale and disposition following thereon having been respectively entered into and granted under error *in essentialibus* as aforesaid, the pursuers would have been entitled to reduce the said contract and disposition, and to be restored against the same if matters had remained entire and restitution had been practicable; and as the defender, in the knowledge of said error, has by his actings made restitution impracticable, he is bound to implement the contract on the footing on which it was entered into by the pursuers, and the pursuers are entitled to have the said *cumulo* feu-duty made an exclusive burden on the said property: Therefore finds, decerns, and declares, under the second alternative conclusion of the summons, that the defender is bound to free and relieve the pursuers of the sum of £9, 14s. 11½d. sterling, payable from the said subjects and other parts of said Printfield Lands to Sir William Stirling Maxwell, Baronet, of Pollockshaws, the superior of the same, with corresponding casualties, and that the said sum of £9, 14s. 11½d. sterling, and corresponding casualties, are real liens and preferable burdens on the said subjects sold to the defender as aforesaid, and decerns and ordains the defender to free and relieve the pursuers of the same accordingly as from the term of Martinmas 1873 inclusive, and for all time coming thereafter, and grants warrant to the pursuers to record this decree in the appropriate Register of Sasines for publication, or for publication and preservation: Finds the defender liable in expenses, and remits the account thereof, when lodged, to the Auditor to tax and to report. Three words delete.

"*Note.*—It is, I think, impossible to read the proof in this case without coming to the conclusion that the defender is seeking to obtain an unfair advantage in the transaction which he entered into with the pursuers for the purchase of the Cogan Street property. It is plain that the pursuers' agents were under the erroneous belief that the *cumulo* feu-duty payable from the Printfield Lands, which belonged to the late Mr Steuart, had been imposed exclusively on the Cogan Street property, with the effect of relieving the remainder of the lands of any part of it. This belief arose from information which had been communicated after Mr Steuart's death, which occurred in the beginning of 1871, by Mr Brown, afterwards and now the defender's agent, who had been Mr Steuart's managing clerk for some time. A valuation of Mr Steuart's heritable estate was required for Government purposes, and Mr Brown, in communicating the rental and burdens of Mr Steuart's properties to Mr Binnie, the valuator, for the purpose of his valuation, entered the feu-duty, which may be called £9, 15s., as a burden on the Cogan Street property, while the other Printfield Lands were entered as free from any part of it, and it was on this footing that Mr Binnie valued the property at £111, 18s. 4d. In doing so he deducted the value of the feu-duty at twenty-one years' purchase, being £204, 15s. If the feu-duty had been merely nominal, his valuation, which was a guide to the trustees in exposing the property for sale, would have been £315 instead of £111, or nearly three times the amount fixed.

"It is further, I think, clear that the defender and his agent Mr Brown were both aware of the serious error under which the pursuers' agents laboured. It is painful to read their evidence on this subject as to the communications which took place between them in reference to the purchase when the negotiations were going on, for they not only contradict each other, but each of them contradicts himself in the course of the testimony he gave. But of the result there appears to be no doubt. Both of them knew that the sellers, or their agents who represented them in the transaction, were under the erroneous belief, contrary to the fact, that the whole feu-duty had been allocated on the Cogan Street property, and both of them knew that if this were not really so the burden of the great part, if not the whole of the feu-duty, must be borne by the remaining lands belonging to the pursuers. It is, I think, also proved beyond question that the case is not one of mutual error. The defender states distinctly that he believed the feu-duty to be almost nominal, and that the sellers were acting under error, but he thinks it was no duty of his to enlighten them as to their mistake, and that he did nothing wrong in taking advantage of their error if he could. He distinctly states that at the very outset of the negotiations he knew the sellers understood the subjects to be burdened with the gross feu-duty as an exclusive burden on them, but that he had been informed by Mr Brown, his agent, that he would have a right of relief of all except two or three shillings. Mr Brown gives a different account of this. At one part of his evidence he states that he knew there was a substantial claim of relief for a large part of the feu-duty, while at another he states that his letters to the seller's agents were written in the belief that the whole feu-duty was exigible from the Cogan Street subjects without a right of relief. The impression, however, produced on my mind by the evidence, as a whole, is that the first of these statements is the correct one.

"Both parties, that is, the defender and his agent, are agreed, however, that before the disposition was drafted by Mr Brown and sent to the sellers' agents for revisal they were aware that under the titles the proprietor of the Cogan Street property was entitled to relief of all the feu-duty except 3s., and that the claim of relief for the whole or the greater part of the feu-duty was a claim against the pursuers, and before the transaction was completed by the granting of the conveyance; it is thus not even disputed that the defender and his agent knew positively the true state of matters, as well as the fact that the sellers had acted under error.

"The first question that arises in these circumstances is, What were the pursuers' rights if they had discovered the error under which they acted before granting the conveyance to the defender? On that question I am of opinion that they were entitled to resist implement of the contract of sale, and if necessary to set aside the transaction by reduction. If either party to a contract has entered into it under essential error, so that in fact there has never been that *consensus ad idem* which is essential to a concluded agreement, the contract cannot be enforced. Essential error may

exist with reference to the subject, the price or consideration, or in some cases the person with whom the contract is made. In the present case the error, which was a material one, had reference to the price.

"If the converse of the actual circumstances be assumed, I think this becomes clear. Had the sale been entered into by missives specifying a fixed price, and without any reference to feu-duty, but in the belief on the part of the buyer, in consequence of what occurred during the negotiations, that the feu-duty was nominal, whereas the fact was there was really a feu-duty of £10 payable, say, without relief, I cannot doubt that the error would have been *in essentialibus*, and the purchaser would not have been bound to go on with the transaction. Feu-duty is really price, and so much so that in many cases it is the sole price stipulated for. The consideration which in selling the property in question the pursuers had in their minds was, as stated to the defender, that the defender should undertake an annual payment of £9, 15s. and pay down a sum of £75. The undertaking for an annual payment was the more important part of the consideration, for the feu-duty of £9, 15s. at the ordinary rate of twenty-one years' purchase amounts to £204, 15s.

"It is unnecessary to consider whether such an error would have been sufficient to render the contract void if the defender had been entirely in ignorance of the pursuers' real intention and state of mind. The sound rule, when the error is not mutual, necessarily destroying the contract, appears to be that laid down by Lord Wensleydale in *Freeman* v. *Cook*, 2 Exchequer, 654, 'that whatever a man's real intention may be, if he manifests an intention to another party so as to induce that other party to act upon it, he will be estopped in denying that the intention, as manifested, was his real intention'—Benjamin on Sale, p. 326. In the case supposed everything might turn upon what had taken place to manifest the real intention of the sellers; and if the real intention manifested had been to sell the property subject to the feu-duty, without any reference to its amount as it stood in the titles, it may be they would have had no remedy against that error. In the present case the real intention was not only manifest but was known to the other contracting party. It was not even a case of mutual error, in which also the contract would have been void.

"Holding, therefore, that the pursuers might have declined to grant the conveyance to the defender if they had been aware of their error, are they precluded from the remedy which justice requires they should obtain because of having granted that deed, or because the defender has expended a considerable sum of money on the property since his purchase? This question must, I think, be answered in the negative, because the defender obtained the disposition in the knowledge of the essential error under which the sellers sold the property and granted that very deed in his favour. He knew that there had never been that *consensus ad idem* which alone can make a binding contract; but knowing this, and being aware that he had no true right to enforce the contract, he obtained the conveyance without informing the pursuers of their mistake. I think he was not entitled to demand and take implement of a contract which he knew had no real existence, because the parties had never agreed as to the price, the pursuers not having intended to take £75 as the full consideration for the subjects.

"If restitution were still practicable, the pursuers would, I think, be entitled to have the disposition cancelled, and to take back the property on repayment of the sum of £75 paid by the defender. This cannot be, because the defender has changed the nature of the property. But, again, this change was made in the knowledge of the pursuers' error, and, it must be assumed, in the knowledge also that the pursuers were entitled to be restored against the contract. Restitution cannot be obtained, and as the defender is the party responsible for this, he must bear the consequences. In many circumstances this would infer a payment of damages or compensation for loss, which is usually the alternative when restitution cannot be given. In the present case such a claim might, I think, be insisted in for payment of a sum of money, but it appears to me that as there is no difficulty in enforcing the contract in the very sense in which the defender knew that the pursuers understood it, and entered into it, there is no reason why this remedy should not be given, and I have therefore given decree against the defender, ordaining him to relieve the pursuers of the whole feu-duty of £9, 15s., and making that amount a real burden on the property.

"In the view which I have thus taken it has been unnecessary to enter on the question whether the contract may not be truly represented as having been procured by fraud on the part of the defender or his agent, for I am of opinion that, taking the case as one of essential error only—but such error known to the other contracting party—the law gives the remedy which the pursuers ask. If it were necessary, however, that fraud should be established in order to give the pursuers that remedy, I am disposed to think there is enough in the case to entitle the pursuers to succeed.

"It may be true that the purchaser was not under a legal obligation to inform the sellers of the mistake under which they were acting, although I think it is equally true that he was not entitled to take the benefit he has endeavoured to obtain by acting on the contract which he knew was void. But although the purchaser is in some cases entitled to take advantage of the seller's manifest ignorance—that is, where the error is not *in essentialibus*, he is not entitled in the negotiations for the purchase, by his statements and expressions, to create or confirm the error, or to induce a buyer to forbear making such inquiries as for his security he might otherwise have made. Lord Eldin, in the case of *Turner* v. *Harvey*, Jacob, 178, observed in such a case—"If the least word be dropped by the purchaser to mislead 'the vendor' the latter will be relieved;" and in the case of *Vernon* v. *Keys*, 12 East. 632, Lord Ellenborough states that a similar effect will be given to statements by a purchaser which may induce the buyer to forbear making the inquiries which, for his own security and advantage, he would otherwise have made, and I do not doubt that these statements embody a sound legal principle.

"The letters by the defender's agent of 8th October and 4th December 1872 contain, I think,

representations which were calculated, and which, in the light of the general evidence, appear to have been intended, to mislead the sellers and to prevent their making any investigation into the titles to satisfy themselves that the feu-duty had been imposed exclusively on the property which was the subject of the negotiations and sale. In the former of these letters the feu-duty is expressly stated at £9, 15s., which is put forward as the larger part of the consideration to be paid annually in perpetuity by the purchaser for the property, and the same feu-duty is plainly referred to in the subsequent letter, in which the obligation for duplication of the feu-duty is made the subject of anxious stipulation. These were misleading statements, calculated to create a feeling of security in the mind of the sellers as to the fixed nature of the feu-duty, and to lead them to refrain from making inquiries or investigations into the titles to satisfy themselves on the subject, and as such entitle the pursuers to say the contract was procured by fraud; and if this be so, the pursuers are, on this ground also, entitled to the decree they ask."

The defenders reclaimed, and argued—There were no grounds for restitution, because (1) The disposition was the only embodiment of the contract, and superseded all preliminary documents; (2) the disposition did deal with the allocation of feu-duty, and under 31 and 32 Vict. cap. 101, secs. 5 and 6, the seller was obliged to relieve the buyer of all feu-duty; (3) the pursuers were attempting to introduce another clause different to what was in the deed and in the previous titles. The Lord Ordinary's view was inadmissible, because this was an action on contract, and an obligation to relieve was of the essence of the contract, and it was inconsistent to hold the allegations of fraud and error proved, and yet sustain the contract. The error here was not mutual, and was the sellers' alone; it was not induced by the person by whom the contract was made, and Brown was not my agent at the first exposure. There was no case of *dolus dans causam contractui;* in any view, it was merely *dolus incidens.* The only competent redress was *restitutio in integrum* with payment of expenditure.

Authorities—*Oliver* v. *Suttie*, 1 Feb. 1840, 2 D. 514, 15 F. 554; *Gillespie* v. *Russell*, 28 Feb. 1856, 18 D. 677, 19 D. 897, 3 Macq. (H. L.) 757.

The pursuers argued—The original bargain contemplated the burden of feu-duty which should now be imposed upon the purchaser. The defender could not be allowed to take advantage of his fraud. If the Lord Ordinary's judgment was wrong, the remedy of *restitutio in integrum* could be given, and an error of the nature which had been proved justified the remedy of *restitutio.* Expenditure should be repaid to the defender only so far as improvements were permanent and the property benefitted.

Authorities—*Squire* v. *Ford*, 20 L. J. (Ch.) 308; *York Buildings Co.* v. *Mackenzie*, 3 Pat. App. 378; *Fernie* v. *Robertson*, 19 Jan. 1871, 9 Macph. 437; *Rutherford* v. *Rankine*, M. 13,422, Bell's Prin. 538.

In the course of his argument the Dean of Faculty was allowed to amend the terms of the offer the pursuers had made to the defender upon record as above mentioned. As amended, the offer was "to repay the price and to pay to the defender the sums expended by him on permanent additions to and improvements of the said subjects, as the same shall be judicially ascertained in the course of the present process, reserving to the pursuers, in the event of the above offer not being immediately accepted, to maintain their right to have the property restored to them without any payment in respect of the foresaid alleged expenditure. The defender is called upon to state the amount of the expenditure made in connection with the brassfoundry, and also the subsequent expenditure made in the erection of workmen's houses."

At advising—

Lord President—This is an action of reduction on the head of essential error, but there are also certain other conclusions to which the Lord Ordinary has given effect. There is a conclusion to have it found and declared that the defender is bound to relieve the pursuers of the sum of £9, 15s. of feu-duty, and that that sum is a real lien and preferable burden on the subjects which were sold to the defender.

The dispute between the parties results from a sale of what is called the "Cogan Street property" by the pursuer to the defender at the small price of £75. The property is described as being old houses, "mostly in a ruinous state;" in short, it is not of great value except for its situation. A good deal of communing and disputation took place between the parties, but a disposition was at length granted by the pursuer to the defender containing all the usual clauses, and stating as the sole consideration for the transfer of the property the payment of the sum of £75. It provided for a double manner of holding *a me vel de me*, which means, according to the recent statute (31 and 32 Vict. cap. 101, § 6), that the holding may be either of the seller's superior, or base of the seller himself for payment of blench due. But the pursuer alleges in substance that during the communings with a view to a sale he had it in mind to impose a feu-duty of £9, 15s., which is payable to the superior, not in respect of that subject only, but of others. The object was to impose the feu-duty on that subject which was about to be sold. The pursuer says he believed that would be the effect of the sale he entered into, and that the sale was to be made on that footing. He further avers that the defender and his agents were aware that it was intended to make the feu-duty of £9, 15s. a burden on the property, and also that in taking the disposition which they did they knew it did not give effect to what the seller intended, and would not produce what he thought would be the result of the sale. In short, the allegation is that the seller was under essential error, and that the defender knew what the thoughts and intentions of the pursuers were, and took advantage of their oversight. That is a case which presents the appearance of relevancy on its face, and is fairly established by evidence. The property was advertised as subject to a feu-duty of £9, 15s., and this was announced in other ways—the defender's attention was called to the conditions of sale very precisely. It is also very apparent that the pursuers were acting in the belief that by some means or other they had secured their object. It is not material to inquire how they came to be deluded. The delusion was a stupid one, for I

cannot see how they could imagine that a disposition would have the effect of imposing a burden, no mention of which was contained in it. In whatever way the error was caused, there is abundant evidence that the pursuers laboured under it. It is just as clear, even if we look to the letters of the defender and his agent, that they knew the intention of the pursuers was to make this condition, and that their belief was that it had been so made. They were further in knowledge of the fact that it had not been made.

So far I agree in the findings in fact of the Lord Ordinary, and I am not prepared to say that the pursuers are without a remedy. But the remedy which the Lord Ordinary has given is clearly not competent. It does not reduce the sale, but alters its conditions. It varies and changes the defender's title as contained in the disposition, and inserts clauses constituting the feu-duty of £9, 15s. a real burden on the property; and further provides that such decree shall be entered in the Register of Sasines. This is to me a new and startling doctrine, and without precedent, and I cannot hold it competent. It is not possible to reform the contract of parties or a disposition which has been granted with certain clauses. It is not in the power of any Court to alter the terms of a sale. I am for recalling the interlocutor of the Lord Ordinary, but not to the effect that the pursuer is altogether without remedy.

I think that the pursuers are entitled to reduce this sale on the ground of essential error on their part, known to the defender, and taken advantage of by him. The proper remedy therefore in my opinion is under the reductive conclusion of the action. But further, the sale cannot be set aside without regard to the fact that money has since been expended on the property, and no reduction can take place except on the footing that not only shall there be repayment of the price, but also of all money since that date spent by the purchaser upon the subjects. The record as it originally stood did not contain a relevant averment sufficient to justify such a result, but the pursuer has been allowed to amend the 10th article of the condescendence. As it now stands, I am prepared to say that the pursuer is entitled to prevail on the conditions I have named.

There is a further question as to the validity of the parole evidence which has been led. That evidence is competent and admissible for the purpose of proving the existence of essential error, and that in the knowledge of that error on the part of the seller the purchaser completed the contract. If this proof was originally intended with a view to show the terms of the contract, it was entirely inadmissible. By the interlocutor allowing proof the Lord Ordinary repelled the third plea-in-law for the defender, which was as follows:—"The transaction in question having been concluded by formal deed, it is not competent to modify or contradict the same by extrinsic evidence." I think that plea was wrongly repelled, and if the proof was intended to relate to its subject-matter, it ought not to have been allowed.

I am of opinion on the whole matter that the Lord Ordinary has erred.

Lord Deas—The subject called "the Cogan Street property" was sold at the price of £75, and I think it is clear that the price was so fixed on the footing that the property was to be burdened with a feu-duty of £9, 15s., and that therefore, if not to be so burdened, the price would have been at least doubled. I can have no doubt that there was essential error on the part of those acting for the seller.

I further think with your Lordship that it is clearly proved that those acting for the purchaser knew of the error and proposed to take advantage of it. It is equally clear that they were not entitled so to do. The sellers are therefore entitled to some remedy, whatever the law can afford.

I agree with your Lordship that in a case like this, where a regular and formal disposition has been executed and delivered, it is altogether impossible to interfere as the Lord Ordinary has done and reform the contract. No such remedy has ever been given in our practice, nor is it recognised by our law. On the contrary, there are many decisions repudiating it. Nothing is more fixed than this proposition, that a deed conveying heritable property duly executed and delivered must be allowed to stand or must be set aside *in toto*.

I am quite of opinion that the proper remedy is reduction of the deed coupled with *restitutio in integrum*. There is no difficulty about this; it is merely a question of the repayment of money. It is not stated that there has been any conveyance to a singular successor. The only room for dispute is whether the pursuers are to reimburse the defender in the actual sum he has expended on the property since the sale, or only in that which has been properly expended in the improvement of the subject. The tender which was made by the pursuer was very nearly right. In the answer to article 10 of the condescendence it is admitted that it was proposed that the transaction should be cancelled. If the pursuer had offered to cancel the sale on the footing of *restitutio in integrum*, and a reimbursement for money expended to such extent as the law may allow, in place of restricting his offer to the actual amount beneficially spent, that would have been a good offer. I have a strong impression that the reimbursement must include all money expended.

As regards the competency of the parole evidence, I entirely agree with the remarks which have fallen from your Lordship in the chair.

Lord Ardmillan—I have a strong opinion that the justice and equity of this case are with the pursuers. I am not much surprised that the Lord Ordinary should have given the remedy which he has provided. That remedy is, however, in my opinion, a wrong one. It is nothing less than the introduction of a new clause, and imports a new obligation into the disposition of the property. It amounts to the creating and recording a real burden on a heritable property, the disposition of which has been executed and delivered. Nor can the correspondence and parole evidence be admitted as proof of the terms of the contract. That remedy is therefore inappropriate and incompetent.

The remedy which your Lordships have suggested of *restitutio in integrum* is different. The

pursuers were under essential error when they concluded the contract, an error which the opposite party knew they laboured under, but notwithstanding dealt with them with the contrary in his mind. I quite agree with your Lordships in holding that under the circumstances restitution is the proper remedy.

There is another question as to the validity of the parole evidence which has been taken. I do not think parole evidence can be admitted to support the introduction of a new obligation. But I have no hesitation in saying that it may be used for the purpose of showing that the pursuers were labouring under essential error when the contract was completed.

LORD MURE concurred.

The following interlocutor was pronounced:—

"The Lords having heard counsel on the reclaiming note for Thomas Hart against Lord Shand's interlocutor of 5th April 1875, together with the minute of amendment for the pursuers, No. 100 of process, now allowed to be received, Recal the said interlocutor: Find that the pursuers, in concluding the contract of sale to the defender of the Cogan Street property, mentioned on record, and in granting the disposition thereof sought to be reduced, were acting under the essential error that the said subjects were burdened with a feu-duty of £9, 15s., to the effect of relieving certain other subjects belonging to the pursuers of the said feu-duty: Find that the defender throughout the negotiations for the said sale, and in concluding the contract and accepting of the said disposition, was well aware that the pursuers were acting under the essential error foresaid, and took advantage of that error to obtain from the pursuers a disposition of the said subjects without the burden of the said feu-duty: Find that in these circumstances the pursuers are entitled to reduce the said sale and disposition, and to have the subjects restored to them with the whole rents and profits thereof received by the defender since the date of his entry thereto, but on condition of repaying to the defender the price of the said subjects, with interest thereof at five per cent. since the payment thereof, and of reimbursing the defender in his whole expenditure since his term of entry on permanent additions to or improvements of the said subjects, with interest at five per cent. on the sums so expended: Appoint the defender within eight days to lodge a state with vouchers, showing the amount due to him in terms of the above findings: Find the pursuers entitled to expenses in the Outer House to the extent of four-fifths of the taxed amount thereof, and remit to the Auditor to tax the account of the said Outer House expenses, and report: Find no expenses due to either party since the date of the Lord Ordinary's interlocutor reclaimed against."

Counsel for the Pursuers—(Respondents)—Dean of Faculty—Trayner—D. Crichton. Agents—Messrs Dewar & Deas, W.S.

Counsel for the Defenders—Balfour—Vary Campbell. Agent—L. A. Grubb, L. A.

Tuesday, November 30.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.
[Lord Young, Ordinary.

BEITH *v.* MACKENZIE.

Trustee—Trust-Funds—Payments to Beneficiaries—Lapse of reasonable Time—Outstanding Claims—Bona fides of Trustee.

Where a trustee or executor, after lapse of a reasonable interval and after due inquiry, paid the trust-funds to the beneficiaries thereto entitled—*held* that he was not liable to be called upon for payment of certain outstanding claims of which no one was aware, not even the creditor himself, and which had lain over for twenty-five years, until discovered and constituted by a decree of the Court of Session.

Observations (*per* Lord Gifford) on the principle of law on this point, and on the case of *Stewart* v. *Evans*, as illustrative thereof.

This was a suspension at the instance of Donald Beith, W.S., sole surviving trustee under the settlement of the late Hugh Mackenzie of Dundonnell and the now deceased Mrs Catton, against Kenneth Mackenzie of Dundonnell and Murdo Mackenzie younger of Dundonnell, as sole acting testamentary trustees of the late Murdo Mackenzie of Dundonnell. The complainer had been charged, at the instance of the respondents, to pay a sum of £3002, 6s. 1d., with interest as from a certain date. This sum was made up of *jus relictæ* payable to the respondent's mother out of the estate of their father, with whose estate the late Hugh Mackenzie intromitted. After certain litigation (*Mackenzie* v. *Mackenzie's Trs.*, 11 Macph. 681), the Lord Ordinary (MACKENZIE) on 7th January 1874, before answer, remitted the whole accounts to Mr Haldane, C.A., for audit and report. Under this order Mr Haldane, on 9th December 1874, submitted an *interim* report, in which he sought the directions of the Lord Ordinary upon the following matters:—

"*First*, Whether a sum of £2715, 17s. 10d., received by the complainer under a policy of insurance on the life of Mrs Catton, who was the daughter and residuary legatee of Hugh Mackenzie and Mr Beith's co-trustee, falls to be treated as an asset of Hugh Mackenzie's trust?

"*Second*, Whether the whole or any portion of certain payments, amounting in all to £2257, 4s. 11d., which the complainer alleges he paid to Mr and Mrs Catton on account of Mrs Catton's interest in the residue of Hugh Mackenzie's estate, are to be held to have been so paid, and if so, whether they can to any extent compete with the claim of the respondents?

"*Third*, Whether the whole or any portion of certain law expenses, amounting in all to £2312, 1s., paid by the complainer, and which he alleges were paid by him in the *bona fide* belief that they formed proper charges on Hugh Mackenzie's trust, are to be dealt with as such, and if so, whether the complainer's claim for all or any portion of these payments is preferable to the claim of the respondents?

"*Fourth*, Whether the whole or any portion of certain sums of interest, amounting in all to