Counsel for the Pursuers—Campbell, Q.C. —C. N. Johnston. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Defenders—Dundas, Q.C. —Taylor Cameron. Agents—Bruce, Kerr, & Burns, W.S.

Friday, November 25.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

MANNERS *v.* WHITEHEAD.

Reparation — Contract—Rescission—Damages—Fraud.

A partner in a firm raised an action against one of the other partners as an individual for payment of the amount of capital which the former had put into the business, and of a sum representing so many years' salary at the rate which the pursuer had been enjoying in a situation before the commencement of the copartnery. There was an alternative conclusion for payment of £20,000 in name of damages. The ground of the action was fraud and misrepresentation on the part of the defender or his agent. The summons contained no conclusion for the reduction of the contract of copartnery, which was still in force.

Held (*aff.* judgment of Lord Kyllachy) that the remedy sought was damages and not rescission and restitution, and that, the pursuer having in fact failed to prove fraud, the defender must be assoilzied.

Process—Proof—Lord Ordinary.

Observations per L. P. Robertson and Lord M'Laren on the weight to be attached to the opinion, on the facts, of a Lord Ordinary before whom proof has been led.

On 3rd March 1897 Frederick William John Manners raised an action against John Whitehead, concluding for payment of "(*First*) the sum of £7250 sterling under deduction of the sum of £333, 6s. 8d. sterling; (*second*), the sum of £1354, 3s. 4d. sterling, with the legal interest of said sum from the date of citation to follow hereon until payment, or alternatively, the defender ought and should be decerned and ordained by decree foresaid to make payment to the pursuer of the sum of £20,000 in name of damages."

The pursuer averred that in October 1892 he had entered into a contract of copartnery with the defender and his son, who carried on the business of granite merchants at Aberdeen. The capital of the new firm was £21,000, of which the pursuer contributed £6000. The pursuer set forth a prospectus and certain balance-sheets of the defender's business which had been drawn up and shown to him prior to his entering the partnership by Mr Harvey Preen, C.A., London, and also set forth certain statements which had been made to him by that gentleman, who, he averred, had been acting as Mr Whitehead's agent in the transaction. The pursuer took charge under the partnership agreement of the Aberdeen office of the firm, whose profits amounted in 1893 to £1475, in 1894 to £1141, and in 1895 to £4, 13s. 3d. "The business did not prove so remunerative as the representatives of the defender and the defender's agent Mr Henry Preen led the pursuer to expect, but the pursuer had no reason to suspect any want of good faith until" he discovered accidentally a copy of an old balance-sheet, which showed the profits for the eighteen months down to May 1891 to be £900 less than the figure at which they had been stated by Mr Preen for the same period.

(Cond. 10) "The said prospectus and balance-sheets contained serious misrepresentations and omissions in essential particulars. The existence of the said errors and omissions was well known to the defender and to his agent Mr Henry Preen. They were not disclosed to the pursuer, but were kept concealed with the object of inducing, and they did in point of fact induce, the pursuer to enter into the foresaid contract of copartnery. When he entered into the partnership the pursuer relied upon the accuracy of the statements made in the said prospectus and balance-sheets. If he had known then the true state of matters the pursuer would never have joined the said partnership." (Cond. 14) "The business of John Whitehead & Sons never has yielded any substantial profit during the whole period of the said copartnery. It can now be carried on only at a serious loss, and the pursuer and defender have concurred in a trust-deed in favour of Mr George M'Bain junior, C.A., Aberdeen, for the purpose of winding-up the business. A copy of the trust-deed is herewith produced and referred to." (Cond. 15) "The sum sued for under the first conclusion of the summons is made up as follows:—

Capital put into the business by the pursuer . . .	£6000	0	0
Interest on said capital for four years and two months at 5 per cent. . . .	1250	0	0
	£7250	0	0
Less amount actually received by the pursuer out of the business from May 1892 to the date of this action	333	6	8
	£6916	13	4

From this sum there will fall to be deducted the amount which the pursuer may receive out of the estate to be realised by the trustee in terms of the foresaid trust-deed. At the time when the pursuer entered into partnership with the defender he was in receipt of a salary of £325 per annum. The amount which he would have drawn during the four years and two months that have since intervened is £1354, 3s. 4d., which is the sum sued for under the second conclusion of the summons."

The pursuer pleaded—"(1) The pursuer having been induced to enter into the said

contract of copartnery on the faith of said prospectus and said balance-sheet of 1892, and said prospectus and balance-sheet having contained material misstatements and misrepresentations, he is entitled to reparation for the loss which he thereby sustained. (2) In respect of the fraudulent misstatements, misrepresentations, and omissions of the said prospectus and balance-sheet of 1892, the pursuer is entitled to reparation for the loss and damage which he has sustained through entering into the said contract of copartnery induced thereby. (3) The pursuer having been induced to enter into the said contract of copartnery through the fraudulent misrepresentations and concealment of the defender and his agent, is entitled to decree in terms of one or other of the conclusions of the summons."

The defender denied the statements in condescendence 10, and pleaded, *inter alia*—"(1) The pursuer's whole rights and claims, as in a question with the defender, being regulated by the said contract of copartnery, the present action is incompetent. (4) The pursuer's averments, so far as material, being unfounded in fact, the defenders should be assoilzied."

The material portions of the trust-deed referred to by the pursuer (which was dated 12th and 13th February 1897) were the following:—"We, J. Whitehead & Sons, granite merchants, Aberdeen and London, and John Whitehead, granite merchant, residing at 74 Rochester Row, Westminster, London, and Frederick William John Manners, granite merchant, residing at Cattofield, Aberdeen, the individual partners of said firm,—Considering that I, the said Frederick William John Manners Manners, am about to bring an action against the said John Whitehead for rescission of the contract of copartnery between us and Frank John Whitehead, and for damages, and that we consider it desirable that a trustee should be appointed to carry on, manage, and realise the business of granite merchants and quarriers carried on by us at Aberdeen: Therefore we do hereby alienate, dispone, assign, convey, and make over from us, and our heirs, executors, and successors, to and in favour of George M'Bain junior, chartered accountant in Aberdeen, as trustee for the purposes after mentioned, and to his assignees, all and sundry the whole estates belonging to our said firm of J. Whitehead & Sons, heritable and moveable, real and personal, including the entire stock-in-trade presently in the premises occupied by us situated at Fraser Road, Aberdeen, and at the quarries at Murdoch Head, near Peterhead, at Dyce, near Aberdeen, and at Ben Cruachan, Argyllshire, or wherever the same may be, and also the office or warehouse furniture, goods, gear, effects, sums of money, and debts whatsoever now pertaining and belonging, or due and indebted to our said firm of J. Whitehead & Sons in Aberdeen, or wherever the same may be, together with the documents, vouchers, and instructions thereof, and all action and execution that has followed or is competent to follow thereon dispensing with the generality hereof, and declaring that these presents shall be as effectual as if every particular of the means and estate of the said firm were herein specially enumerated and conveyed, surrogating hereby and substituting the said George M'Bain junior in our full right and place of the premises, with full power to him to take immediate possession of the said whole stock-in-trade, furniture, and other effects, and to sell the same by public or private sale in whole or in lots, or on such conditions and at such prices as he shall think fit: Providing and declaring, however, that our said trustee shall, in the realisation of the estate hereby conveyed to him, be bound to use all and every endeavour to obtain the same sold as a going concern, and with a view to this shall have full power to carry on the business hitherto carried on by us for such period as he may judge expedient for this purpose in order that the same may have a fair chance of being sold as a going concern, but failing realisation as a going concern within such time as he may think expedient, he shall sell the same by public roup, by tender, or by private bargain, in such way as he may consider best. . . . *In the second place*, we appoint the said trustee to apply the proceeds that shall remain of the said estate and effects in satisfying and paying the whole debts due by us to our creditors rateably and proportionally according to their respective debts, and at such times and by such instalments as the said trustees shall judge proper: *And in the third and last place*, the said trustees shall hold just count and reckoning with and pay to us or our heirs and successors the residue of his intromissions with the said estate and effects in the proportion of our respective interests therein, as the same may be settled by mutual arrangement or decree of Court: It is, however, agreed that notwithstanding this deed all claims competent to the said Frederick William John Manners Manners against the said John Whitehead in respect of the alleged misrepresentation and concealment referred to in the letter from the solicitors of the said Frederick William John Manners Manners to the solicitor of the said John Whitehead, of date 8th December 1896, or alternatively for damages in respect thereof, and of carrying on a business in London and Aberdeen to the prejudice of the copartnery, or in any other respect, shall not be in any way affected, and the said John Whitehead's whole rights and pleas in answer thereto, and his whole claims against the said Frederick William John Manners Manners in connection with said copartnery are hereby reserved." . . .

After a proof the Lord Ordinary (KYLLACHY) on 18th November 1897 pronounced an interlocutor, in which he found that the pursuer had failed to prove his averments of fraudulent misrepresentation and concealment, and therefore sustained the defences and assoilzied the defenders from the conclusions of the action.

Opinion.—"In this case I have come to

the conclusion that the pursuer's success must depend on the proof of fraud. Innocent misrepresentation may, in certain circumstances, be a ground for rescinding a contract, but it cannot, in my opinion, found an action for damages; and I agree with the defender's argument that this is not an action for rescission, but is an action for reparation—an action of damages for deceit, and nothing else. It has no reductive conclusions. It is not directed against the whole parties to the contract of partnership, and its pleas are directed solely to the remedy of reparation. Nor am I able to accept the suggestion that the distinction between the two remedies of rescission and reparation is here displaced by the existence of the trust for liquidation to which reference has been made. The trust-deed, it is true, narrates that the pursuer is about to bring an action for rescission and for damages, and provides that when the assets of the firm are realised and its debts paid, the surplus shall be divided as the rights of parties may be ascertained by decree of the Court. It also reserves what it describes as the pursuer's 'whole claims in respect of the alleged misrepresentations, or, alternatively, for damages in respect thereof;' but the contract of partnership is not rescinded. The partnership is as yet not even dissolved. And it is, I think, clear that while the pursuer, if he recovers damages, may have a right to have these damages placed to his credit in the accounting between him and the defender under the trust, the existence of the trust can have no further or other effect upon his (the pursuer's) rights and remedies in the present action.

"I hold therefore, in the outset, that it is not open to the pursuer to treat this action as being, either in form or substance, an action for rescission. And, as I have already said, that, in my opinion, excludes all complaint of innocent misrepresentation. The pursuer's case--if there is a case—must be one of fraud, and I do not require to consider certain perhaps difficult questions which would otherwise have arisen. I refer, in particular, to the questions—(1) How far rescission involves restitution, and whether that is now possible; and (2) Whether innocent representation, not amounting to warranty, can be a ground even for rescission, unless it has induced what is recognised in our law as essential error.

"Fraud, however, is certainly alleged, and having heard the evidence, I have since read the whole correspondence, and gone as carefully as I could into the figures. The conclusion to which I have come is that, while there was considerable, and I think reprehensible looseness, and some resulting inaccuracy, on the part of Mr Harvey Preen or his subordinates, there is no evidence of fraud as against him, and certainly none against the defender Mr Whitehead. The correspondence contains no trace of any conspiracy to deceive. On the contrary, it gives me the impression that both Mr Whitehead and Mr Preen believed that the defender's business was a sound and good one, and believed also in the correctness of the valuations and balance-sheets on which the transaction proceeded. I think also that the pursuer was himself largely to blame for not examining more closely into various matters of which he now complains, and as to which he certainly had full opportunities for informing himself."

[It is unnecessary to give his Lordship's detailed examination of the facts disclosed by the proof.]

The pursuer reclaimed, and argued—It was unnecessary to have a reductive conclusion in the summons, for the contract of copartnery had been brought to an end by the trust-deed. Such a conclusion would have been a mere form. The contract having ceased to exist, the pursuer was entitled to *restitutio in integrum*, and it was no answer to his claim for the defenders to say that the business was now in a much worse position than it had been at the commencement of the partnership—*Adam* v. *Newbigging*, L.R., 13 A.C. 308; *Redgrave* v. *Hurd*, L.R., 20 Ch. D. 1. The first plea-in-law was wide enough to cover a demand for restitution, and was appropriate to averments of misrepresentation. What the pursuer really sought was to recover the capital he had been induced to put into this business.

Argued for the defenders—Reduction of the contract was no mere formality, but was an indispensable preliminary to the pursuer's getting restitution. So long as the contract subsisted, it and it alone must continue to regulate the rights of parties—*Addie* v. *The Western Bank*, May 20, 1867, 5 Macph.(H.L.)80. [Lord Kinnear referred to the opinion of L.P. Inglis in *Houldsworth* v. *City of Glasgow Bank*, July 4, 1879, 6 R. 1164.] A man was not entitled to cling to a contract and at the same time demand restitution.

[Both parties submitted an argument on the question of fact whether fraud had been proved, which it is not necessary to reproduce.]

At advising—

Lord President—I have found it impossible to discover in this action an action of rescission, and I agree with the Lord Ordinary that it is "an action of reparation—an action of damages for deceit, and nothing else." It is neither in form nor in substance an action of rescission. The form of the summons, the parties called, and the pleas, none of them indicate or embody a claim of rescission; there is neither an offer of restitution nor an adequate explanation of the absence of such offer. The fact that by agreement the parties have entrusted the winding-up of the partnership to a third party, and that this winding-up is proceeding, has no effect in altering the relation between the litigants so far as regards the present question. The partnership subsists and it has traded for several years. On the mere question of form a reductive decree might have been asked, with an express saving of the liquidation; or if the pursuer could not reconcile this to his views of process, at least a declarator

might have been asked which would have stated restitution as the thing he claims. What he asks is not restitution but damages, and these two remedies are entirely different in themselves and are open to different defences.

If the action be one of damages, then it was scarcely disputed that it is necessary to the pursuer's success that he prove fraud. Now, that there are in the case several things constituting, so far as they go, cogent evidence of fraud cannot be ignored. Each of these matters is involved in circumstances requiring a good deal of attention; but several mis-statements were made which, when all is said, are not well accounted for. Still, the question is one of personal conduct. The Lord Ordinary saw and heard the witnesses whose conduct is inculpated, and he has held that the pursuer has failed to prove that the mis-statements were made fraudulently. I attach the more weight to the Lord Ordinary's conclusion because his opinion discloses a complete grasp of the points which bear against the honesty of the gentlemen involved. With these things fully in view he absolves the defender. As I do not regard any one of the proved misrepresentations, nor the whole taken together, as demonstrative or conclusive of fraud, I do not feel justified in rejecting the Lord Ordinary's conclusion that in fact there was no deceit.

I am for adhering to the interlocutor reclaimed against.

Lord M'Laren—I agree with your Lordship and the Lord Ordinary. I think the rule which renders necessary the averment and proof of fraud where damages are sought is by no means artificial or technical, but is a rule consistent with equity and justice. Where a pursuer only desires to set aside a contract of sale on the ground of innocent misrepresentations, he may obtain relief, but only on condition of making *restitutio in integrum*. While the other party may thus be deprived of the benefit of a bargain which he considers advantageous to him and is desirous of retaining, yet he receives compensation in the shape of restitution. But when we are in the region of damages it does not appear to be consistent with equity or with any sound principle of law that in respect of a mistake for which neither party is responsible the seller shall pay to the purchaser a sum of damages, the purchaser retaining such benefit as the contract has given to him. The remedy of damages—according to all the light which our decisions throw on the question—perhaps there is not very much light to be got from them—is confined to the case of proved fraudulent misrepresentations, and the damages we find as compensation for loss sustained through fraud. I agree with your Lordship in the chair that on a question of the fraudulent character of representations which are proved or admitted to be made, the judgment of the Lord Ordinary is entitled to the utmost weight, because such questions generally resolve into matter of credibility and of the fairness or unfairness of professions made by the principal witness, the defender. I see no ground for disturbing the Lord Ordinary's judgment on the question of the fraudulent character of the representations which were the basis of the sale, and which were certainly not correct in fact. It follows, in my opinion, that the action must fail.

Lord Kinnear—I agree with your Lordship.

Lord Adam was absent.

The Court adhered.

Counsel for the Pursuer—Sol.-Gen. Dickson, Q.C.—Ure, Q.C.—Morton. Agents—Philip, Laing, & Harley, W.S.

Counsel for the Defender—Balfour, Q.C.—W. Brown. Agent—Alexander Morison, S.S.C.

Friday, November 18.

FIRST DIVISION.

[Sheriff Court of Aberdeen.

ROTHWELL *v.* STUART'S TRUSTEES.

Trust — Liability of Trustees — Personal Loan by Trustees on Security of Contingent Right of Beneficiary.

A truster directed his trustees to pay the liferent of his whole estate to his widow, and on her death to pay to R. a legacy of £350. By the terms of the trust-deed the legacy was not to vest in R. till the death of the liferentrix, and it was declared to be "strictly alimentary, and not assignable by her nor arrestable, nor attachable by diligence of creditors, . . . and exclusive always of the *jus mariti* and right of administration of her husband, and not affectable by the debts or deeds of her husband."

R. survived the liferentrix and became entitled to payment of the legacy free of the restrictions imposed by the truster. Before that date R. had authorised the trustees to pay a debt due by her husband "now out of the legacy left me by my uncle, or when the same is payable," and on the strength of this they had advanced the money to pay the debt. *Held* that the advance by the trustees was to be treated as a personal loan at their own risk upon the contingent security of the legacy should it vest in R, and that the trustees were entitled on making payment of the legacy to retain the amount thus advanced by them.

Fraud — Undue Influence — Husband and Wife.

In an action by a wife against the trustees on a testamentary estate to which the husband was indebted, and under which the wife was a beneficiary, she alleged that she had been induced to authorise the trustees to pay the debt due by her husband out of her share of the trust estate. *Averments* of fraud and undue influence on the part of the husband and of the trustees which *held* irrelevant.