to Sir David Hunter Blair a deed discharging the lands of Brownhill from the security created by the bond and disposition in security and restricting the security to that extent. A deed of restriction was thereafter executed by them restraining the security accordingly, but it was thereby declared that the same should not in any way affect the amount to which Lady Hunter Blair might be entitled under the said bond, nor should affect or prejudice her right to have the rental of the lands disburdened taken into computation in connection therewith. On the other hand, Sir David Hunter Blair's right to challenge the provision was reserved entire.

It appears to me that the rights of parties are the same now as they were when the deed of restriction was originally granted, and accordingly that the question should be answered in the affirmative.

On the questions submitted to the seven Judges, the LORD PRESIDENT, LORD ADAM, LORD KYLLACHY, and LORD LOW concurred in the opinions delivered by Lord Kinnear, Lord M'Laren, and Lord Pearson. On the remaining question, 2 (*b*), the LORD PRESIDENT, LORD M'LAREN, and LORD KINNEAR concurred in the opinion of Lord Adam.

The Court pronounced the following interlocutor:—

"In conformity with the opinion of the whole seven Judges, Answer the first question in the affirmative: And in answer to the second question subsection (*a*), Find and declare that in ascertaining the amount to which the annuity granted to the second party may be restrictable, the rental of 1896, the year of the death of Sir Edward Hunter Blair, is to be taken, but reserving all questions as to the amount of the rental, and the deductions to be made therefrom: Answer the second question, subsection (*b*), in the affirmative: Answer the third question in the affirmative: And in answer to the fourth question, Find and declare that the bond and disposition in security for £20,000 is restrictable to, and that the amount of said provision is, three years' free rent calculated on the said rental of 1896, but reserving all questions as to the amount of the rental and the deductions to be made therefrom: And find that the first party does not insist in his contention with respect to the fifth question; and decern: Find the second, third, fourth and fifth parties entitled to their expenses as against the first party, and remit," &c.

Counsel for First Party—H. Johnston, Q.C.—W. Campbell, Q.C.—A. O. M. Mackenzie. Agents—E. A. & F. Hunter & Co., W.S.

Counsel for Second, Third, and Fourth Parties—Balfour, Q.C.—Rankine, Q.C.—Pitman. Agents—Cooper & Brodie, W.S.

Counsel for Fifth Parties—Rankine, Q.C.—Craigie. Agents—Cooper & Brodie, W.S.

Friday, January 27.

SECOND DIVISION.

[Sheriff of Lanarkshire.

HAMILTON *v.* LOCHRANE.

Proof—Proof prout de jure—Cost of Work Done in Reliance on Verbal Agreement to Purchase Heritage—Recompense.

By memorandum of agreement between A, a builder, and B, A agreed to build a villa which B was to have the option of purchasing up to a certain date. B having ultimately refused to exercise this option, A sued her for the cost of certain alterations and additions made upon the villa while it was being erected, as he alleged, at her request, and in consequence of a verbal intimation by her to him that she had decided to exercise her option, and also of an undertaking to pay the expense occasioned by the alterations and additions. A averred that the alterations and additions cost him not less than £150, and did not add to the selling value of the house. B admitted that certain alterations had been made upon the house in consequence of objections stated by her. *Held* that although A would not have been entitled to a proof except by writ if he had claimed damages as for breach of contract, he was entitled to a proof *prout de jure* in support of his claim for reimbursement.

Opinion reserved by Lord Moncreiff as to whether such proof would be competent in a case where the defender did not admit that alterations had been made in consequence of his objections.

Sale—Sale of Heritage—Proof—Breach of Contract—Damages.

Where A had contracted with B to erect a villa which B was to have the option of purchasing up to a certain time—*opinions* that if A, alleging exercise of the option by B, claimed either implement of the contract or damages for the breach of it, he could not prove that B had exercised the option otherwise than by B's own writ or oath.

This was an action brought in the Sheriff Court at Glasgow by George Hamilton, builder, Dumbreck, against Mrs Maria Agnes Murphy or Lochrane, widow, residing at 10 Parkview Gardens, Crosshill.

Originally the pursuer sought decree for the sum of £400 as damages for breach of a contract concluded, as he alleged, between him and the defender for the sale of a villa erected by him, but his claim was ultimately limited to the sum of £150, being the amount expended by him upon the villa in question, as he alleged, in reliance upon the representations and undertakings of the defender, and without any resulting benefit to himself.

By memorandum of agreement entered into between the pursuer of the first part and the defender of the second part, dated 26th and 27th July 1897, the pursuer under-

took to build, on the site and according to the plans therein referred to, a self-contained villa of the description therein specified. It was stipulated that the plaster work should be finished, and the drainage arrangements completed, not later than the middle of October 1897, and that the pursuer should intimate in writing to the second party when the work had been so far completed. The memorandum thereafter proceeded as follows:—"*Fourth*, the second party shall have the option of buying the said villa at the price of Two thousand three hundred pounds sterling, with entry at Whitsunday Eighteen hundred and ninety-eight, her option to be declared before eleventh November next, or within a fortnight after receiving the intimation before mentioned, whichever date shall be later."

The pursuer set forth the memorandum of agreement, and averred that immediately after the date thereof he proceeded with the erection of the villa.

The pursuer further averred as follows:—"(Cond. 2). . . . The defender was frequently on the ground inspecting the progress of the buildings, and in the course of a conversation that took place between the parties at the building in or about the second week of August 1897, she informed the pursuer that she had decided to exercise said option, and agreed with him to that effect, and on the faith of her statement pursuer made at her request certain alterations, including a fireplace to heat the hall. (Cond. 3). In or about the last week of August, when the house was about 3 feet above the first flat, the defender called at the building and explained to the pursuer's foreman that she wished an additional storey on the back wing, and to have it rearranged and to include a dressing-room. The foreman explained the difficulty of doing so, owing partly to the stage the building had arrived at, but the defender said that she had decided to have it done, and asked when she could see the pursuer, who was from home. She was informed that the pursuer would probably be at the building two days or so later about a certain hour, and the defender called again at the time indicated. The pursuer explained to the defender the structural difficulties in the way of getting the additional storey put on the wing and rearranged in the form that she desired it, and that part of the walls already erected would have to be taken down, but the defender stated to pursuer that she had made up her mind to have the house in that form. She also undertook to pay for the additional storey and alterations caused by the rearrangement of the wing, according to measurement, and she instructed the pursuer to proceed with the additional storey and rearrangement of the wing at once. On the faith of the said statement, undertaking, and instructions, the pursuer forthwith had part of the back wall taken down so as to allow the addition to the wing, and he proceeded with and duly completed the said villa according to the original specification, with the additions to the wing. The defender was frequently thereafter at the building, and saw what was being done, and approved thereof. (Cond. 4) On or about 25th November 1897 the pursuer was surprised to receive a letter from defender to the effect that she was not to take over the house in the meantime, and the defender has since refused or delayed to take over the said house or pay for the extras. (Cond. 6) . . . The *cost* of the additions *and alterations* specifically ordered by the defender, *as stated in Condescendence* 3, amounts to not less than £150. *The said alterations and additions did not add anything to the value of the house, and will not enable the pursuer to obtain any greater price therefor than he would have obtained if they had not been made.*"

The words printed in italics were added or substituted by amendment made upon the record after the case had been partly heard on appeal in the Court of Session.

The pursuer originally claimed the whole damage accruing to him in consequence of the defender's alleged breach of contract to take the villa and pay for it.

The defenders averred, *inter alia*, as follows:—"Explained that defender was very much dissatisfied with the house as she saw it in course of erection, and that as she believes in consequence of her objections, and in order to induce her to exercise her option in taking the house when the time came, the pursuer made alterations which he led the defender to believe would involve very little additional cost. The pursuer made the alterations entirely at his own risk."

The pursuer pleaded—"(1) The defender having exercised her option to take over the house and having ordered the additions referred to and undertaken to pay for them, and *rei interventus* having followed, was bound to pay to pursuer the agreed-on price, together with the cost of the said additions ordered by her, and having failed to do so is liable to the pursuer in the amount sued for as the loss sustained by pursuer through defender's failure and actings as aforesaid. (2) The pursuer having been induced to expend money on the house in question, which he would otherwise not have done, without any benefit to the pursuer, on the footing that the defender had declared her option to buy the house, as the defender intimated to the pursuer that she had done, the pursuer is entitled to decree for the amount of money so expended. (3) The additional building and alterations having been done by the pursuer on the instructions of the defender, and on the footing that she was to pay therefor as she agreed to do, the pursuer is entitled to decree for the cost thereof." The second and third pleas for the pursuer were added to the record after the case had been partly heard on appeal in the Court of Session.

The defender pleaded—"(1) The pursuer's statements are irrelevant. (3) The alleged agreement by the defender to take the house can only be proved by writ or oath."

On 23rd August 1898 the Sheriff-Substi-

tute (BALFOUR) issued the following interlocutor:— "Finds that the agreement founded on by the pursuer is only provable by the writ or oath of the defender: Allows a proof by the writ or oath of the defender accordingly."

Note.— . . . "It is quite clear that if there had been no written agreement it would have been incompetent to prove by parole a sale of heritage by a verbal bargain even though followed by *rei interventus*. This is made clear in Dickson on Evidence, sec. 832, and the cases there cited. The law is stated as follows:—'The equitable principle which excludes *locus penitentiæ* from an informal written contract dispenses with the necessity for writing in an obligation which could not have been contracted verbally if matters had been entire, such an obligation being effectual when it has been followed by *rei interventus*. But while the obligation may be constituted verbally *it can be proved only by writ or oath*.' The case of *Gowan's Trustees* v. *Carstairs*, 24 D. 1382, is referred to by Mr Dickson, and it shows that a verbal agreement for the sale of a house, if proved by oath of party, is binding if followed by *rei interventus*, but the agreement cannot be proved by witnesses. The case of *Allan* v. *Gilchrist*, 2 R. 587, is also referred to by Mr Dickson, and it also instructs that a verbal bargain regarding heritage can only be proved by oath of party, although when so proved there may be proof by parole of *rei interventus*. See also *Walker* v. *Flint*, 1 Macph. 417

"It was maintained by the pursuer's agent (and at first I was disposed to agree with him) that these cases differ from the present one, in respect that there was no writing forming the basis of the contract in these cases, but that here we have a formal agreement containing the whole essentials of the bargain, and the present case was likened to the case of *Colquhoun* v. *Wilson's Trustees*, 22 D. 1035, where informal missives of feu were held to be binding by the vassal having proceeded to make alterations on the subjects, and the vassal was held bound to enter into a feu-contract containing conditions which were not mentioned in the vassal's offer. That is not a case on all fours with the present, neither were the other cases that were cited by the parties.

"The question appears to me to turn upon the consideration whether the exercise by the defender of the option to purchase really amounted to a purchase of the house. There was no purchase until the defender exercised her option, and it follows that the exercise of the option was the purchase of the house. The law already cited would therefore appear to apply to this case, viz., that the exercise of the option must be in writing, or be proved by the oath of the purchaser.

"It was contended by the defender's agent that the *rei interventus* alleged was not unequivocally referable to the bargain of the parties, but I do not think there is anything in that contention.

The other cases referred to were *Hamilton* v. *Buchanan*, 4 R. 854 (H.L.) 69; *Westren* v. *Miller*, 7 R. 173; *Malcolm* v. *Campbell*, 19 R. 278; and *Mowat* v. *Caledonian Banking Company*, 23 R. 271."

The pursuer appealed to the Sheriff (BERRY), who by interlocutor dated 28th October 1898 adhered to the interlocutor appealed against, adding the following note:—

Note.—"It is an established rule of law that an agreement for the sale or purchase of heritage cannot be proved by parole. Where it is averred that there has been an agreement of that kind, and that *rei interventus* has followed, the agreement itself cannot be proved except by writ or oath of party, although the acts said to amount to *rei interventus* may be proved by parole.

"The law on this subject has been explained in various cases, as by Lord Deas in *Gowan's Trustees* v. *A. D. Carstairs*, 24 D. 1382; and again in *Allan* v. *Gilchrist*, 2 R. 587. Here the option to purchase, as it is called, which under the contract between the parties was given to the defender, was, if exercised, to all intents and purposes an agreement to purchase the property, and in my opinion it falls under the general rule I have stated.

"I think that the fact that the claim is one of damages for alleged non-fulfilment of the defender's intimated option does not affect the question as to the mode of proof, nor do I think that the fact that the pursuer proceeded to erect a villa under the contract which gave an option of purchase to the defender, has any bearing on the nature of the evidence competent to prove the exercise of the option."

The pursuer appealed to the Second Division of the Court of Session, who by interlocutor dated 22nd November 1898 dismissed the appeal as incompetent.

By minute dated 24th November 1898 the agent for the pursuer stated that he had no other writ than the memorandum of agreement referred to *supra*, and that meantime he declined to refer the case to the defender's oath.

By interlocutor dated 29th November 1898, in respect of the statements in the minute for the pursuer, the Sheriff-Substitute assoilzied the defender from the conclusions of the action, and decerned, and found the pursuer liable in expenses.

The pursuer appealed to the Court of Session.

Counsel for the pursuer and appellant at first maintained that he was entitled to a proof *prout de jure* of his averment that the defender had exercised her option to purchase. He argued that the agreement was a completed contract for the sale of heritage subject only to a suspensive condition, and that he was entitled to prove by parole that this suspensive condition had been purified, or at least was entitled to such a proof in view of the *rei interventus* which had followed upon the defender's verbal intimation of her decision to exercise the option. Authorities referred to—Dickson on Evidence (Grierson's edition), vol. ii., sec. 1036; Taylor on Evidence (9th ed.) secs. 1132-1135; *Colquhoun* v. *Wilson's Trustees*,

March 20, 1860, 22 D. 1035; *Ballantine* v. *Stevenson*, July 15, 1881, 8 R. 959.

This contention was, however, ultimately abandoned, and the record having been amended as narrated *supra*, the pursuer and appellant argued — It might be that it was incompetent to prove a contract relating to heritage by parole, whether with a view to obtaining implement of such contract or damages for the breach of it, but what was now sought in the present action was merely reimbursement for substantial loss occasioned and induced by the representations and undertakings of the defender, and proof *prout de jure* was allowable in support of such a claim — *Walker* v. *Milne*, June 10, 1823, 2 S. 338, and June 11, 1824, 3 S. 123; *Allan* v. *Gilchrist*, March 10, 1875, 2 R. 587, where, although the pursuer was not allowed to prove a contract relating to heritage by parole with a view to obtaining damages for breach of it, it was recognised that he would have been entitled to a proof *prout de jure* in support of such a claim as the present — see *per* Lord Deas at page 590; *Heddle* v. *Baikie*, January 14, 1846, 8 D. 376; *Bell* v. *Bell*, July 9, 1841, 3 D. 1201. What the pursuer was now asking was not damages generally for breach of contract, but repayment of a sum expended by him in the belief induced by the defender that she would take over the house. In *Walker* v. *Milne*, *cit.*, no decision was given as to the relevancy of any claim there actually made, but it was decided that such a claim as the present might be relevantly made, which was sufficient for the decision of the present question. It was not necessary that there should have been fraud on the part of the defender, or that she should have been *lucrata* — see *per* Lord Fullerton in *Bell* v. *Bell*, *cit.*, at page 1204, where in his statement of the elements requisite to found a claim of this kind neither fraud nor gain were mentioned as essential.

Argued for the defender—Except when the person against whom the claim was made had been guilty of fraud, or was himself *lucratus*, no action had ever been sustained for disbursements made upon expectations induced by representations or undertakings not amounting to a binding obligation — see *Maddison* v. *Alderson* (1883), 8 App. Cas. 467; Pollock on Contract (6th ed.) 503. See also *Young* v *Dougans*, February 23, 1887, 14 R. 490. Here fraud was not averred, and the defender was not alleged to have been *lucratus* by what the pursuer had done. In *Bell* v. *Bell*, *cit.*, the defender was accused of fraud, and he was also *lucratus*. In *Heddle* v. *Baikie*, *cit.*, the pursuer had made improvements upon the farm. In *Walker* v. *Milne*, *cit.*, the case was remitted to the Lord Ordinary to consider any claim of damages not based on breach of contract relating to heritage, but there was no judgment in that case finding any such claim of damages relevant. See per Lord Deas in *Allan* v. *Gilchrist*, *cit.*, at page 590. In *Dobie* v. *Lauder's Trustees*, June 24, 1873, 11 Macph. 749, there was breach of a contract which could be proved by parole. In this case the pursuer's claim could only be made out if it were proved that the defender had exercised her option to take the house. That could not be proved by parole, and the pursuer ought not therefore to be allowed a proof *prout de jure*. In this view the case of *Allan* v. *Gilchrist*, *cit.*, was directly in point and should be followed.

At advising—

Lord Justice-Clerk—In this case the demand of the pursuer is now limited to the first item of damages, amounting to £150, based upon his averment that the defender asked him to make certain alterations on the original plans of the house he was building, stating that she had determined to pay it, and thus held out an inducement to him to make the alterations for her. He maintains that although he cannot compel her to take over the house as a purchaser, he can prove her inducements to him to spend money on making these alterations, and the damage resulting from her not becoming the owner of the house. I am of opinion that he is entitled to an opportunity for proof, as I hold that if he can establish that on the faith of the representations he alleges were made by the defender he made extensive alterations on the house to which the dispute relates, for which alterations he has been unable to get recompense, as she now declines to take the house, he will be entitled to a decree. He cannot insist on her buying the house, but he may establish that the damage resulting to him from doing the work was caused by the defender, and if he does so he would be entitled to decree.

Lord Young—I am of the same opinion. It is not necessary to say anything more except this, which is putting the case as a late Lord President of this Court (Lord Colonsay) used often to do, that upon and within these averments I think the pursuer may prove a case which will entitle him to the sum which he asks.

Lord Trayner—This case has assumed a different aspect in the course of the discussion before us from that which it presented in the Court below, when the interlocutors appealed against were pronounced. Before the Sheriff (and to some extent originally before us) the pursuer presented his case as a claim for damages on the ground of breach of contract. The contract he alleged was a contract of sale under which the pursuer bound himself to sell to the defender a certain dwelling-house as set forth in the writing dated 26th and 27th July 1897, which is before us, and an alleged verbal intimation by the defender that she exercised the option which the writing gave her. I think the Sheriff was right in holding that the pursuer could only prove the contract in the circumstances by the writ or oath of the defender. All contracts relating to the sale and purchase of heritable property can only be so proved. It appears to me that the writing I have referred to, although represented, and in some respects accurately represented, as an agreement between the

parties comes, in effect, to nothing more than this—an offer on the part of the pursuer to sell the house to the defender, binding on the pursuer for a certain time, within which the defender had the option to accept or decline the offer. But the exercise of the option, which was just the acceptance of the offer, to be effectual and binding on either party required to be in writing, or proved by the oath of the party who was said to have accepted. I do not therefore differ from the views which the Sheriff took as to the mode of proof by which alone the pursuer could establish the existence of the contract he was seeking to enforce.

The pursuer, however, does not now ask us to hold that there was a valid contract of sale between him and the defender, nor does he ask damages as for a breach of that contract. He now confines his claim to the first item mentioned in Cond. 6, being the cost of certain works performed by him at the request of the defender, and for which she undertook to pay (Cond. 3). But whether the pursuer's claim is one based on the defender's undertaking, or is (as put by Lord Deas in *Allan* v. *Gilchrist*) "a claim for reimbursement of substantial loss occasioned to the one party by the representations and inducements recklessly and unwarrantably held out to him by the other party," it may be proved *prout de jure.*

Lord Moncreiff — The Sheriff's judgment was in my opinion quite right on the case presented to him. But the pursuer has departed from his claim on contract, and we have to decide whether proof *prout de jure* is competent on the case as amended. As your Lordships are all agreed that a proof before answer should be allowed to the pursuer of his averments as amended, I do not propose to object to that course being followed. The defender admits (Answer 3) that she was dissatisfied with the house as she saw it in course of erection; that she made objections, and that the pursuer made alterations "which he led the defender to believe would involve very little additional cost." Thus it is not disputed that the pursuer made additions or alterations in consequence of objections made by the defender—at whose expense is the question? It may be that these admissions make the case special and let in proof *prout de jure* as was done in the cases of *Walker* v. *Milne* and *Bell* v. *Bell*, to which we were referred, although the present case is weaker inasmuch as the defender entirely denies that the work was done at her risk and was not *lucrata* by it to any extent.

But I desire to reserve my opinion as to the mode of proof in a case in which the defender gives no such admissions. It may be that the same principles would apply; but the authorities relied on do not seem to me to be conclusive. In *Walker* v. *Milne* the intending purchaser actually entered upon and broke up the intending seller's ground. Again in *Bell* v. *Bell* the intending seller built a house upon the other party's ground in the full sight and knowledge of the latter, who was *lucratus* by the value of the house. Thus in neither case was there any nice disputed question of contract or inducement to go to proof. The facts spoke for themselves.

There is no authority for the proposition that in every case in which a pursuer who claims damages for breach of a contract relating to heritage is unable to instruct the contract by writ or oath, he is entitled to prove by parole the very same averments for the purpose of obtaining, it may be, the same items of claim under the name of reimbursement or recompense for outlays made or work done on the faith of the alleged contract.

Counsel for the defender moved for expenses from the date of closing the record, in respect that the case had been decided wholly upon the amendment.

The Court pronounced this interlocutor:—

"The Lords allow the pursuer to amend his record in terms of his minute No. 14 of process, and the amendments having been made, of new close the record: Further having heard parties on the appeal, Recal the interlocutor appealed against: Allow the parties a proof before answer: Remit the cause to the Sheriff to proceed therein as accords, and with power to him to dispose of the expenses of this appeal as expenses in the cause."

Counsel for the Pursuer—Sol. Gen. Dickson, Q.C.— M'Clure. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Defender—Ure, Q.C.—J. Wilson. Agents—J. & J. Ross, W.S.

Friday, January 27.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

DICKSON *v.* BELL

Proof—Proof prout de jure—Agreement to Grant Abatement of Rent—Lease—Mandate.

Held that a tenant could competently prove an agreement to reduce the rent stipulated in a formal lease, for the period still current of the lease, by the writ of the landlord's agent, and (*dub.* Lord Young) that he could competently prove by parole that the agent's writ was authorised or homologated by the landlord.

Terms of letters passing between the landlord's agent and the tenant which *held* (*rev.* the Lord Ordinary and *diss.* Lord Trayner) not to amount to an unconditional agreement to modify the rent fixed by the lease.

Archibald William Dickson, proprietor of Hassendeanburn, Roxburghshire, brought an action against Robert Bell, tenant of the farm of Horsleyhill on that estate, for