to have fallen is due to their having overlooked the fact that the pursuer alleges the statements in question to be fraudulent as well as false. It is evident that the report was written by the director in question for the purpose of its being inserted in the prospectus. Even if this were not so, it is clear that it was used for such purpose with his knowledge, consent, and participation. We have therefore an allegation of a fraudulent statement made by a director of the company, used by the company for the purpose of obtaining subscriptions, and effective in inducing the pursuer to take the shares. Now it is elementary law that no person can take advantage of the fraud of his agent. It would be contrary to good conscience that this company should hold the pursuer to a bargain which (for the purposes of this argument) is admitted to have been obtained by the making of a fraudulent statement by a director of the company, which fraudulent statement was used by the company to the knowledge of their director for the purpose of bringing about the contract in question.

I am of opinion, therefore, that the averments of the pursuer are relevant to support the conclusions of the summons and that this appeal should be allowed. It is not necessary, therefore, for me to examine the prospectus in order to decide whether those averments would have been relevant had there been no allegation of fraud, and I abstain from expressing any opinion upon the point.

Their Lordships reversed, with expenses, the interlocutor complained of, and remitted to the Court of Session with a declaration that the pursuer was entitled to a proof.

Counsel for the Pursuer (Appellant)—Buckmaster, K.C.—Sandeman, K.C.—J. A. Christie. Agents—St Clair Swanson & Manson, W.S., Edinburgh—Barlow, Barlow, & Lyde, London.

Counsel for the Defenders (Respondents)—Macmillan, K.C.—Gentles. Agents—J. Stuart Macdonald, Solicitor, Edinburgh—Neish, Howell, & Haldane, London.

COURT OF SESSION.

Saturday, July 12.

FIRST DIVISION.

[Sheriff Court at Perth.

CHRISTIE *v.* LYBURN.

Process—Proof—Evidence—Credibility of Witnesses—Weight to be Given to Opinion of Judge of First Instance—Duty of Judge of Appeal.

Observations (*per* Lord Kinnear and Lord Mackenzie) on (1) the weight to be given by a judge of appeal, before whom a question of fact is properly laid, to the opinion of the judge who has seen and heard the witnesses; and (2) the duty of the judge of appeal, taking into account the impression made by the witnesses on the judge of first instance who saw and heard them, to give his own opinion on the evidence in the case.

Annie Christie, *pursuer*, brought an action of affiliation and aliment in the Sheriff Court at Perth against James Lyburn, *defender*.

On 2nd March 1912 the Sheriff-Substitute (Sym), after proof led, found that the defender was the father of the pursuer's illegitimate child.

The defender appealed to the Sheriff.

On 18th May 1912 the Sheriff (Johnston) refused the appeal.

Note.—"... In affirming the Sheriff-Substitute's interlocutor in this case I am not to be taken in giving his finding, should this case go further, the weight which the Supreme Court is sometimes disposed to attach to the concurrent judgment of both Sheriffs. If it had fallen to me to decide the case in the first instance upon the evidence as recorded, my judgment would have been the other way. . . . But credibility upon both sides enters very largely into this case and recent decisions of the Court of last resort do not encourage independence of judgment in a court of review when this is the case. I think that this consideration applies with special force when a single judge is called upon to review the judge of first instance without the advantage of consultation with colleagues. In the whole circumstances I do not feel that there are grounds upon which I am able to proceed with confidence in disturbing the Sheriff-Substitute's verdict."

The defender appealed to the Court of Session.

At advising—

Lord Mackenzie—This action of affiliation and aliment comes up on appeal under unusual circumstances. The Sheriff-Substitute, who saw and heard the witnesses, has held the pursuer's case proved. The Sheriff on appeal has affirmed this judgment, but states in his note—"In affirming the Sheriff-Substitute's interlocutor in this case I am not to be taken in giving his finding, should the case go further, the weight which the Supreme Court is sometimes disposed to attach to the concurrent judgment of both Sheriffs. If it had fallen to me to decide the case in the first instance upon the evidence as recorded my judgment would have been the other way." This course, as the Sheriff explains, he followed from his desire to give effect to recent decisions in the House of Lords as to the effect to be given to the opinion of the judge of first instance in dealing with questions of evidence. The Act of Parliament does, however, give litigants a right of appeal on questions of fact, and if, after giving all due weight to the impression produced by the witnesses on the Sheriff-Substitute who took the proof, the Court to whom an appeal lies considers that the case is not proved, their duty is to

give effect to this opinion. . . . Upon the whole matter I think that the interlocutors of the Sheriff and Sheriff-Substitute should be recalled and that we should find that the pursuer has failed to prove that the defender is the father of her child.

LORD KINNEAR—I entirely agree. . . . I only wish to add that I agree with the view expressed by Lord Mackenzie as to the course which the learned Sheriff has thought it right to follow in this case. Whether an appeal should be allowed or not upon questions of fact is not for the Courts but for the Legislature to determine. And so long as an appeal on a matter of fact is allowed, it is the plain duty of the judge of appeal to apply his own mind to all the materials of fact which may be brought before him and to pronounce his own judgment. I do not think a judge of appeal, before whom a question of fact is properly laid, is entitled to withhold the benefit which the law gives to the person aggrieved by the judgment below and to refuse to give his own opinion upon the evidence. Of course he may attach—as we always do attach—the greatest possible weight to the opinion of the judge who has seen and heard the witnesses, and there may be particular facts upon which the Court of Appeal may reasonably accept the opinion of the judge simply because it is his, but that is only when it is apparent from the judgment that he has been moved by considerations which cannot be brought fully, if at all, before the Court of Appeal. It is a totally different thing to say that the Court of Appeal is to suppress its own perception of the ordinary probabilities of conduct and results, out of deference to an opinion which it is called upon to review.

LORD PRESIDENT—I agree, and I do not think it necessary to repeat what Lord Mackenzie has said.

LORD JOHNSTON was not present.

The Court recalled the interlocutors of the Sheriff and Sheriff-Substitute, found that the pursuer had failed to prove that the defender was the father of her illegitimate child, and therefore assoilzied the defender from the conclusions of the action.

Counsel for Pursuer and Respondent—Solicitor-General (Anderson, K.C.)—Wark. Agents—Menzies, Bruce Low, & Thomson, W.S.

Counsel for Defender and Appellant—D. Anderson, K.C.—C. H. Brown. Agents—Macpherson & Mackay, S.S.C.

Wednesday, July 16.

FIRST DIVISION.

[Sheriff Court at Forfar.

M'DIARMID *v.* OGILVY BROTHERS.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—*Accident Arising out of and in the Course of the Employment—Prohibited Act.*

A was employed to work at a mangle, his duties being to bring the cloth to the machine and to help in putting it on and in taking it off the roller. It was no part of his duty to be inside the rails in front of the mangle or to interfere with the machine while the cloth was in it. On certain days and at certain fixed times A had to assist B, the headman, in cleaning the machinery when it was stopped for the purpose. Cleaning the machinery when in motion was strictly prohibited, and a notice to that effect was placed opposite the mangle. On a day which was not one of the cleaning days, and when B was out of sight, A placed himself within the rails and attempted to clean the mangle, and was injured.

Held that the accident did not arise out of and in the course of his employment.

In an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) between Robert M'Diarmid, factory worker, Kirriemuir, *respondent*, and Messrs Ogilvy Brothers, manufacturers, Kirriemuir, *appellants*, the Sheriff-Substitute (TAYLOR) awarded compensation, and stated a Case for appeal.

The *facts* were as follows:—"1. That the respondent was in the employment of the appellants at a weekly wage of 19s. He entered their employment on 2nd December 1912. 2. That the respondent worked at a mangle as underman or beamer along with and under William Burnett as headman. 3. That the mangle at which they worked has three rollers. 4. That at a distance of 4 feet from the mangle there are rails. 5. That the middle roller, called the beamer-roller, moves on slides, and is moved out for the cloth to be passed over the rails and rolled on to it. 6. That while the process of mangling the cloth is going on there is no motion on the slides. 7. That after the cloth is on the beamer-roller it is moved back between the two other rollers. 8. That the cloth is then mangled by an alternate forward and reverse motion of the mangle. 9. That after it is mangled the cloth is rolled on to a fourth roller, called the stripper-roller, which is fixed above the mangle, and this is then unfixed and carried away to a rack with the cloth on it. 10. That part of the beamer's duties is to bring the cloth to the machine, to help to put it on the beamer-roller, to help to take it off on to the stripper-roller, and to carry the latter to the rack with the assistance of the head-