the defender's writ, the writings were at least sufficient foundation for *rei interventus* and that there was sufficient evidence of *rei interventus* in this case. They rely on the taking over by the defender early in 1910 of the stock of Mr Considine, Mr Devlin, and Dr Watson at par, amounting to £5200. But it is admitted that if the defender's action in taking over this income stock is to be held as *rei interventus* validating the contract of 5th April and 5th May, it must be unequivocally referable to it. I cannot draw any such inference in view of the evidence as to the meeting between the defender and Mr Considine in the Euston Hotel on 5th April. I cannot hold that the transaction in stock which the pursuers found upon is more referable to the meeting of 5th April than to that meeting. In addition, as already indicated I think the two alleged obligations by the defender in reference to the income stock and the overdraft were so separate that implement or part implement in the one case would not fail to validate an informal agreement relating to the latter.

[*His Lordship then dealt with other questions.*]

LORD JUSTICE-CLERK — I have had an opportunity of perusing the opinions which your Lordships have prepared, and, apart from all questions as to the competency of parole evidence to establish the pursuers' case (as to which I again entirely agree with what your Lordships have said), the law seems to me to be quite clear. Even if parole evidence were competent, I come to the conclusion that there has not been a true understanding between the parties as to what the defender undertook to do. They were not agreed. There was, I think, no true *consensus*, and assuming parole evidence to be competent, it must be evidence conclusively proving that such a *consensus* existed. I am unable to find any such evidence in the proof, and I therefore concur with your Lordships in thinking that the interlocutor of the Lord Ordinary must be recalled.

LORD DUNDAS was sitting in the Extra Division.

The Court recalled the interlocutor reclaimed against and assoilzied the defender.

Counsel for the Pursuers and Respondents—Lord Advocate (Munro, K.C.)—Chree, K.C.—Carmont. Agents—W. & H. Considine, W.S.

Counsel for the Defender and Reclaimer—Clyde, K.C.—Sandeman, K.C.—Wilton. Agents—Davidson & Syme, W.S.

Thursday, December 17.

SECOND DIVISION.

[Sheriff Court at Glasgow.

IRVING *v.* BURNS.

Cautioner — Fraud — Reparation — Company—Guarantee—Misrepresentation by Secretary as to Financial Strength of Company — Proof — Mercantile Law Amendment Act (Scotland) 1856 (19 *and* 20 *Vict., cap.* 60), *sec.* 6.

The secretary of a cinema company entered into a contract with a plumber to execute certain plumbing work for the company. The company had no assets and was unable to pay for the work, and the plumber brought an action against the secretary for payment, in which he averred that he had been induced to enter into the contract by statements made to him by the defender to the following effect—(1) That the pursuer's money would be all right, (2) that the company had plenty of money, (3) that £3000 of the capital of the company had been subscribed, and (4) that the directors of the company would provide additional security, and that the defender knew that statements (1), (2), and (3) were false. The pursuer admitted that he could not prove statements (1), (2), and (3) by writ subscribed by the defender.

The Court *assoilzied* the defender, *holding* (*a*) that in the absence of writ, in virtue of the Mercantile Law Amendment Act (Scotland) 1856, section 6, statements (1), (2), and (3) were of no effect, and (*b*) that statement (4) was irrelevant in respect that the pursuer did not aver that the defender knew it to be false.

Agent and Principal—Warranty of Authority — Reparation — Liability of Agent—Damages.

The secretary of a cinema company entered into a contract with a plumber to execute certain plumbing work for the company. The company had no assets and was unable to pay for the work. The plumber brought an action against the secretary for payment, in which he averred that the defender had no authority to make the contract although he fraudulently represented that he had authority.

The Court *assoilzied* the defender, *holding* that the averment was irrelevant in respect that since the company was unable to pay anything the damage arising from the alleged breach of warranty of authority was *nil.*

The Mercantile Law Amendment Act (Scotland) 1856 (19 and 20 Vict. cap. 60), section 6, enacts—" . . . All representations and assurances as to the character, conduct, credit, ability, trade, or dealings of any person made or granted to the effect or for the purpose of enabling such person to obtain credit, money, goods . . . shall be in

writing and shall be subscribed by the person . . . making such representations and assurances, or by some person duly authorised by him or them, otherwise the same shall have no effect."

John Irving, plumber, *pursuer*, Glasgow, brought an action in the Sheriff Court at Glasgow against Charles T. Burns, C.A., Glasgow, *defender*, for payment of £164, 13s. 8d.

The following *narrative* of the facts is taken from the opinion of Lord Salvesen, *infra*—"The defender was the secretary of a company known as "The Langside Picture House, Limited," and he is sued by the pursuer for payment of certain plumbing work which the pursuer did for the company under a contract entered into between him and the defender as secretary. The Langside Pictures, Limited, was a private company incorporated on 14th December 1911. The defender appears to have been the chief promoter, as he and his clerk are the only persons who sign the memorandum and articles of association. The history of the company as disclosed in the minutes of its directors might well afford a warning to investors. Such a company does not require to issue a prospectus, although the company in question appears to have issued two, the terms of which are not before us. It may be assumed, however, that there was no condition that the company would not start business unless a considerable proportion of its capital was subscribed. The nominal capital was £4500, but in the course of its brief and inglorious existence only a fraction of the capital had been subscribed; and in some cases shares were issued not in respect of money but in respect of services alleged to have been rendered to the company. Of the small capital available £300 was paid away to vendors and £60 for preliminary expenses, leaving the company substantially without capital. Nevertheless contracts were entered into to the amount of £2500 for building a picture house on a site which the company had secured on lease. After these contracts had been partially implemented the company found itself unable to meet its liabilities, and eventually the directors renounced the lease, and the proprietors are now in possession of the ground and the buildings that had been so far erected upon it. The company has no assets, and the pursuer has not received a penny to account of the contract work which he did to an amount which he estimates at the sum of £164, 13s. 8d. It is not surprising that in these circumstances he should have looked about for some person who could be made responsible to him for payment of his account. The minutes of the directors display an absolute disregard of the articles of association and of the Companies (Consolidation) Act 1908, which they partially incorporated. Of the four directors named in the articles two obtained an allotment at an early stage, the remaining two—Mr Lucas and Mr Lloyd—did not obtain share certificates in their favour for any shares until 14th May 1912, five months after the company was registered. During the first two months they were entitled to act in respect of their being nominated in the articles; but as they did not then obtain the necessary qualification shares (which in this case amounted only to £25) they both vacated office in terms of section 73 (1) of the 1908 Act, and became incapable of being reappointed until they had obtained their qualification. Nevertheless these two gentlemen transacted most of the business of the company. On many occasions they were the only persons present at the meetings of directors, and on one occasion the meeting consisted of only one director. The 1908 Act provides that where a quorum is not fixed by the articles of association it shall consist of three directors where there are more than three holding office. This provision was habitually disregarded."

The pursuer averred, *inter alia*—"(Cond. 5) In or about the middle of February 1912 the pursuer received from the said company through George C. Cumming, 45 West Nile Street, Glasgow, who had been appointed measurer for the said company, a schedule inviting the pursuer to give in an estimate for executing plumber work, &c., for the said Langside Picture House, Limited, in connection with a hall or theatre which the said company were erecting or about to erect. (Cond. 6) The pursuer, who did not know the defender, and who knew nothing concerning the alleged company known as the Langside Picture House Company, duly filled up the said schedule and offered to execute the said work at the price of £312. (Cond. 7) On or about 26th March 1912 the pursuer received a letter from the defender as secretary of the said company requesting the pursuer to call at 133 St Vincent Street, Glasgow, on the following day, and intimating that the pursuer might have to take a small part of the contract price in shares of the company. (Cond. 8) In response to said letter the pursuer on 27th March 1912 called upon the defender at his office. At the meeting then held it was arranged that as the price of materials had risen since the date of pursuer's estimate, and as the pursuer was to take a portion of the price in shares, the price of the work to be executed should be increased to £330, and that of this sum 10 per cent. should be taken in shares of the company, to be deducted from the final payment. At said meeting the pursuer asked what security there was that payment of the estimate prices would be made. The defender replied that the pursuer's money would be all right, that the company had plenty of money, that £3000 of the capital of the company had been subscribed, and that in addition the directors of the company would provide security. The pursuer's offer as altered was accepted, and a formal acceptance was sent to him on 28th March 1912. At said meeting the defender urged the pursuer to hurry on with the work so as to have it finished within two months. The pursuer believes and avers that Henry Dewar, architect, Glasgow, who on defender's express instructions sent to pursuer a formal acceptance of his offer, only did so when the defender assured him (Dewar) that he had seen his directors and obtained their

authority to accept pursuer's contract. It is further averred that the defender falsely and fraudulently represented to Dewar that he had obtained such authority from his directors, whereas in point of fact he had not. At the date when defender accepted the pursuer's estimate and instructed the pursuer to proceed with the work, and also on the date when the defender caused a formal acceptance to be sent to the pursuer, the defender had no authority from the company or the directors to accept the pursuer's said estimate or to contract with the pursuer. Further, at the date when the defender's actings are alleged to have been ratified and approved there was no quorum of directors as required by the articles of association qualified to act or to give the defender authority. These facts were well known to the defender. The defender, however, warranted his authority, and induced the pursuer to believe that he had the authority of directors of the company qualified to act as such. . . . (Cond. 12) The pursuer has ascertained and avers that at no time were more than 945 shares of the company, the shares being of £1 each, applied for or allotted. At 27th March 1912, the date defender made the false and fraudulent representations to the pursuer, only 875 shares had been applied for or allotted. Of said 875 shares only 450 had been allotted for cash. The remainder have been allotted to the holders in return for services or for considerations other than cash. The only money which the company had at its disposal was thus a sum of £450, and of this sum £300 had been paid away to vendors. The preliminary expenses amounted to £60, thus leaving a balance of not more than £90 to meet all expenditure in connection with the buildings of the company. The liabilities of the company on or about said 27th March 1912 amounted to not less than £3522, and taking into consideration the shares which the various contractors had agreed to accept as in part payment of their charges for work, there was a shortage or deficit of at least £2677. Of these facts the defender was well aware."

The pursuer pleaded, *inter alia*—"(1) The pursuer having been induced to enter into the said contract, and to execute the work as certified in the measurer's certificate in consequence of the false and fraudulent misrepresentations of the defender as condescended on, and having suffered loss and damage thereby, the defender is bound to pay him the amount of his loss, and decree should be granted as concluded for, with expenses. (2) The defender having falsely professed to have the authority of the directors of the company to contract with the pursuer and to accept the pursuer's offer, and having thus induced the pursuer to believe he had such authority, the defender is personally responsible for the loss suffered by the pursuer, and decree should be granted as craved."

The defender pleaded, *inter alia*—"(1) The averments of the pursuer being irrelevant and insufficient to support the crave of the initial writ, the action should be dismissed, with expenses. (1*a*) The false and fraudulent representations alleged to have been made by the defender not having been made in writing and subscribed by him, are by section 6 of the Act 19 and 20 Vict. cap. 60 'of no effect.' [1*a added by amendment at the hearing in the Second Division of the Court.*]

On 11th February 1914 the Sheriff-Substitute (BOYD) repelled the first plea-in-law (No. 1) for the defender and allowed a proof.

Note.—"The pursuer is a plumber in Glasgow, and he sues Charles T. Burns, a chartered accountant there, for £164, 13s. 8d. as the value of the work he executed on a picture-house in Langside on the employment of the defender as secretary of a private limited liability company who owned this place of entertainment. The company was registered on 14th December 1911. The capital was £4500 in an equal number of £1 shares. The articles state that the directors were W. L. Lucas, T. W. Richardson, Samuel Lloyd, and R. T. Walker. The qualification was and is 25 shares. The pursuer states that Lucas was the only person who qualified, but he did not do so till 25th March 1912 and Lloyd on 15th April 1912, on which date Richardson resigned. The pursuer states that the defender conducted several meetings without the necessary quorum. The first meeting was upon the 15th December 1911, and the defender was appointed secretary. Lucas, Richardson, and Lloyd were present as directors, which was a competent quorum. On 27th December a meeting was held at which Lucas presided and was the only director. The minutes contain, *inter alia*, the statement that the directors instruct the secretary to write the architect to proceed with the erection.

"On 18th day of January a meeting of directors was held, when Lucas and Richardson were the only directors present. As at this time there were four directors it is plain that there was not a quorum present. On 4th March at another meeting there were only two directors present and no quorum.

"The articles of association provide, No. 14, that the office of director shall be vacated if the director (*a*) 'ceases to be a director by virtue of section 73 of the Companies (Consolidation) Act 1908.'

"Section 73 provides that the office shall fall if the holder does not within two months obtain his qualification.

"On Monday, 25th March, a meeting of directors took place when Lucas, Walker, and Richardson were present. The pursuer avers that Lucas had ceased to be a director but Walker and Richardson were qualified, and this was the only meeting held under a quorum.

"The minutes of this meeting contain the following:—'The secretary resubmitted the estimates, but it was unanimously agreed that nothing could be done in the meantime, and that a meeting of directors was to be held on Monday, 1st April 1912, to reconsider same, and also to report steps taken to raise further capital for the company.'

"About the middle of February 1912 the pursuer says he got through the measurer of the company a schedule to offer for the

plumber work which he filled up, and on 26th March on the invitation of the defender the pursuer called upon him, and in spite of the decision of the last meeting of directors the defender arranged the terms on which the pursuer was to work for the company and directed him to proceed. The pursuer asked what security there was that payment of his estimate prices would be made. The defender replied that the pursuer's money would be all right, that the company had plenty of money, that £3000 of the capital of the company had been subscribed, and that in addition the directors of the company would provide security.

"The pursuer's offer was accepted on 28th March 1912, and he started work and continued until 7th June. He says the former assurances of the defender were repeated to him in May 1912, and that far from this statement being true when these representations were made, the company had only issued 875 shares of which only 450 were for cash; £300 of this sum was paid to vendors; the preliminary expenses amounted to £60, and the balance of £90 was all that was available for the construction expenses, which by March 1912 amounted to upwards of £3000.

"The defender maintained that his dealing with the pursuer had been ratified by a meeting on 15th April, but the pursuer replies that there were no directors present.

"I think the pursuer's statements are relevant, and that there must be inquiry."

The defender appealed to the Sheriff (Gardiner Millar), who on 27th March 1914 adhered to the interlocutor of the Sheriff-Substitute, with this variation, viz., that the proof should be before answer.

Note.—"This case was very fully and ably argued by both counsel who appeared at the debate, but I have come to be of opinion that the case cannot be decided without inquiry into the facts, and, accordingly, I think the interlocutor of the learned Sheriff-Substitute should be affirmed. With regard to the first plea-in-law for the pursuer, counsel for the defender founded very strongly upon the case of the *Clydesdale Bank* v. *Paton*, 23 R. (H.L. 22). He said that the representations were no more than a representation and assurance with regard to the credit of his principal and must therefore be in writing, otherwise it had no effect in terms of section 6 of the Mercantile Law Amendment Act (Scotland), 1856, but I think Mr Fenton's answer is well founded when he says that these false and fraudulent representations were made by the company itself through their servant the defender, and are not of the class referred to in the statute. Of course this will depend on the facts as disclosed in the case. The other question that was raised was with regard to the second plea-in-law for the pursuer. Mr Burns stated his argument as being that the defender was represented by the pursuer as having guaranteed the authority of his directors. But if the facts show that he never had the authority of his directors to enter into the contract, and therefore never had a principal, then he may make himself liable personally. It is contended by the pursuer that at the meeting of 25th March 1912 there was a quorum of directors present, and, according to the minute, the defender was directed not to enter into the contracts until a meeting should be held on the 1st of April, when authority could be given. The pursuer undertakes to prove that there was no meeting of duly qualified directors subsequent to that date at which the defender received authority to enter into this contract. I do not see how this question can be decided until after the facts are inquired into. On the whole matter I agree with the learned Sheriff-Substitute that there should be a proof, but I think it should be before answer."

The defender appealed, and argued—1. With regard to the pursuer's first plea-in-law. It was founded on four alleged misrepresentations, viz., (1) "that the pursuer's money would be all right," (2) "that the company had plenty of money," (3) "that £3000 of the capital of the company had been subscribed," and (4) "that in addition the directors of the company would find security." The representation (4), even if it was proved, was irrelevant. It was not a statement of fact at all, but merely a promise for whose non-fulfilment the pursuer was alone to blame. The other representations—(1), (2), and (3)—might be relevant, but section 6 of the Mercantile Law Amendment (Scotland) Act 1856 (19 and 20 Vict. cap. 60) applied to them, and they were of no effect unless proved by writ—*Clydesdale Bank, Limited* v. *Paton*, May 12, 1896, 23 R. (H.L.) 22, 33 S.L.R. 533; De Colyar, Law of Guarantees (3d ed.), p. 43. In *Royal Bank of Scotland* v. *Greenshields*, 1914 S.C. 259, 51 S.L.R. 260, and in *Devaux* v. *Steinkeller*, 1839, 6 Bing. (N.C.) 84, under Lord Tenterden's Act (9 Geo. IV, cap. 14), section 6, questions were raised as to the special relationship of the person making the representations to the person about whom the representations were made, but in the present case no such question could arise, because the pursuer's whole case on record was that the defender was acting on his own authority when he made the representations. *Henderson* v. *Lacon*, 1867, L.R. 5 Eq. 249, was distinguishable because it dealt with a misrepresentation in a prospectus, and there were special statutory provisions as to prospectuses—*cf. Penang Foundry Company, Limited* v. *Gardiner*, 1913 S.C. 1203, 51 S.L.R. 3. 2. With regard to the pursuer's second plea-in-law, admittedly, if an agent had no authority to make a contract he was liable on his implied undertaking that he had authority—Bell's Prins., section 225—but in order to make him liable it was necessary to aver (1) that the contract was made by the defender acting for an undisclosed principal, (2) that there was no contract with that principal, and accordingly (3) that the pursuer must rightly have recourse against the agent—*i.e*, that the principal repudiated the contract. But in the present case the pursuer had not made these averments. The pursuer had not relevantly averred (1). "A secretary is a mere servant. . . . No

person can assume that he has authority to represent anything at all"—*per* Lord Esher (M.R.) in *Barnett* v. *South London Tramways Company*, 1887, L.R., 18 Q.B.D. 815, at 817. In point of fact, the invitation to contract came from the measurer, and it was the architect who actually made the contract. Nor had the pursuer relevantly averred either (2) or (3). It did not appear that the defender lacked the necessary authority. The contract had been ratified by the company. The qualification of the directors was immaterial—Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69), section 74; and there was a sufficient quorum —Buckley, Companies Acts (9th ed.), pp. 169 and 646; *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Company*, [1895] 1 Ch. 629, *per* Lindley (L.J.) at 636; *British Asbestos Company, Limited* v. *Boyd*, [1903] 2 Ch. 439; *Firbank's Executors* v. *Humphreys*, 1886, L.R., 18 Q.B.D. 54. In the present case the public could not know of the absence of a quorum.

Argued for the respondent—1. With regard to the pursuer's first plea-in-law. The representations were fraudulent, and accordingly the defender, who made them, was liable as well as the company—Bell's Prins., section 224 (*b*); *Cullen* v. *Thomson & Kerr*, July 28, 1862, 24 D. (H.L.) 10, *per* Lord Westbury (L.C.) at 12; *Houldsworth* v. *City of Glasgow Bank*, July 4, 1879, 6 R. 1164, *per* Lord President (Inglis) at 1168, 16 S.L.R. 700, at 703, *aff.* March 12, 1880, 7 R. (H.L.) 53, 17 S.L.R. 510; *Henderson* v. *Lacon* (*cit.*); *Hirst* v. *West Riding Union Banking Company*, [1901] 2 K.B. 560; *Stainbank* v. *Fernley*, 1839, 9 Sim. 556; *Ferguson* v. *Wilson*, June 4, 1904, 6 F. 779, 41 S.L.R. 601; *Adam* v. *Newbigging*, 1888, L.R., 13 A.C. 308. The Mercantile Law Amendment Act (Scotland), 1856, section 6, did not apply to a case like the present, where the person who made the representation was merely the mouthpiece of the person who benefited. Under section 6 of Lord Tenterden's Act the words "any person" meant an independent third party, and it was the intention of the Legislature to bring the law of Scotland into line with that of England by virtue of section 6 of the Mercantile Law Amendment Act (Scotland) 1856. In any event the Mercantile Law Amendment Act (Scotland) 1856, section 6, did not apply to mere statements of facts such as that contained in representation (3) — *Bishop* v. *Balkis Consolidated Company*, 1890, L.R., 25 Q.B.D. 512; *cf. Lyde* v. *Barnard*, 1836, 1 Meeson and Welby, 101; *Campbell, Shearer, & Company* v. *Gillies*, June 1, 1901, 9 S.L.T. p. 33. 2. With regard to the pursuer's second plea-in-law. The defender had no authority to make the contract for the company, and the company did not ratify it, because the directors were not qualified, and there was not a quorum of them. Therefore the defender was liable for the loss caused to the pursuer by the implied warranty that he had authority to make the contract—Bowstead on Agency (5th ed.), p. 410; Moncreiff on Fraud, p. 57; *Collen* v. *Wright*, 1857, 8 Ellis and Blackburn 647; *Smout* v. *Ilbery*, 1842, 10 Meeson and Welby 1, *per* Alderson (B.) at 9; *Firbank's Executors* v. *Humphreys* (*cit.*), *per* Lord Esher (M.R.) at 60; *Morrison* v. *Statter*, June 23, 1885, 12 R. 1152, 22 S.L.R. 770.

At advising—

LORD SALVESEN—[*After the narrative, supra*]—The defender as secretary of the company, in my opinion, fully shares the responsibility of the directors in these irregular and reprehensible proceedings.

Unfortunately, however, the liability of the defender for the account sued for does not depend upon the part which he took in the administration of the company's affairs. The case against him is a twofold one—(first) that at a meeting which he had with the pursuer, when the price of the work to be executed by him was fixed at £330, he made certain statements by which the pursuer was induced to enter into a contract with the company; and (second) that these statements were false to his knowledge. The statements in question may be thus summarised — (1) that the pursuer's money would be all right; (2) that the company had plenty of money; (3) that £3000 of the capital of the company had been subscribed; and (4) that the directors of the company would provide additional security. In the Court below the defender maintained that these averments were irrelevant to found an action of damages against him. I think they were plainly relevant. Before the Sheriff the defender further argued that the statements in virtue of section 6 of the Mercantile Law Amendment (Scotland) Act 1856 could only be proved by writing. When the case came before us it was pointed out that there was no plea to this effect, but the defender was allowed to amend his pleadings, and the record therefore now raises the true question which is submitted for our decision.

By section 6 of the Act referred to "representations and assurances as to the character, conduct, credit, ability, trade, or dealings of any person made or granted to the effect or for the purpose of enabling such person to obtain credit, money, goods . . . shall be in writing and shall be subscribed by the person . . . making such representations and assurances, or by some person duly authorised by him or them, otherwise the same shall have no effect." Do the representations I have already summarised fall under this clause? In my opinion the first three of them undoubtedly do. The pursuer maintained that the third statement was a representation of a fact, and that while it might have a bearing on the question of the ability of the company to meet its debts, the word "ability" ought to be construed as meaning business capacity or skill, and had no more necessary relation to finance than the word "character" used in the early part of the clause. In this connection we were specially referred to the case of *Lyde* (1 M. & W. 101), where the construction of the corresponding English Act was discussed. In that case a lender was induced by the defendant to lend money on a life interest of a certain Lord Edward Thynne by a statement that the annual income was charged only with three annui-

ties, whereas the defendant well knew that the funds were also charged with a mortgage of a large amount. There was a division of opinion on the bench, Lord Abinger, C.B., and Gurney, B., holding that this was a representation concerning or relating to the credit and ability of the debtor, whereas Parke, B., and Alderson, B., were of opinion that it was not. The difference of opinion, however, turned on the special circumstances, for the two last-named Judges thought that the assurance did not relate to the debtor's trustworthiness, but only to the value of the particular fund about to be assigned. Alderson, B., in this connection, says—"Although the personal responsibility of Lord Edward Thynne was also to be taken, and therefore a representation as to the value of a portion of his property might if unexplained have referred to that also, yet I think the peculiar circumstances of this case, so far as it had gone when the nonsuit took place, negatives that supposition here"; and Parke, B., at the close of his opinion says—"I do not by any means intend to say that a representation as to the condition or value of a particular part of a man's property may not relate to or concern his character, credit, &c., within the meaning of these words; it would do so where the declared object of the inquirer should be to give credit to a third person upon his personal responsibility and he is seeking information as to part of the means which constitute its value." In the view therefore of even the dissenting Judges—for the Court being equally divided the nonsuit stood—the representation here would, I think, clearly have come within the terms of the Act. None of them suggests that "ability" is to be construed as referring to business capacity and not to financial ability; and I cannot imagine any statement more likely to induce credit to be given to a company which has just commenced business than that the bulk of the capital had been subscribed. The fourth representation does not fall within the scope of section 6, but there is no statement that the defender knew that the directors of the company would not provide security, and no action lies at common law for a statement honestly made although mistaken. At best it is a statement of expectation, and it appears from the minutes that the directors did contemplate at one time giving their personal security for at least part of the obligations that the company incurred. In order to make this a relevant ground of action the pursuer would require to state that the directors never intended to provide security and that the defender was well aware of this. Condescendence 12 contains some very pertinent statements with regard to the first three representations and the defender's knowledge of their falsity, but the record is silent as regards the fourth.

It may at first sight seem strange that the Legislature by the enactment in question has protected all verbal assurances by means of which money or credit has been in fact induced, however fraudulent such assurances may have been. The point has, however, been authoritatively settled by the House of Lords in the case of *The Clydesdale Bank* v. *Paton*, 23 R. (H.L.) 22, 33 S.L.R. 533. The object of the Act was apparently to prevent reliance being placed upon mere verbal representations which might be honestly misunderstood and which might result in injustice to the person who was alleged to have made them. Just as a verbal guarantee is ineffectual, so verbal representations which may have the same effect as a guarantee are also of no avail unless committed to writing. I am therefore of opinion that we must sustain the new plea which the defender has added to the record.

Before leaving this part of the case I ought to mention an argument which apparently found favour with the Sheriff and which is to the effect "that the false and fraudulent representations were made by the company itself through their servant the defender, and are not of the class referred to in the statute." I confess I do not appreciate this view, for it is entirely inconsistent with the pursuer's own record. His case is that the defender had no authority from the company or the directors to contract with the pursuer, and his position as secretary certainly did not include the right of making contracts on behalf of the company. A verbal guarantee by a servant of his master's solvency would bind neither the servant nor the master; and I confess that I am entirely unable to understand how verbal assurances to the like effect can be the foundation of an action because the person making them happens to do so with regard to a company with which he is employed. It is true that in the case of *Cullen*, 24 D. (H.L.) 10, it was held that the manager and secretary of a bank were liable along with the directors to the shareholders, but the present plea does not raise the question of liability, which I think clear enough if the pursuer's averments are well founded, but whether the representations relied on can be proved otherwise than by writ.

The pursuer's second ground of action is embodied in his second plea-in-law, and is to the effect that "the defender having falsely professed to have the authority of the directors of the company to contract with the pursuer and to accept the pursuer's offer, and having thus induced the pursuer to believe he had such authority, the defender is personally responsible for the loss suffered by the pursuer." The averments upon which this plea is founded are contained in cond. 8. Briefly they amount to this, that while on 15th December 1911, at a duly constituted meeting of directors, when the defender was appointed secretary, it was decided that the company proceed with the erection of the buildings as soon as possible, and agreed that this matter be left in the hands of Mr Lloyd, the architect, and secretary, at a meeting subsequently held on 25th March, when the only two qualified directors were present, this authority was recalled, and it was agreed, on the secretary re-submitting the estimates, that nothing could be done in the meantime in the matter

of accepting these. Notwithstanding this the defender on 27th March had a meeting with the pursuer at which he arranged the price of the work to be executed by him, and on the same day wrote to the architect —"I have received instructions from Mr Lloyd to accept the following contracts in connection with the building of this company's theatre." The list includes the pursuer, for plumber work, £330. The architect on receipt of this letter appears to have closed the contract. These actings of the defender are relevantly averred to have been wholly without authority, and it is undoubtedly the case that an agent warrants the authority of the principal on whose behalf he professes to contract. But the minutes of a subsequent meeting on 15th April under the head of "Erection of buildings" contain the following—"The directors approved of what had been done by Mr Lloyd, the architect, and secretary." It is true that this meeting was attended only by Mr Lucas and Mr Lloyd, who had not yet got their qualifications and had no right to act as directors at all; but at the following meeting on 29th April, which was attended by Mr Lucas, Mr Lloyd, and Mr Clark, who had been elected in room of Mr Richardson, the minutes were read and approved. The erection of the buildings proceeded, but at no time did the directors ever depart from the position that had been taken up regarding the contracts under which the work was being done. I do not see, therefore, if the company had been solvent, how it could have resisted liability for payment of the price due to the pursuer. The majority of the *de facto* directors, and the only ones present at the meeting of 15th April, were not qualified, but the company had no others, and I presume that the shareholders must suffer for the confidence they so rashly reposed in the persons nominated by the articles of association. If, therefore, the company was bound by the contract made on their behalf by the defender or on his instructions no claim can arise on the breach of warranty. Even if it were otherwise I cannot see what claim the pursuer can have against the defender. The import of the numerous cases cited to us on this subject is that the agent who acts without authority on behalf of his principal does not become liable on the contract which he professes to make, but only warrants his authority. Now it is part of the pursuer's case that if he had had a good contract with the company he could have recovered nothing, as the company has no assets. In the case of *Firbank*, 18 Q.B.D. 54, at 62, Lord Justice Lindley in dealing with the liability of directors who issued debenture stock on the implied representation that they had authority to do so, whereas they had none, said—"If genuine debenture stock of the company had been worthless the measure of damages would have been nil." The defender here, no doubt, warranted his authority to contract on behalf of the company. If he had in fact had authority the company would have been bound, but as it has no assets the damage arising from a breach of the warranty is nil. On both grounds, therefore, I hold that the pursuer has no relevant averments to support his second plea. I indicate no opinion as to whether he may have a remedy against the defender on other grounds, or against the directors through whose reckless administration of the company he finds himself in his present position. I am clear, however, that he has none against the defender under this head.

The result of my opinion is that we should find that the representations alleged to have been made by the defender at the meeting on 27th March "that the pursuer's money would be all right, that the company had plenty of money, and that £3000 of the capital of the company had been subscribed," are, in terms of section 6 of the Act 19 and 20 Vict. cap. 60, of no effect unless the same were made in writing and subscribed by the defender; that *quoad ultra* the averments with regard to the alleged representation that the "directors of the company would provide security" are irrelevant, and that the statements in support of the pursuer's second plea-in-law are not relevant to infer personal responsibility against the defender for the sum sued for or any part thereof. If the pursuer is now in a position to say that he holds no writing I would be prepared to dispose of the action altogether; but if not I am afraid it must be remitted back to the Sheriff for further procedure.

On the question of expenses, as the plea which we have sustained was only added at the debate, I think there can be no expenses to either party in this Court.

LORD GUTHRIE and LORD ANDERSON concurred.

The LORD JUSTICE-CLERK did not hear the case.

LORD DUNDAS did not hear the case, being engaged in the Extra Division,

The Court pronounced this interlocutor—

"Find that the representations alleged to have been made by the defender at the meeting on 27th March 1912 'that the pursuer's money would be all right, that the company had plenty of money, and that £3000 of the capital of the company had been subscribed,' are, in terms of sec. 6 of the Act 19 and 20 Vict. cap. 60, of no effect unless the same were made in writing and subscribed by the defender; that *quoad ultra* the averments with regard to the alleged representation 'that the directors of the company would provide security' are irrelevant, and that the statements in support of the pursuer's second plea-in-law are not relevant to infer personal responsibility against the defender for the sum sued for or any part thereof; and in respect it is admitted by counsel for the pursuer that pursuer holds no writing of the nature above mentioned, dismiss the action and decern."

Counsel for the Appellant (Defender)—Constable, K.C.—Maconochie. Agents—Norman Macpherson & Dunlop, S.S.C.

Counsel for the Respondent (Pursuer)—J. Roberton Christie, K.C.—Fenton. Agents—Allan-Lowson & Hood, S.S.C.