Answers were lodged by John Stewart the other trustee, who maintained that the petition was incompetent.

On 15th July 1922 counsel were heard on the petition as amended and the answers.

Argued for the reclaimers—The petition as amended was now one which could only be dealt with in the first instance by the Junior Lord Ordinary—Distribution of Business Act 1857, sec. 4; Rhind v. Shlach, 1875, 2 R. 1902, 12 S.L.R. 642; Smith v. Smith, 1892, 20 R. 27, 30 S.L.R. 59; Gaff and Others, Petitioners, 1893, 20 R. 825, 30 S.L.R. 758. It should therefore be remitted to the junior Lord Ordinary or be be dismissed. The Inner House could not deal with it without consent of parties—Mitchell v. Mitchell, 1864, 2 Macph. 1378. The Court should not deal with the petition in the exercise of its nobile officium. This was only done when there was no other remedy.

Counsel for the petitioners was not called on.

LORD PRESIDENT — The petition as originally framed was properly presented to the Lord Ordinary in accordance with the Trusts Act (11 and 12 Geo. V, cap. 58), and was competently brought before this Division on a reclaiming note against the Lord Ordinary's interlocutor. In the course of the hearing, however, it became apparent that in the rather unusual circumstances presented by the case the objects of the petition could not be secured without resort to the common law powers of the Court under its nobile officium, and the petitioners having proposed to amend the peti-tion we gave them an opportunity of doing The amendment took the form of deleting the reference to the Trusts Act from the narrative and adding a crave for sequestration to the prayer. No objection was tabled to this amendment and it was allowed. But it is now maintained that in consequence of the amendment having been made the petition has ceased to be competent before this Division. The argument is that under the Distribution of Business Act 1857 a petition of the character which this petition has come to assume in consequence of the amendment must be presented in the first instance to the Junior Lord Ordinary. I think this objection must be repelled. the first place the objection comes too late. If it had been a good one it should have been tabled on the petitioner's motion to amend. But in the second place it would be contrary to all reason and principle to hold that in a proceeding competently before the Division on reclaiming note the Distribution of Business Act implies any restraint on the power of the Division to allow any amendment designed to facilitate appeal to the nobile officium, even though—had the petition been originally framed for that purpose -it would have had to be presented in the first instance to the junior Lord Ordi-

LORD MACKENZIE—I concur.

LORD SKERRINGTON--I concur.

LORD CULLEN did not hear the case.

The Court recalled the interlocutor of the Lord Ordinary, sequestrated the estate, and appointed a judicial factor.

Counsel for the Petitioners — Patrick. Agents—Strathern & Blair, W.S.

Counsel for the Minuters the British Legion—Burns. Agents—Strathern & Blair, W.S.

Counsel for the Respondents — Mitchell, K.C.—Maclaren. Agent—W. R. Mackersy, W.S.

Counsel for the Minuters the United Services Fund-Menzies. Agents-Hutton, Jack, & Crawford, S.S.C.

Saturday, June 17.

## FIRST DIVISION.

[Lord Hunter, Ordinary.

WESTVILLE SHIPPING COMPANY, LIMITED v. ABRAM STEAMSHIP COMPANY, LIMITED.

 $Title \ to \ Sue--Contract--Rescission---Assigna-$ 

 $tion-Restitutio\ in\ integrum.$ 

A & Company assigned their rights under a shipbuilding contract to B & Company on certain representations as to the stage of construction reached by the vessel which were in fact false. B & Company subsequently sub-assigned their rights to C & Company, using practically the same representations but in ignorance of their falsity. & Company discovering the falsity of the representations and intimating that they repudiated the contract, B & Company were advised that they had no defence, and it was arranged that judgment should be allowed to go against them in the English Courts. B & Company then brought an action against A & Company for reduction of their contract with A & Company and for damages, but at the time of raising the action judgment had not been pro-nounced by the English Courts annulling their sub-assignation, though such judgment was obtained before the record was closed. In the action by B & Company against A & Company objection was taken that B & Company had no title to sue in respect that at the date of raising the action they had not been re-invested in their contract and therefore were not in a position to make restitutio in integrum. Held that B & Company had a good title to sue.

Contract — Misrepresentation — Homologation—Rescission—Shipbuilding Contract —Sub-Assignees in Knowledge of Misrepresentation Requesting Minor Alteration in Plan of Ship.

The sub-assignees of a shipbuilding contract after they had discovered the falsity of the representations on which they had bought, requested the ship-

builders to make a slight alteration in the design of the ship which, however, was not carried out. In an action at their instance against the assignees the contract was annulled. The assignees having sued the original cedents for rescission of their contract on the ground of misrepresentation and damages, held that the act of the sub-assignees did not amount to homologation so as to bar the assignees from insisting in their action, and that the unimportant character of the alterations did not make restitutio in integrum inequitable.

Contract - Rescission - Mora - Prejudice -

Fall in Value of Subject of Contract.

Observed (per Lord President) that
in an action for the reduction of a contract for building a ship, on the ground of misrepresentation, a fall in the value of the ship owing to a slump in freights did not render restitutio in integrum

inequitable.

The Westville Shipping Company, Limited, pursuers, brought an action against Abram Shipping Company, Limited, defenders, for (1) reduction of an agreement, dated 20th February 1920, whereby the defenders in consideration of the sum of £26,700 assigned to the pursuers all their rights under an agreement between them and the Dublin Shipbuilders, Limited, for the building, launching, and completing of a steel screw steamer, (2) repayment of the sum of £26,700, and (3) payment of £6300 as damages. Messrs Thomas M'Laren & Company, shipbrokers, Glasgow, who had acted as agents for the defenders in concluding the agreement of which reduction was sought, were also called as defenders, but by minute of amendment the pursuers abandoned the action against them before the closing of the record.

The pursuers pleaded—"1. The pursuers having been induced to enter into the said agreement by the fraudulent misrepresentations made by the defenders, are entitled to have the same reduced, and to have the sums paid by them thereunder repaid to them, and are accordingly entitled to decree in terms of the first and second conclusions of the summons. 2. The said agreement having been entered into by the pursuers under essential error, induced by the misrepresentations of the defenders, the pursuers are entitled to have the same reduced and to have the sums paid by them thereunder repaid to them. 3. The pursuers having sustained loss and damages to the amount of £6300, in consequence of the fraudulent misrepresentations of the defenders, are entitled to decree in terms of the third conclusion of the summons. 4. Alternatively, the pursuers are entitled in name of damages to payment of the sums concluded for in the second and third conclusions of the summons.

The defenders pleaded, inter alia—"1. No title to sue. 3. Restitutio in integrum being impossible, the first and second conclusions of the summons are incompetent and should be dismissed. 4. The pursuers are barred by their actings under the agree-

ment between them and the defenders from maintaining the present action. 5. The pursuers' averments in so far as material being unfounded in fact, the defenders are entitled to be assoilzied. 6. The defenders not having made any fraudulent representations to the pursuers are entitled to absolvitor. 7. The defenders are entitled to be assoilzied from the conclusion of the summons in respect— (1) That the representations made by them were made in good faith and were not false or misleading; (2) That they gave no guarantee as to the date of delivery of the steamer; and (3) That the representations made by them were not material. 8. The pursuers not having been induced to enter into the agreement under reduction by the representations of the defenders founded on, the defenders are entitled to absolvitor."

On 29th February 1921 the Lord Ordinary (Hunter) allowed a proof before answer.

The averments of the parties and the import of the evidence sufficiently appear from the opinion of the Lord Ordinary, who on 15th June 1921 sustained the second pleain-law for the pursuers and repelled their remaining pleas, reduced the agreement of 20th February 1920, and decerned against the defenders for payment to the pursuers of the sum of £26,700.

Opinion.—"In this action the Westville Shipping Company, Limited, seek to reduce an agreement between them and the defenders, dated 20th February 1920, on the ground that they were induced to enter into it by misrepresentations of the defen-They also conclude (first) for repayment of a sum of £26,700 paid by them to the defenders, and (second) for payment of a further sum of £6300 in name of damages. This second sum is claimed by them only on the footing that the misrepresentations complained of were fraudulently made. At the proof I allowed the pursuers to amend by adding an alternative conclusion, in the event of their not being in a position to rescind the contract, concluding for payment of the sums specified in name of damages. Success in this alternative conclusion would also depend upon the pur-suers establishing a case of fraud against the defenders.

"On 24th September 1919 the defenders contracted with the Dublin Shipbuilders, Limited, Dublin, for the building, completing, and finishing of a steel screw steamer of certain specified dimensions. The price payable was £40,000, to be paid in five different instalments of £8000. The first instalment was paid by the defenders on 6th February 1920, when the keel of the vessel

was laid.

"In February 1920 the pursuers were desirous of purchasing a steamer of about the dimensions of the steamer agreed to be built by the Dublin Shipbuilders, Limited, for the defenders. The pursuers employed Messrs Edward Hall & Company (Cardiff) Limited, who are brokers for the sale and purchase of vessels, to negotiate the purchase of a vessel for them. This firm got into communication with Messrs Thomas M'Laren & Company, shipbrokers, Glasgow, who on behalf of the defenders submitted to

them the steamer referred to in the agreement sought to be reduced. The case turns upon certain statements made by Messrs M'Laren & Company to Messrs Hall &

Company.

"At the time when negotiations opened for the purchase of the vessel the market in the sale of ships was brisk, prices ruled high and were rising. There was, however, considerable uncertainty as to the date when delivery of ships contracted to be built might be expected. Shipbuilders would not guarantee any particular date of delivery, but the prospect of delivery within a reasonable time enhanced the value of a contract to get a ship from the builders, as the indefinite continuance of the inflated freights then ruling could not be relied upon.

upon.
"After certain communications between the brokers, which I need not refer to in detail, Messrs M'Laren & Company on 17th February 1920 telegraphed to Messrs Hall & Company as follows—'850 tonner keel laid tank tops being laid frames bent starting erecting expected July delivery but cannot guarantee estimated she will carry 870 tons all told Fifty eight thousand declined subject unsold have verbal firm offer from owner at Fifty-eight thousand seven hundred this absolutely best possible and rockbottom telegraph quickly others negotiating.' In a letter of the same date this passage occurs—'As regards delivery they expect she will be ready by July, but of course will give no guarantee. The position is, the keel is laid and they have started on the tank tops. Frames are bent, and they are starting to erect same. We also inquired at the engineers and they are well ahead with their work and see no reason why their part of it should not be ready for delivering steamer in July.'
"In reply to Messrs M'Laren & Com-

"In reply to Messrs M'Laren & Company's telegram just quoted Messrs Hall & Company sent a telegram accepting the offer in these terms—'Dublin 850 tonner expected July delivery message received clients instruct us accept steamer at Fiftyeight thousand seven hundred pounds subject approval plans specifications and terms contract telegraph confirmation quickly.'

"The sale thus concluded was confirmed by Messrs M'Laren & Company by telegram and letter of same date, in the latter of which they say, 'Messrs Abram' (i.e., the defenders) 'have paid the keel instalment, so that the amount to be paid by your purchasers would be sellers' profit, plus the keel instalment, then they would take up the position of the owners and pay the other instalments as they fall due.'

"The agreement between the parties was then duly executed, and the sum of £26,700 paid by the pursuers to the defenders. "Shortly after they had effected the pur-

"Shortly after they had effected the purchase of the vessel from the defenders the pursuers realised that they would have difficulty in financing the payment of the instalments of the price to the builders for which they had rendered themselves liable under the agreement. As the market in ships was still improving, they resolved to dispose of their rights under their agree-

ment with the defenders at a profit to themselves. Accordingly by agreement, dated 13th March 1920, they, in consideration of a sum of £33,000 to be paid by the British Hispano Line, Limited, assigned to that company all their rights and benefits under the agreement of 24th September 1919, and the British Hispano Line, Limited, covenanted duly and punctually to pay the several instalments which would thereafter become due under the said agreement. The difference between £26,700 paid by the pursuers to the defenders and the said sum of £33,000, viz., £6300, represents an apparent profit made by the pursuers upon this transaction.

"In their negotiations with the British Hispano Line, Limited, the pursuers made representations with reference to the state of progress of the building of the vessel founded upon the information which they had received in the telegram and letter of Messrs M'Laren & Company to Messrs Hall & Company, dated 17th February 1920. I do not think that the evidence is clear as to the precise nature of the representation made by the pursuers. In a letter to the pursuers from the British Hispano Line, Limited, dated 3rd July 1920, they say-'When you asked us to take over this contract we were naturally concerned with the question of date of delivery of steamer which is of the highest importance to us, there was some suggestion made as to inspection, but on your informing us the matter was urgent as you were unable to meet the next instalment, which would be due in a few days, we agreed to accept your assurance that the framing was almost completed and the boat was well in hand for delivery in July. It was only on this assurance that we dropped the question of inspection and agreed to purchase.

In replytto this communication the pursuers on 8th July 1920 say—'The second paragraph of your letter is incorrect. We, throughout the negotiations, merely passed on to you the information given to us by the selling brokers at the time of our purchase, which was that no guarantee as to delivery in July could be given al-though our sellers expected that the steamer would then be ready. We gave you the position, namely, that the keel was laid and that work on the tank tops had started. builders were at the time of our purthat frames were bent, and that chase starting to erect the same. We had been informed of the above position on the 19th of February, and during our interviews you and ourselves were all of the opinion that the probability was that after a lapse of nearly a month the framing would have been partly completed.' From the oral evidence I think that the pursuers made definite statements on the lines mentioned in this latter letter as to the state of progress of the building of the ship, and indicated that the source of their knowledge was the telegram of Messrs M'Laren & Company of 17th February, which was exhibited to Messrs Pittard and Thomas, directors of the British Hispano Line' Limited. They did more than merely re-

present that they had no information except what they had received from the defenders, leaving it to the purchasers from them to satisfy themselves as to the actual state of facts. They made the defenders' representations to them their own representations in a question between them and the

British Hispano Line, Limited.

"In June the British Hispano Line, Limited, who had become suspicious as to the state of progress of the building of the vessel, sent a representative to Dublin to ascertain the real position regarding the ship's construction. He found that nothing had been done except the laying of the keel, and that for three months no work had been done on the vessel at all. The Hispano Company complained to the pursuers, and the pursuers in turn on 21st June complained to the defenders, who, however, replied—'When you bought the steamer from us the keel was already laid, and accordingly you paid us the amount of this instalment in addition to the purchase price. Further than that we gave no information to Messrs M'Laren, and no doubt they acted in a like manner in their transactions with Messrs Hall of your city

"On 3rd July 1920 the British Hispano Line, Limited, intimated to the pursuers that they repudiated the contract on the ground of misrepresentation. The pursuers appear to have taken the opinion of counsel about the situation. They also instructed Mr Walliker of Cardiff to proceed to Dublin to report upon the progress that had been made with the ship. His report is dated

17th July 1920.

On 24th July 1920 the pursuers' agents wrote to the defenders referring to the defenders' letter of 21st June and calling their attention to the representations made by Messrs M'Laren & Company at the time when the contract between the pursuers and defenders was being negotiated. They continue—'You have already had a copy of Messrs M'Laren's letter to our clients brokers, and we believe you know that not only were our clients induced by such representations to purchase your interest in the building contract, but that also on the faith of the same representations they transferred their contract to another company in Cardiff. This latter company is the British Hispano Line, Limited, and the latter company as well as our clients have ascertained that the representations which induced our clients to enter into the contract were untrue. The British Hispano Company have notified our clients that they repudiate the contract, that they are applying to the Courts to rescind the same, and are claiming the sum paid to our clients for their interest in the contract. In these circumstances we have to give you notice that our clients will, on the ground of the misrepresentations made to them, claim a rescission of their contract with you, the return of the sum paid to you, and for damages.

"This letter was replied to by the defenders agents, who say - Our clients gave no warranty as to delivery of the steamer. They simply signed the contract to put your clients into their place, and they admit no responsibility for any representations made by Messrs M'Laren & Com-

pany.'
"Action was taken in the English Courts
"Line against the by the British Hispano Line against the pursuers to have their contract set aside on the ground of misrepresentation and to obtain repayment of the money paid by them thereunder. Intimation of these proceedings was duly made by the pursuers to the defenders, who, however, adhered to the position they had already taken up in their agents' letter as above indicated. The pursuers were advised that they could not successfully defend the action taken against them by the British Hispano Line, Limited, and on 11th December 1920 judgment was pronounced against them. Thereafter these parties entered into an agreement which provided on certain specified considerations for the British Hispano Line, Limited, delaying to take any steps to enforce this judgment until judgment is obtained by the pursuers in the present action, the sum-mons in which had been signeted on 5th November 1920.

"From the correspondence it appears that the second instalment payable to the Dublin Shipbuilders, Limited, became payable on 27th November 1920. On 23rd November they made intimation to the defenders, on whose request they also applied to the pursuers. On 26th November the pursuers intimated to the shipbuilders that they had never made any arrangement with them and referred them to the defenders. They added — 'We may say that the contract between ourselves and Messrs Abram, which apparently gave rise to their communication to you of the 1st March last, is now the subject of litigation, and we are satisfied that we are under no liability to them in the circumstances to provide for further payments in respect of this steamer.'

"On 2nd December 1920 the shipbuilders intimated to the defenders that if they did not receive payment of the instalment due they would exercise their right to advertise and put up the vessel for sale in terms of their contract of 24th September 1919. Apparently from the letter of this date Mr H. K. Abram, a member of the defenders' company, had indicated to the builders that in this event the ship would be purchased by the defenders or by some-one on their behalf. The vessel was exposed for sale upon 25th January 1921, on which date it was purchased by Mr Henry Abram. That gentleman was not examined, but his son Mr H. K. Abram explained that his father, although largely interested in the defenders' business, had made the purchase entirely on his own behalf.

"The first question which I have to determine on the evidence is whether the representation made by Messrs M'Laren & Company in their telegram of 17th February 1920, for which it is now admitted that the defenders are responsible as to the stage of construction reached by the vessel, was false in fact. I have no hesitation in answering this question in the affirmative. A certain amount of evidence was adduced by the defenders as to the indefinite character of the statement made and the possibility of drawing different inferences therefrom. In fact all that had been done in the way of construction was that the keel of the vessel had been laid. I do not think that anyone, however ignorant of the precise meaning of expressions used in shipbuilding, would draw any other inference from the statements in the telegram than that the construction of the vessel had reached a much more advanced stage than this. was not true that 'they have started on the tank tops.' It was proved in evidence that this work could not be started until the bottom framing was erected and the floors or some of them in position. This work had not been done when Mr Walliker made his inspection in July. It was also not true that the frames had been bent and they were starting to erect same. I think from the terms of the letter that the pursuers were justified in assuming that the frames referred to were the side frames which were not delivered to the builders until long after the

date of the telegram. "It was contended for the defenders that the statements made although untrue were not material. Their argument was that even though all the work referred to in the telegram had been completed this would not have led to earlier delivery, which was the root of the matter. It is proved that it was very difficult for the builders to obtain material, and I understand that at the date of the proof delivery had not been given, although that was almost a year after the expected date. However that may be, a purchaser might well be prepared to purchase a vessel where satisfactory progress with construction had been made, while he would have refused to have anything to do with the purchase if he had known that after the keel had been laid weeks had passed without any further work being done. Sir John Daniel, a director of the pursuers' company, explains that he was averse to having anything to do with the purchase until the telegram was produced, when owing to what was said as to construction he was induced to make the offer. Another director, Mr Allin, gives similar evidence as to the importance he attached to the information in the telegram. In Menzies v. Menzies (20 R. (H.L.) 108, at p. 142, 30 S.L.R. 530) Lord Watson said— Error becomes essential whenever it is shown that but for it one of the parties would have declined to contract. He cannot rescind unless his error was induced by the representations of the other contracting party or of his agent made in the course of negotiation, and with reference to the subject-matter of the contract. If his error is proved to have been so induced, the fact that the misleading representations were made in good faith affords no defence against the remedy of rescission.' In my opinion the pursuers would not have entered into the agreement sought to be reduced unless they had been in error as to the stage of construction reached by the vessel, and that error was induced by the misrepresentation of the defenders. I do not think that it is in

the defenders' mouth to contend that the pursuers ought not to have been influenced by the statements made. They were clearly put forward with a view to induce a prospective purchaser to accept the offer made.

spective purchaser to accept the offer made. "The next question I have to consider is whether the statements which I have held to be false were fraudulently made. way in which they came to be made is this. Mr H. K. Abram, a director of the defenders' company, communicated them by telephone to Messrs M'Laren & Company with the object of their passing them on to the pursuers as an inducement to them to purchase at his figure. At the time he made the statements he had no personal knowledge of the progress that had been made with the construction of the ship. The only information he had was contained in a letter from the builders in which they state-'The bottom frames are all set at furnace, and the stern frames are also in progress. We have hopes of getting the bottom framing plates very shortly, and when these are received they will be pro-ceeded with.' This information afforded no justification for saying that the builders had started on the tank tops. I have difficulty in seeing how a gentleman so long associated with shipowning as Mr Abram could be so ignorant of ship construction as to think that what is said in the telegram of 17th February is the same thing as what is said in the letter of 9th February. It should be noted, however, that when he was telephoning the particulars Mr Abram says that he did not have the builders' letter of 9th February before him. He had had information about another vessel, referred to as the Larne boat, which was being built for the defenders, to the effect that the builders had received the last consignment of tank margin and floor plates, and that the tank would all be plated in a few days, when they would immediately proceed to erect the frames, which were all ready. I think it probable that he may have thought this information referable to the steamer in question. At the date of the transaction there was no great inducement to make a deliberately false statement as to the stage of construction reached. The demand for ships was keen, and the pursuers would probably have been able to dispose of their contract with the Dublin Shipbuilders, Limited, at a substantial profit to them-selves. I think Mr Abram had no reasonable ground for believing that the statement he made was true, but I do not think that he made it knowing that it was untrue, without believing it to be true, or recklessly careless whether the statement was lessly careless whether the statement was true or false. It appears to me therefore that fraud cannot be imputed to him. For this proposition I refer to the instructive opinion of Lord Herschell in Derry v. Peek, 1889, 14 App. Cas. 337. At p. 369 his Lordship says—'A man who forms his belief carelessly, or is unreasonable gredulous may be blameworthy when ably credulous, may be blameworthy when he makes a representation on which another is to act, but he is not, in my opinion. fraudulent in the sense in which that word was used in all the cases from Pasley v

Freeman down to that with which I am now dealing.' At p. 374 there is the following passage—'I think the authorities establish the following propositions—First, in order to sustain an action of deceit there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved where it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent there must I think always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false has obviously no such honest belief.

"Although in my opinion the charge of fraud is not established against the defenders, I think that their own conduct in asserting that they were not responsible for the statements made by Messrs M'Laren & Company in the telegram of 17th February 1920 was largely responsible for the charge being made and persisted in against Owing to the position taken up by them the pursuers were forced to bring their action not only against the defenders, but against Messrs M'Laren & Company. On the defenders accepting responsibility the pursuers asked leave to amend their summons, which on 5th January I granted, and assoilzied Messrs M'Laren & Company from the conclusions of the summons, and found them entitled to expenses against the pursuers, but reserved the question whether or not the pursuers were entitled to recover the amount of said expenses from the defenders. On the information that is now before me I hold them to be so entitled, and that independent of their success in this action.

"In the view which I take of the facts of the case the pursuers are entitled to have the agreement of 20th February 1920 reduced and the money paid by them there-under returned, unless there is some bar to their obtaining this remedy arising from their actings or from the circumstance that they are not in a position to give restitutio in integrum. It was suggested that the pursuers had not timeously made complaint of the inaccuracy of the statements, but the truth was not known to them until about the middle of June, and they wrote to the defenders about the matter on the 21st of that month. delay that has occurred does not appear to me of itself to prevent the pursuers claiming relief. More reliance was placed by the defenders on the circumstance that on 2nd July the British Hispano Line, Limited, intimated their approval of a suggested alteration of minor importance. The alteration of the control of ation was not carried out, and as the British Hispano Line, Limited, had already complained of the misstatements made to them about the stage in the construction of the vessel reached, and on 3rd July 1920 intimated their intention to rescind their contract with the pursuers, I do not think that this circumstance can be considered of sufficient importance to amount to homological

logation.
"The defenders' second plea in-law that restitutio in integrum is impossible remains to be considered. This plea is based upon the circumstance that the pursuers failed to pay the second instalment of the price. and that the vessel was thereupon sold by the builders. I do not think that I need to determine whether or not the sale should be treated as in effect a sale to the defenders themselves. The validity of the plea falls, in my opinion, to be determined either at the date when the pursuers inti-mated their intention to rescind, or at latest on 5th November, when they actually took action. On either of these dates, if the defenders had accepted responsibility for the inaccurate statements made by them and tendered repayment of the money paid to them, there would have been no obstacle to their complete restoration to the rights enjoyed by them under their agreement with the Dublin Shipbuilders, Limited. I am not prepared therefore to give effect to their plea-in-law. In the result I shall sustain the second plea-in-law for the pursuers.

"Perhaps I should add that if I had had to consider the pursuers' claim for damages amounting to £6300 I should not have been able to sustain it in its entirety or perhaps to any extent. Although the agreement with the British Hispano Line, Limited, bears that they were to pay £33,000 to the pursuers, which with the liability for future instalments taken over by them makes a price of £65,000, it appears that £3500 of the price apparently payable to the pursuers was paid to two of the directors of the British Hispano Line, Limited. In an excerpt from the minutes of the pursuers' company, dated 15th March 1920, it appears that the managers reported that the s.s. No. 17 building at Dublin which was purchased at a price of £58,700 had been re-sold for £61,500.' The secret commission payable to the directors of the British Hispano Line, Limited, by the pursuers would not in any event be recoverable from the defenders. and I doubt whether the transaction was not of such a character as to preclude the pursuers from founding upon the loss they apparently sustained from the cancellation of their agreement with the British Hispano Line, Limited, but it is not necessary for me to determine this point."

The defenders reclaimed, and argued—The pursuers had no title to sue. At the date of the action being raised they were not in a position to make restitutio in integrum, because they had parted with their title to the ship. No doubt they had been reinvested in their title after the action had been raised, but a defect in title could not be purged pendente processu unless it were purely formal—Symington v. Campbell, 1894, 21 R. 434, 31 S.L.R. 372; Doughty Shipping Company, Limited v. North British Railway Company, 1909, 1 S.L.T.

267. In any event there was no material misrepresentation. The test of materiality was not what the party said was material, but what was reasonable. The misrepresentation here was not material in the sense that it was the inducing cause of the con-The precise stage of construction was not an essential element in the agreement. Further, through the actings of the defenders' assignees the agreement had been homologated after the alleged misrepresentation had become known to them. By request to the builders to alter the design of the ship they had unequivocally adopted the agreement, and it did not affect the matter that that request was never carried out—Western Bank of Scotland v. Addie, 1867, 5 Macph. (H.L.) 80; Ex parte Briggs, 1866 L.R., 1 Eq. 483; Clough v. London and North-Western Railway Company, 1871 L.R., 7 Ex. 26; Erlanger v. New Sombrero Phosphate Company, 1878, 3 App. Cas. 1218, per Lord Blackburn at p. 1277; Pollock on Contract, 9th ed., 626; Erskine, iii, 3, 48; Bell's Com., vol. i, p. 140. Further, the pursuers were barred by delay and by the fall in value during the delay.

Argued for the pursuers and respondents -The pursuers had a good title to sue. The fact that the contract with the sub-assignees had not been formally rescinded at the date of raising the present action did not matter and they were entirely in a position to make restitutio in integrum. The sub-assignees by requesting the builders to make a slight alteration in the plans, which was not carried out, had not in knowledge of the misrepresentation homologated the contract or made restitution inequitable—Hay v. Rafferty, 1899, 2 F. 302, 37 S.L.R. 221; Adam v. Newbigging, 1888, 13 App. Cas. 308. There was therefore no election-Morrison v. Universal Marine Insurance Company, 1873 L.R. 8 Ex. 197; Gloag on Contract, pp. 611, 612. The misrepresentation was material and induced the contract, and the pursuers were entitled to rely on it—Redgrave v. Hurd, 1881, 20 Ch. D. 1. There was no unreasonable delay, and the defenders could not complain of delay if their own conduct misled the pursuers as was the case here. A fall in values was not a bar to restitutio in integrum-Armstrong v. Jackson, [1917] 2 K.B. 822.

## At advising-

LORD PRESIDENT—The defenders having contracted with a firm of shipbuilders for the construction and delivery of a steam vessel assigned the contract to the pursuers. The pursuers subsequently intimated their rescission of this assignation on the ground that a certain representation made to them by the defenders at the time they took the assignation was erroneous and misleading. They have accordingly brought this action to have the assignation reduced on the plea of essential error induced by misrepresentation, and to recover the price paid for it. Fraud, which was at first a ground of action, is now out of the case, and the conclusion for damages accordingly disappears Manners v. Whitehead, 1898, 1 F. 171, 36 S.L.R. 94.

There is no doubt that the defenders did misrepresent the stage which had been reached by the builders in the construction of the vessel at the time the assignation was agreed on, to an extent involving about six weeks' progressin construction. Whereas little more than the keel was completed, it was represented that the understructure was all but ready to receive the side frames. But the defenders argued that this misrepresentation was not material, and that any error it induced in the pursuers' minds as to the progress of the builders' contract was not essential, in the sense explained by Lord Watson in Menzies v. Menzies, 1893, 20 R. (H.L.) 108, at p. 142-that is to say, that but for it the pursuers would not have taken the assignation. [His Lordship then stated his reasons for holding that in the circumstances the misrepresentation was material and induced the contract.]

The other arguments presented by the defenders arise out of a sub-assignation of the builders' contract which was granted by the pursuers to a third party before they had become aware of the misleading character of the representations which had induced them to accept the original as-

signation.
There is no doubt that if the pursuers had become aware of the essential error (under which they laboured in accepting the original assignation) before they sub-assigned they would by sub assigning have irrevocably lost their option to rescind the original assignation, and could never have succeeded in this action. The essential error made the original assignation voidable, but not void, and when the pursuers became aware of the mistake into which the defenders' misrepresentation had led them they would on the above hypothesis have been at once placed-vis-à-vis the defenders-in the position so well described by Lord President M'Neill in Panmure v. Crockat, 1854, 17 D. 85, at p. 92. They would, in short, have been put to their election. The effect of the doctrine of election, in the first stage of its application, is negative. The party who is put to his choice can be prevented from approbating and reprobating at the same time, but while the other party has so far a hold on him he cannot dictate the side on which the election is to fall. The second stage is positive in character, and is reached as soon as, either expressly or by acts affording evidence of election, the party entitled to elect exercises his choice. other party then becomes entitled to take him at his word as it were, and if the election is on the side of approbation the contract is said to be homologated. Homologation in such cases has been called acquiescence (Ex parte Briggs, 1866 L.R., 1 Eq. 483) or affirmance (Clough v. L.N.-W.R., 1871 L.R., 7 Ex. 26) in England. Sub-assignation by the pursuers after they had learned their mistake would have implied the clearest homologation, for in sub-assigning they would have deliberately taken the fullest benefit of the original assignation which they preferred not to rescind.

But the pursuers sub-assigned before they became aware of their mistake, and before

they were in a position to make an election at all. Nevertheless the sub-assignation made it impossible for them to rescind as against the defenders, not because they had approbated the original assignation by subassigning (for they sub-assigned in ignorance of their mistake), but because they had disabled themselves from reprobating it. They were precluded, by granting the subassignation, from doing anything inconsistent with the right they had conferred on the sub-assignees, for what could be more inconsistent with that right than to impugn the original assignation upon the validity of which the validity of the sub-assignation depended. In short, the granting of the sub-assignation deprived the pursuers of their title to rescind, or to sue for rescission. Moreover, by parting with the benefits of the builders' contract, they deprived themselves of the means of fulfilling a condition without which the law does not permit rescission of a voidable contract—the condition, namely, of restitutio in integrum. But the pursuers say that their title to rescind—and also their ability to make restitution—though temporarily lost by the sub-assignation, have been restored to them as the result of a subsequent rescission of the sub-assignation by the sub-assignees on grounds to which the pursuers could make no good answer in law. The legal questions thus raised are referred to, but not decided, in Edinburgh United Breweries v. Molleson, 21 R. (H.L.) 10, 31 S.L.R. 922.

In considering them regard must be had to the circumstances, which are as follows:

—The agreement for the original assignation by the defenders to the pursuers had been reached by telegram and letter on 17th February 1920. The sub-assignation was agreed on and carried into effect nearly a month later, viz., on 13th March 1920. the meantime the pursuers had made neither inspection of the ship nor inquiry of the builders, and still believed the state of progress as at 17th February to have been such as had been represented to them. It was not until about four months later still, namely, on 3rd July 1920, that the subassignees wrote to the pursuers intimating their rescission of the sub-assignation. The sub-assignees founded on essential error on their part, induced as they alleged by misrepresentations made to them by the pursuers. These misrepresentations, like those complained of by the pursuers against the defenders, concerned the state of progress in the construction of the ship, but were stated by the sub-assignees (in their letter of 3rd July) to be referable to the condition of matters as at 13th March instead of as at 17th February. In point of fact practically no progress had been made with the ship since 17th February. But the pursuers, anxious to avoid the delay which inspection of the ship by the sub-assignees would cause, and no doubt relying on the letter and telegram for the state of progress a month before, represented on their own responsibility that the framing was now (13th March) so near completion that the framing instalment of the price would be due in a week or so. I agree with the Lord

Ordinary in his remarks about the evidence on this part of the pursuers' case—one of crucial importance to them on the facts. The mere exhibition of the letter and telegram of 17th February inferred no representation except as to the genuine character of the documents, and expressions of honest opinion, if clearly such, do not amount to misrepresentations. The evidence led by the pursuers has caused me some misgivings, but I do not think I should be justified in differing from the learned Judge who heard it, and on the whole I have myself arrived at the conclusion stated above. The subassignees did not ascertain the true state of matters until the middle of June. then informed the pursuers of their discovery, but intimated no rescission of the sub-assignation pending communication by the pursuers with the defenders. The pursuers in turn wrote a letter of complaint to the defenders on 21st June, which the latter answered by a denial of any misrepresentation on their part. Then followed the letter by the sub-assignees to the pursuers of 3rd July intimating their rescission of the subassignation, to which the pursuers replied insisting that the sub-assignation must stand good. And finally the pursuers, after getting a report for themselves on the state of progress, wrote to the defenders on 24th July intimating rescission of the original assignation, to which the defenders replied holding the pursuers to their bargain. The next step was the institution of proceedings in the English Courts on 17th August 1920 at the instance of the sub-assignees against the pursuers to have the sub-assignation set aside on the ground of misrepresentation. It is, I think, sufficiently clear that by this time the pursuers had decided not to contest the rescission by the subassignees. The suit was a friendly one, and the sub-assignation was formally rescinded by order dated 11th December 1920. Meantime on 5th November 1920 the pursuers had raised the present action. During all this time progress in the builders' yard was very slow, and the framing instalment did not become due until January 1921. It was not paid by any of the parties who were or might ultimately be interested in the delivery of the ship, and she was accordingly sold by the builders. The questions thus come to be whether the pursuers when they came into Court (5th November 1920) (1) had a good title to sue for rescission, and (2) were in a position to restore the benefits of the builders' contract to the defenders?

If the pursuers had reacquired the benefits of the builders' contract by purchase, they would have put themselves in no better position to rescind or to make restitution than they were in at any time after the sub-assignation. Reacquisition by such means would have vested them in the benefits of the builders' contract under a title acceptance of which was not in any way induced by the defenders' misrepresentations, and which being their own voluntary and deliberate act could give them no right to throw the subject thus acquired back on the defenders. If the subject was an undesirable one their reacquisition of its dis-

advantages would have been the pursuers' own choice, not the result of any misrepresentations by the defenders. But the case which has occurred is one not of reacquisition from the sub-assignees, but of rescission of the sub-assignation itself. The subassignation is swept out of existence, and the pursuers are thus put into exactly the same relation with the builders' contract they were in before. Why in these cir-cumstances should not the pursuers' title to rescind revive along with their ability to restore the subject? I cannot see that it makes any difference that the misrepresentations which proved fatal to the subassignation were not identical with those which are alleged against the defenders. They were related to them, no doubt, but suppose they had been concerned with some completely different matter 1 think the result would have been the same. I say nothing as to the position which would have arisen if the misrepresentations which laid the sub-assignation open to attack had been fraudulent.

The defenders further contended that the pursuers were not actually reinstated in the benefits of the builders' contract until the Order of 11th December 1920 was pronounced in the English Court. They pointed to the fact that nothing was proved to have occurred at the time the present action came into Court (5th November 1920) which bound the pursuers to accept rescission of the sub-assignation or prevented the sub-assignees from recalling their intimation to rescind, abandoning the English action, and electing to hold by the sub-assignation after all. But the genuine and bona fide character of the English proceedings is not challenged, and if the pursuers had no good answer to the sub-assignees' action I cannot see that they were bound to postpone raising action in this Court until the rescinding order was actually pronounced. All that actually stood between them and reinstatement in the benefits of the builders' contract was the pronouncement of this order which the sub-assignees were moving the English Court to make and which, if the above stated hypothesis is correct, the pursuers had no means of resisting. I think in these circumstances the pursuers may properly be regarded as having a substantial title to sue and as being substantially in a position to offer restitution to the defenders. If this be so, the circumstance that the substantial right was not actually completed at the initiation of proceedings is not material—See Symington v. Campbell, (1894) 21 R. 434.

The defenders, however, did contend that the pursuers had a good answer to the sub-assignees' claim to rescind and to their action in the English Courts. This answer, if it was a good one, was open to the pursuers in the English proceedings at the time the present action was raised. I think if the defenders could establish that the sub-assignees were not entitled to rescind as against the pursuers, but that, on the contrary, the sub-assignees had homologated the sub-assignation, or could not have made restitution to the pursuers, the defen-

ders would be justified in their contention that the pursuers were neither entitled to sue nor in a position to offer restitution to them. Unfortunately for the defenders the point on which this contention is based is not set forth on record. On the other hand, the evidence with regard to it was allowed to be led without objection, and the Lord Ordinary dealt with it. In these circumstances I think we are bound to entertain it. The fact is that on 2nd July 1920-fully a fortnight after the state of progress in the builders' yard was known to the sub-assignees and had been communicated to the pursuers, and only a day before the sub-assignees wrote to the pursuers intimating rescission of the sub-assignation the sub-assignees approved or instructed an alteration of the general arrangement plan of the steamer amidships. In accordance therewith the deckhouse was to be shifted several feet and a passage was to be removed from its after end to its forward end. This alteration was a relatively trifling one and involved little expense. But its importance lies less in the magnitude of the change than in the quality of the act by which the sub-assignees approved or instructed it. For such approval or instructed it. tion undoubtedly wore the aspect of an assertion of right to the benefits of the builders' contract. On the other hand, it must be kept in mind that the construction of the ship was progressive, or at least was normally so, from day to day. This was the case whoever might turn out in the end to be entitled to the benefits of the contract or to the completed ship; and clause 4 of the builders' contract provided the usual means for effecting minor devia-tions from the original plan while construction was in progress. It must be admitted that it would have been no more than prudent if approval of any change, however unimportant in itself, had been made subject to the pursuers' sanction for any interest they might have, for the circumstances were such that any change had to be made for whom it might concern. But under clause 4 the change itself was not irrevocable, and in point of fact it was never carried out. Further, although this is not an infallible test on the question of homologation, the change (even if it had been carried out) would not in my opinion have been such as to make restitution inequitable. I think the law is, that provided the thing offered to be restored is the same thing as that which was the subject of the assignation under rescission and not a subassignation under resension and not a substitute for it—Western Bank v. Addie, (1867) 5 Macph. (H.L.) 80; Boyd & Forrest v. Glusgow and South-Western Railway Company, 1915 S.C. (H.L.) 20, 42 S.L.R. 205 it is enough that the circumstances of the subject and the relations of the parties to it are such as to make it not inequitable to reinstate the original owner in possession-Boyd & Forrest v. Glasgow and South-Western Railway Company (cit. sup.) per Lord Atkinson at pp. 29, 31; Adam v. New-bigging, 1878, 13 A.C. 308. I think the Lord Ordinary was right in regarding this action of the sub-assignees as insufficient to amount

to an homologation by them of the subassignation or as disabling them from offer-

ing restitution to the pursuers.

It remains to deal with the plea of bar stated for the defenders. A slump in shipping values occurred in June 1920, and an appreciable and progressive further fall occurred during the later half of the year. The defenders argued that the pursuers' delay in raising the action was to their prejudice in consequence of the depreciation in the value of the benefits of the builders' contract and barred the action. They said this prejudice rendered restitution inequitable, and they maintained with force that when the pursuers intimated rescission of the original assignation on 24th July they had not accepted the sub-assignees' rescission of the sub-assignation and must therefore bear whatever burden of responsibility might be involved in delay. But I do not think the fall in the speculative value of the builders' contract raised any bar or imported any inequity into the proposed restitution. Prices are always changing, and after all the builders' contract was to deliver a definite and useful commercial subject, to wit, a steam vessel, however much its price in the market might be affected from time to time by current rates or freight—Western Bank v. Addie (cit. sup.) per Lord Cranworth at p. 90; Erlanger v. New Sombrero Phosphate Company, 1878, 3 A.C. 1218, per Lord Blackburn at p. 1279.

In the result I think the interlocutor of

the Lord Ordinary should be affirmed.

LORD MACKENZIE-The Lord Ordinary has held that the agreement of 20th February 1920 was entered into by the pursuers under essential error induced by the misrepresentation of the defenders, and that therefore they are entitled to have it reduced. This was the main issue of fact upon which the case was fought. I agree with the conclusion at which the Lord Ordinary has arrived. The statements complained of as to the state of progress of the building of the vessel, particularly the representa-tion that a start had been made on the tank tops, and that the frames were bent, and that a start had been made in the erection of these, were so material as to affect the mind of the purchasers in such a way as to induce error in regard to an essential element in this contract. But for these statements the purchasers would have declined to contract. There is evidence in the case, which the Lord Ordinary accepts, of the effect upon the mind of the purchaser of these statements. There is also evidence that if it were not the case that the builders had started on the tank tops this meant a delay of some six weeks in the completion of the vessel. This period was so substantial that it would affect the mind of a reasonable man in entering into the contract. take the same view whether it be regarded that the pursuers wanted a ship for their own use or whether they merely desired to make a speculative contract which they could re-sell at a profit when freights were high.
The pursuers are therefore entitled to

reduction of the agreement of 20th February 1920 and to repayment of the amount they paid unless by their subsequent conduct they have barred themselves. The good prima facie case which the pursuers have is said to be displaced by their actings in regard to the assignation by them of their rights under the shipbuilding contract to the British Hispano Company on 13th March 1920. This assignation the British Hispano Company accepted on the faith of certain representations made to them by the pursuers which are admitted to have been erroneous. In June 1920 the British Hispano Company sent over to Dublin and found that these representations were erroneous. This was communicated to the pursuers, and on 3rd July the British Hispano Company intimated to them that in consequence of the misrepresentations they repudiated the contract and claimed repayment of the sum of £33,000 paid by them. On 24th July 1920 the pursuers' solicitors wrote to the defenders a letter containing the following—"The British Hispano Company have notified our clients that they repudiate the contract, that they are applying to the Courts to rescind the same, and are claiming the sum paid to our clients for their interest in the contract. circumstances we have to give you notice that our clients will on the ground of misrepresentations made to them claim a rescission of their contract with you, the return of the sum paid to you, and for damages.'

When the defenders were faced with this, instead of admitting responsibility for the statements made, and admitting that they were not accurate in point of fact, they took up the position they were not responsible for the statements-this was abandoned by minute in this process-and have throughout maintained that what was termed by their counsel "misdescription" was not material and did not induce the contract. It was this that put the pursuers in an embarrassing position as regards the British Hispano Company. They took the advice of English counsel with the result that proceedings were taken in the English Court by the British Hispano Company to rescind the contract they had made with the pursuers. It was not until 11th December 1920 that a consent order was obtained rescinding this contract. On 5th November 1920 the summons in the present action had been signeted. The record was closed on

1st February 1921.

In these circumstances several points were raised in the argument before us of which there is little if any notice on record and to which the evidence was not directed. It was contended that by passing on the contract to the British Hispano Company the pursuers had divested themselves of their title to bring the action on 5th November. This appears to me to be unsound. The contract was a going contract under which the pursuers were under a continuing liability to the defenders to pay to the shipbuilders the instalments as they fell due.

It was next argued that at the date when the action was brought the pursuers were

not in a position to make restitutio in integrum. It is true that a pursuer in such an action as the present must offer restitution in order to make his averments relevant, and he must be in a position at some point of time to make restitution. In the present case the pursuers were in a position to make restitution at the date when the record was closed. There is nothing said against their good faith. There is no sufficient proof of facts which would instruct prejudice to the defenders. So far as the evidence goes the fall in value had taken place by July. I hold that in point of time there was not delay sufficient to prevent the pursuers being entitled to their remedy. The letter of 24th July was written within a short time after Mr Walliker's report. The pursuers were entitled to time to satisfy themselves. What they were in a position to tender back was the original contract. This is not a case in which an attempt is made to tender a substitute and not the identical thing. Further, the title in virtue of which they sue and offer restitution was their original title. This is not a case in which after a sub-sale there has been a

re-purchase. The position and rights of the pursuers' vis a-vis the British Hispano Company were the subject of much discussion. My view is that the decree in the English Court was pronounced not as the result of a compromise but because, as the witness Allin says, they recognised the fact that they had not a leg to stand on. There is difficulty in construing the evidence as re-corded, but I regard that given by the witnesses Allin and Thomas as coming to this, that a statement was made by Allin upon a matter of fact, viz., the stage of construction of the vessel, and that he supported it by production of the letter and telegram sent by the defenders. He then went on to represent that the next instalment would be due shortly, and that they would not be in a financial position to make payment. The pursuers were entitled to take up the position that the fact that these statements had been made left them without a defence to an action by the British Hispano Company. It is beside the point to suggest that as at 5th November 1920, when the present action was raised, the British Hispano Company might have abandoned their action. It is, no doubt, true to say that the defenders might have countered the pursuers' offer to restore by saying and proving that a third party had acquired right to the contract. But they did not do so. Nor could they have succeeded in doing so, for the British Hispano Company adhered to their posi-tion throughout. From July 1920 onwards parties were negotiating on the footing that an arrangement would be made. It was arranged that time should be given the pursuers for payment of the £33,000. There is nothing, however, to suggest that this was of the nature of a bargain. It appears to have been a concession.

It remains to refer to the alteration on the contract sanctioned by the British Hispano Company in their letter to the

Dublin shipbuilder on 2nd July 1920. It was urged that this was done after the British Hispano Company had full knowledge of facts entitling them to rescind the contract, and that therefore it amounted to homologation of the contract. This, it is said, would have furnished the pursuers with a conclusive answer to the action by the British Hispano Company against them. This point, if properly raised and pleaded, might have created difficulty. There is, however, no record for it, and it was not put to the witnesses. It may be that in a construction contract containing a power to alter, it was considered that an altera-tion asked for by the builders might be assented to without affecting the legal rights of parties. From the references to it in the proof it was regarded as a minor matter, not of any importance, and ought not to have the effect the defenders now seek to ascribe to it. What is tendered back is substantially the same as the pursuers got.

Upon the whole matter I am of opinion that the interlocutor of the Lord Ordinary ought to be affirmed.

LORD SKERRINGTON—The defenders' plea of "no title to sue" makes it necessary for us to decide a legal question which was treated as an open one by Lord Herschell (L.C.) and Lord Watson, and as to which they reserved their opinions in the speeches which they delivered in the Edinburgh United Breweries, Limited v. Molleson, (1894) 21 R. (H. L.) 10, pp. 14 and 16. That question is whether a purchaser, who has re-sold the subject of the purchase not knowing that he bought under essential error induced by his seller's misrepresentations, has a good title after he has discovered the error to sue for reduction of his purchase although the re-sale has not actually been reduced but has merely been repudiated by the sub-purchaser. I am prepared to answer the question in the affirmative provided that the purchaser can prove not only that the sub-purchaser has repudiated his contract, but that there were legal grounds which entitled him to do so. In such a case as I have figured the original purchaser would, I think, have a substantial title to bring his action of reduction notwithstanding the fact that judicial proceedings were necessary in order to enable him to prove that the sub-contract (which prima facie divested him of any such title) was voidable and had actually been rescinded by the subpurchaser. The view which I have expressed is not inconsistent with the decision in the case of Symington v. Campbell, (1894) 21 R. 434, to the effect that a person who has no title at all at the time when he brings his action cannot remedy the defect by acquiring a title after the case has come into Court.

The difficulty which I have felt in repelling the plea of "no title to sue" arises not so much from the law as from the way in which the pursuers have presented to the Court the facts relative to their negotiations with the Hispano Company which culminated in the re-sale to that company. Both

in averment and in evidence they confuse the "passing on of information received" (in other words a representation that certain information has been received from a certain source) with a representation that the information so received was in fact correct. The evidence seems to me unsatisfactory as regards this part of the pursuers' case, but as it satisfied the Lord Ordinary who saw and heard the witnesses I do not think it safe to dissent from his conclusion that the pursuers "made the defenders' representa-tions to them their own representations in a question between them and the British Hispano Line, Limited."

The defenders have two other preliminary pleas (pleas 3 and 4). In so far as there are averments which support these pleas they have not, in my opinion, been established by the evidence. On the merits I think that the pursuers have proved their case, and I have nothing to add to what has been said by the Lord Ordinary on the subject.

LORD CULLEN-I agree with the Lord Ordinary in holding that the contract between the pursuers and defenders was induced by material misrepresentations made by the defenders.

As regards the question whether the contract between the pursuers and the Hispano Company was induced by a repetition to the latter company by the pursuers of the misrepresentations made to them by the defenders, the evidence is to my mind not wholly satisfactory; but on this question of fact I do not feel justified in differing from the conclusion reached by the Lord Ordinary, who saw and heard the witnesses, that

it was so induced.

The defenders, however, in the first place, plead no title to sue. On this topic I concur in what has been said by Lord Skerrington. In the next place, the defenders plead that the pursuers are not able to make restitutio in integrum. The position under this head of the case is as follows:--When the action was raised the pursuers offered to make restitutio in integrum on the footing of their contract with the defenders being rescinded. The defenders, however, refused to have the contract rescinded, and maintained that there was no ground for rescinding it. Prior to the closing of the record the pursuers became able to make restitutio in integrum by the setting aside of their contract with the Hispano Company. Now that it has been decided that the defenders are wrong on the main issue as to misrepresentation by them so that their contract with the pursuers falls to be reduced, there is no difficulty about restitutio in integrum, and I am unable to see any equity in the view that the pursuers' remedy should fail merely because at the inception of the action when they offered a restitutio which the defenders refused to accept, they could not there and then have made it had the defenders chosen to take it. No legitimate interest of the defenders has thereby suffered so far as I am able to see. The defenders, indeed, by their unfounded defence on the main issue of misrepresentation have unduly prolonged

the period at which the condition of making restitutio as an incident of reduction has become practically operative as a condition on which they are now interested to insist.

In the next place, the defenders maintained that the action is barred by homologation through the proceedings connected with the alterations on the pantry of the ship. This is a perfectly distinct issue. There is, however, no record for it. The record is destitute of any reference to the matter, and I do not think it is entitled to be considered.

Lastly, the defenders found, in bar of the pursuers' remedy, on material change of circumstances through the sale of the ship, &c. On this matter I agree with the Lord Ordinary's view that such change of circumstances was entailed by the defenders' own course of action in wrongfully insisting in the validity of their contract with the pursuers instead of consenting to its rescission.

I agree with your Lordships in thinking that the reclaiming note should be refused.

The Court refused the reclaiming note.

Counsel for Pursuers and Respondents— D. P. Fleming, K.C.—Normand. Agents—Webster, Will, & Co., W.S.

Counsel for Defenders and Reclaimers— Brown, K.C.—Aitchison—Gillies. -Smith & Watt, W.S.

Saturday, July 15.

## FIRST DIVISION.

[Lord Blackburn, Ordinary.

BRITISH THOMSON - HOUSTON COM-PANY, LIMITED v. CHARLES-WORTH, PEEBLES, & COMPANY.

Patent-Infringement-Interdict-Interdict against Exportation of Infringing Articles Brought into this Country from Abroad.

The patentees of an electric lamp who had obtained interdict against foreign manufacturers infringing their patent in this country brought actions of interdict against certain merchants in which they craved interdict against the respondents "using, putting in practice, disposing, selling, or offering for sale, or importing into the United Kingdom, or exporting therefrom" the lamps in question. The respondents only resisted that part of the crave which related to exportation, on the ground that exportation did not per se constitute an infringement, and they declined to accept any limitation on the right they claimed, which would leave them free to return to their foreign consigners lamps sent into this country by mistake in infringement of the patentee's rights. Held (diss. Lord Skerrington) that in view of the fact that the complainers were merchants and not carriers, and that they asserted an unlimited right of exporta-