# COURT OF SESSION.

*Friday, October 27.*

## FIRST DIVISION.

[Lord Sands, Ordinary.

## FLETCHER *v.* LORD ADVOCATE.

*Contract—Essential Error—Misrepresentation—Reduction—Averments—Relevancy.*

In an action of reduction the pursuer sought to have set aside on the ground of essential error, induced by the misrepresentations of the other contracting party, an agreement which he had entered into with him. He averred that the defender laid before him a document informing him that it embodied a certain agreement come to between them and requested him to sign it; that he (the pursuer) not having his eyeglasses with him was unable to read the document; and that he signed it in reliance on the representations of the defender that it embodied the agreement in question. The document did not in fact embody the agreement which the pursuer supposed it did. *Held* that the pursuer's averments were relevant to constitute a case of essential error induced by misrepresentations.

*Process—Proof or Jury Trial—Form of Issue—Essential Error—Misrepresentation—Reduction.*

In an action for the reduction of a document on the ground of essential error induced by the misrepresentations of the other contracting party, the pursuer averred that he had signed it on the faith of misrepresentations made to him by the latter that it embodied a certain agreement come to between them, which in fact it did not, and proposed an issue in general terms, viz., "Whether the said pretended agreement condescended on, bearing to have been made on 28th September 1921 between the Board of Trade on the one part and the pursuer on the other part, was entered into by the pursuer under essential error as to its import and effect induced by the representations of those acting on behalf of the Board of Trade," leaving to the jury to gather from the evidence led what the misrepresentation was on which his case was founded. The pursuer's averments having been found relevant, the defender maintained that the case was one for proof and not for jury trial. *Held* that no reason had been shown for interfering with the decision of the Lord Ordinary to send the case to a jury, and issue in general terms *allowed*.

*Munro* v. *Strain*, 1874, 1 R. 522, 11 S.L.R. 583, *commented on*.

John Fletcher, The Anchorage, Kinghorn, Fife, sole proprietor of the Kinghorn Shipbuilding Company, *pursuer*, brought an action against the Lord Advocate for and on behalf of the Board of Trade, *defender*, in which he sought to have set aside on the ground of essential error an agreement dated 28th September 1921 bearing to have been made between himself and the Board of Trade.

The pursuer averred, *inter alia*—"(Cond. 2) In September 1919 the pursuer negotiated with Mr John Rogers, who was formerly Assistant Director of Materials, Admiralty, afterwards Chief Constructor at Sheerness Dockyard, and is now Manager of His Majesty's Dockyard at Rosyth, for the purchase from the Ministry of Shipping (on whose behalf Mr Rogers acted) of three complete ships, including the whole of the hull materials, the whole of the machinery, and practically the whole of the equipment for these vessels. The pursuer offered the sum of £300,000 for the said ships, materials, machinery, and equipment subject to certain arrangements as to payment by instalments, and this offer was accepted on behalf of the Ministry of Shipping by letter, dated 23rd September 1919, handed to the pursuer by Sir Charles Sanders, as representing the Controller-General of Merchant Shipping. It was set forth in the said letter, and was a term of the agreement, that if any of the parts were missing or had deteriorated to such an extent that they should not be usable, such parts, if material to the construction of the vessel, were to be replaced by the Ministry of Shipping free of cost to the pursuer, but that the pursuer was not to ask the Ministry of Shipping to replace such parts unless they were of substantial importance. The whole of the material was to be delivered at the pursuer's premises without charge for delivery. (Cond. 3) Following on the completion of the said contract the pursuer immediately made payment to the Ministry of Shipping of the sum of £27,000, which was the amount of deposit agreed to be paid by him on acceptance of his offer. Thereupon he proceeded at once to Kinghorn and commenced making arrangements for receipt of the materials which he had purchased and for the construction of the vessels. Before entering into the purchase he was informed by Mr Rogers that the whole of the materials to be purchased were in existence and complete in every respect ready for immediate delivery, and that prompt delivery would be given to him, and further, that it was anticipated that deliveries of the fabricated parts could be given in the sequence necessary for rapid building, and that this sequence would in fact be observed so far as possible. . . . (Cond. 5) At the time when the pursuer entered into the said contract he had excellent opportunities for the sale of the ships provided that they should be constructed within a reasonable time. This involved the necessity for rapid deliveries of the materials, and the further necessity that deliveries should be given in proper sequence as the building of the ships progressed. From the outset the Ministry of Shipping were in delay in giving the necessary deliveries, and throughout the currency of the contract they made deliveries in irregular sequence. . . . (Cond. 7)

Protracted negotiations have taken place between the pursuer and the Ministry of Shipping (now represented by the Board of Trade) for a settlement of the matters arising out of the contract and the failure of the Ministry of Shipping to complete the same. In February 1921 it was suggested that the sale to the pursuer of the hull materials, machinery, and equipment of the third ship should be cancelled, and that the pursuer should purchase these in so far as delivered to him at a scrap price. In connection with this proposal the pursuer was asked to proceed to London and interview Sir Charles Sanders. He accordingly went to London and under pressure from the Ministry of Shipping offered to enter into an agreement as set forth in a memorandum, dated 31st March 1921, in terms of which the Ministry of Shipping were to retain the engines and boilers for No. 3 ship, whilst certain items shown on a list attached to the memorandum were to be supplied to the pursuer by the Ministry of Shipping. This offer was made by the pursuer on the distinct understanding that an immediate decision was to be given by the Ministry. Nothing further was heard of the matter until two months later, when the pursuer was asked to amend his offer of 31st March, and in particular to make a further deposit of cash for the benefit of the Ministry of Shipping. . . . (Cond. 8) On or about 4th August 1921 the pursuer had another interview with the Ministry of Shipping, when he was handed a draft of what purported to be a new agreement for the settlement of the disputes. He took away this draft with him for consideration, but on going over it found, as is the case, that it was based on the view that the memorandum of 31st March formed a legal and binding agreement. On 16th August 1921 the pursuer wrote to the Ministry of Shipping refusing to accept the proposals contained in the draft of 4th August, and in particular pointing out that no agreement had been reached as regards his offer of 31st March. (Cond. 9) Further negotiations took place with a view to the adjustment of disputes, and on 27th September 1921 the pursuer, in response to a request by the Ministry of Shipping, went to London and had an interview, at which there were present Sir Charles Sanders, Mr Hughes, Mr Rogers, and Mr Holford on behalf of the Ministry of Shipping and Board of Trade, along with the pursuer. At this interview the whole position was considered, and after some negotiation a suggestion was made by Sir Charles Sanders that the engines and boilers for No. 3 ship should be delivered to the pursuer, and that he should pay to the Minister of Shipping the round sum of £50,000 in full settlement. No agreement was arrived at on that day, and the pursuer was not in fact prepared to make any payment of £50,000 or any similar sum to the Ministry of Shipping, but was prepared to consider the giving of credit to the Ministry of Shipping in respect of delivery of engines and boilers against his claim against the Ministry. On the following day, the 28th September 1921, a further meeting took place at the offices of the Ministry, at which the parties already noted were present, together with a Treasury representative. The pursuer had no legal or any other adviser with him at the time. The pursuer had been asked to attend this meeting at 11 a.m. on that day, but was kept waiting from that hour until 1 p.m., when he was introduced to the meeting. . . . . (Cond. 10) At the meeting of 28th September 1921 the Ministry representatives stated that the sum of £50,000 previously suggested by Sir Charles Sanders could not be accepted, and proposed that £60,000 should be paid by the pursuer in full settlement. A question then arose as to whether credit was to be given to the pursuer in respect of certain items not delivered to him amounting in value to £13,000. Sir Charles Sanders stated that this matter had been taken into consideration in fixing the sum of £60,000 which the pursuer was asked to pay. The proposal thus made was entirely unreasonable, and put the pursuer into a state of much agitation and distress. He addressed himself at some length to those present at the meeting on the unfair treatment to which he had been subjected, and the unreasonable nature of the proposals made to him, and concluded by stating that the matter must go to law, and that he would give his agents authority to proceed with an action. Sir Charles Sanders and Mr Hughes then suggested that it would be preferable to have matters in dispute decided by arbitration instead of in the Law Courts. The pursuer at first refused to entertain this suggestion, but after some further and somewhat heated discussion he agreed to submit his whole claims to arbitration. He was then asked to nominate an arbiter, and ultimately suggested Mr James Fullerton of Paisley, whose nomination was accepted on behalf of the Ministry of Shipping. It was thereupon suggested by Mr Hughes that the proposed arbitration should be limited in its scope. This suggestion further agitated the pursuer, who declined to agree to any limitations at all. Mr Hughes then made a remark to the effect that they must see that they did not have to pay anything to the pursuer, whereupon the pursuer stated that he would agree to arbitration only on condition that the whole matter in dispute were placed before Mr Fullerton. It was then about 2 p.m., and the pursuer was about to leave the meeting, but was pressed to remain in order that a document submitting the whole matters in dispute to arbitration might be prepared and signed. He agreed so to do, while at the same time stating, as was the fact, that he could remain only for a few minutes. The Government solicitor and Treasury representative thereupon proceeded to draw up a document on a sheet of notepaper. Having completed it they handed it to the pursuer, but the pursuer did not have his eyeglasses with him, and lacking them was unable to read what had been written. He passed the document to Mr Rogers and asked him to read it. No sooner, however, had Mr Rogers received the document than Mr Holford took it away

from him, on the statement that he desired to make an alteration upon it. Mr Rogers accordingly never read the document, nor did the pursuer read it. After Mr Holford had recovered the document from Mr Rogers, Mr Holford asked the pursuer if he could read it, and the pursuer said 'No.' Mr Holford, who was one of the parties who had prepared the document, then explained that the whole thing merely amounted to an agreement to arbitration, and placed the document before the pursuer for signature. On the faith of this representation the pursuer signed the document which was never read aloud to him, and which he was not able in the circumstances to read, and did not in fact read, for himself. After signing the document, which the pursuer understood to be an agreement for submission generally to arbitration of all the claims of parties arising out of the original contract, and which he would not have signed but for this understanding, the pursuer left the meeting. . . . (Cond. 11) Some considerable time after the meeting of 28th September the pursuer received at Kinghorn a copy of the document which was signed by him at the meeting. He then ascertained, and it is the fact, that the document proceeds on the basis that the memorandum of 31st March 1921 embodies a concluded agreement between the parties, and professes in effect to bind the pursuer to an acceptance of its terms. The pursuer never assented to any agreement in the terms set forth in the document of 28th September. If he had been aware of the actual terms of the document then presented to him for signature he would have refused to sign it. In point of fact he signed it under essential error as to its nature, and this error was induced by the representations of those acting on behalf of the Ministry of Shipping."

The defender averred, *inter alia*—"(*Ans.* 10) Admitted that a meeting took place on 28th September as arranged. At the said meeting there were present the pursuer, Sir Charles Sanders, Mr Rogers, Mr Hughes, Mr Holford, Mr Paterson, and Mr Macaulay Mort, assistant in the Legal Branch, Mercantile Marine Department, Board of Trade. Admitted that at the said meeting the pursuer was informed that the sum of £50,000 could not be accepted, but that £60,000 would be accepted in full settlement of the whole claim against him under the said March agreement. Explained that in the course of the conversation which followed it appeared that the pursuer expected that if his offer of £50,000 had been accepted he would have been given the whole machinery for ship No. 3. It was accordingly explained to him that under the March agreement the said machinery was to be retained by the Ministry of Shipping. Further discussion took place between the parties and negotiations seemed to be on the point of breaking down. Mr Hughes then suggested that the amount to be paid under the March agreement should be settled by arbitration. After some discussion the pursuer agreed to submit the said question to arbitration. He proposed that the arbiter should be Mr James Fullerton of Paisley, and this proposal was accepted on behalf of the Board of Trade. It was then proposed that the agreement to arbitrate should be reduced to writing, and that the pursuer should sign it before he left London. Mr Hughes told the pursuer that he could have the document ready for the pursuer's signature immediately after lunch. The pursuer, however, said he did not want to return after lunch. It was accordingly agreed that the document should be drawn up and signed on the spot. Mr Holford immediately drew up the agreement in his own handwriting. After it was drawn up Mr Holford made a slight alteration in it. Thereafter he read over to the pursuer the agreement as altered excepting the schedules attached thereto, with the contents of which the pursuer was already familiar. It was then signed by Mr Hughes on behalf of the Board of Trade and thereafter by the pursuer. The said alterations were also initialed both by the pursuer and the said Mr Hughes. Before the pursuer signed and initialed the said document as aforesaid he had it in his hands for a considerable time, and he read the body of it from beginning to end. He also looked at the schedules attached to the said document. Denied that Mr Holford asked the pursuer if he could read the document, and that the pursuer said 'No.' Explained and averred that before he signed the said agreement the pursuer was well aware that it proceeded on the basis that the said March agreement was valid and binding. He was also aware of the terms of the said agreement of 28th September before he signed it, and in particular that one of the said terms was to refer to arbitration the balance payable by him in pursuance of the said March agreement. A copy of the said agreement is produced herewith and referred to. A copy of the said agreement was posted on 29th September to the pursuer at the Kinghorn Shipbuilding Yard. . . . (*Ans.* 11) Admitted that the agreement dated 28th September 1921 proceeded on the basis that the said March agreement embodies a concluded agreement between the parties. Explained and averred that the said March agreement does in fact constitute a valid and binding contract between the parties. *Quoad ultra* denied."

The pursuer pleaded—"The agreement condescended on, dated 28th September 1921, having been entered into by the pursuer under essential error as to its nature, *et separatim* under essential error induced by the representations of those acting on behalf of the Board of Trade, decree of reduction should be granted as concluded for."

The defender pleaded, *inter alia*—"1. The pursuer's averments being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed. 2. The pursuer not having entered into the agreement dated 28th September 1921 under essential error, the defender should be assoilzied from the conclusions of the summons. 3. The pursuer not having entered into the said agreement under

essential error induced by the Board of Trade or anyone acting on its behalf, the defender should be assoilzied from the conclusions of the summons."

The issues proposed by the pursuer were as follows:—"1. Whether the pretended agreement condescended on, bearing to have been made on 28th September 1921 between the Board of Trade on the one part and the pursuer on the other part, was entered into by the pursuer under essential error as to its nature? 2. Whether the said pretended agreement condescended on, bearing to have been made on 28th September 1921 between the Board of Trade on the one part and the pursuer on the other part, was entered into by the pursuer under essential error induced by the representations of those acting on behalf of the Board of Trade?"

On 25th July 1922 the Lord Ordinary (SANDS) pronounced the following interlocutor:—"The Lord Ordinary having considered the cause, disallows the first issue proposed by the pursuer; approves of the second issue as amended by the Lord Ordinary, and as now authenticated; appoints that issue to be the issue for the trial of the cause by a special jury consisting of men only; authorises a special jury of men only to be summoned for that purpose; and grants warrant to cite witnesses and havers for the diet of trial now assigned at ten o'clock forenoon, on Tuesday, 23rd January 1923."

The issue approved by his Lordship was as follows:—"Whether the said pretended agreement condescended on, bearing to have been made on 28th September 1921 between the Board of Trade on the one part and the pursuer on the other part, was entered into by the pursuer under essential error as to its import and effect induced by the representations of those acting on behalf of the Board of Trade?"

*Opinion.*—"In this case the pursuer seeks to have set aside on the ground of essential error an agreement which he entered into with officials of the Board of Trade. He proposes two issues—one of essential error, the other of essential error induced by misrepresentations.

"It is not enough that the person who seeks to set aside a document which he has signed should simply aver that he was under a misapprehension as to the nature of the document he has signed. If a person signs a bill and is sued upon it, then it will not suffice that he should aver—'Admitted that the defender signed the said bill, but explained that in doing so he was under the belief that it was a petition for the abolition of the Income Tax.' He must aver certain facts and circumstances that induced this belief. Otherwise his defence is irrelevant. Nor will it suffice that he should aver that he could not or did not read the document, but just took it for granted when he signed it that it was the petition referred to. He must aver some circumstance that induced this belief. Finally, the bald averment that he signed the document not knowing what it was will not do.

"Now the question of misrepresentation inducing an erroneous belief arises under the second proposed issue, but if misrepresentation be eliminated I have difficulty in finding any relevant averment of circumstances which induced in pursuer's mind the belief that this document was of a different kind from what he supposed. In disallowing this issue, however, I do not rest upon this consideration only, but I rest on the antecedent consideration that the document was not a document of a different kind from what the pursuer supposed. The question is examined by Lord Dunedin in the case of *Ellis* v. *The Lochgelly Iron and Coal Company*, 1909 S.C. 1278. In that case a workman who had suffered injury granted a discharge of all claims, past and future. The Sheriff-Substitute as arbitrator held it proved that he signed the discharge under the belief that it was merely a receipt for past due compensation, and accordingly set it aside. The Court held that the findings in fact did not show that the arbitrator's decision had proceeded upon a ground in law which was so clearly erroneous as to entitle the Court to interfere with it. In the course of his judgment Lord President Dunedin referred, as an exception to the general rule that the error must be induced by misrepresentation, to 'the case where the real error in the person's mind is not as to the true legal effect of the document which he has signed—a case in which I have no doubt the error must be induced by the opposite party, and in which it is not simply enough to say that there was error in his own mind—but a case where there is actual error as to the *corpus* of the document which is being signed at the time.'

"As an illustration of what he means by a mistake as to the *corpus* of the document he takes the case of a person signing under the impression that it was a visitor's book what was really a cheque.

"The Lord President deemed the case in hand, where the discharge was signed on the printed form usually used for weekly payments, on the border line. I have no doubt that he would not have so regarded it, and would have overruled the arbitrator if the workman's contention had been that whilst he knew it was a discharge, he understood it to be a discharge of any claim under the Employers' Liability Act, but did not understand that it was a discharge of any further claim under the Workmen's Compensation Act. The latter would not in any view have been an error as to the *corpus*, but an error as to the legal effect of the document.

"In my opinion the pursuer here has not averred any error as to the *corpus* of the document. He knew that it was an agreement with the department. He knew that it had reference to the dispute about the contract for the purchase of the three ships. He knew that it contained an agreement to refer to arbitration.

"Accordingly I hold that the pursuer has not set forth a relevant case of error apart from alleged misrepresentation, and I disallow the first issue.

"I turn now to the second issue founded upon alleged misrepresentation. The pursuer builds up his case in this way. He avers that in the knowledge of the officials of the department he had taken up all along and adhered to the position that an alleged agreement of 31st March 1921 was not binding. He avers that at a meeting with these officials upon 28th September 1921 when arbitration was suggested, and it was further suggested that the arbitration should be limited in its scope, he 'declined to agree to any limitation at all.' He further avers that he would agree to arbitration 'only on condition that the whole matters in dispute were placed before Mr Fullerton (the proposed arbiter). It was then about two o'clock, and the pursuer was about to leave the meeting, but was pressed to remain in order that a document submitting the whole matter in dispute to arbitration might be prepared and signed.' Thereupon the document here sought to be reduced was prepared. He avers that it was not read over to him, and not having his glasses with him he could not read it. He further avers that 'Mr Holford, who was one of the parties who had prepared the document, then explained that the whole thing merely amounted to an agreement to arbitration, and placed the document before the pursuer for signature. On the faith of these representations the pursuer signed the document.'

"Taking this narrative as a whole I think that pursuer is entitled to an issue of error induced by misrepresentation as the import and effect of the deed—the misrepresentation, namely, that it was a general reference of the whole dispute as it stood to Mr Fullerton, and not, as was the case, a reference limited to an exegesis and application of the alleged agreement of 31st March.

"This conclusion was not very strenuously resisted on behalf of the Crown, but it was urged that the alleged misrepresentation must be put in issue. It was further urged that the only misrepresentation specified on record was 'that the whole thing merely amounted to an agreement to arbitration,' and that this should be put in issue.

"It is not in accordance with recent practice in cases where the issues have been adjusted by Courts of very high authority to put the alleged misrepresentation in issue. On the other hand, there is authority for the proposition that it should be put in issue—*Munro* v. *Strain*, 1 R. 522. I feel that this places me in a position of some difficulty. If the alleged misrepresentations were short, sharp, and simple, I would insert it in the issue as in *Munro* v. *Strain*. But here, as in the case of *Stewart* v. *Kennedy* (17 R. (H.L.) 25), the matter is somewhat complicated.

"The sentence containing the alleged specific misrepresentation which the defender says should be put in issue does not stand by itself, and standing by itself without the narrative that leads up to it the sentence is of doubtful relevancy as an averment of misrepresentation, for the representation was in a sense true. There are four clauses in the agreement, but three of them are in regard to subordinate matters, and the pursuer does not suggest any misunderstanding about them. The whole matter centres in article 3, and if article 3 be alone regarded, the import of the document was an agreement to arbitration. Pursuer cannot succeed in showing that the statement misled him without the previous narrative bringing out the subsistence of a dispute as to what was to be the subject-matter of the arbitration. If the question being handled had been simply whether or not there should be an arbitration, the statement that 'the whole thing merely amounted to an agreement to arbitration' would not have been a misrepresentation. On the other hand, the statement was a misrepresentation if, as the pursuer avers, one of the matters still in dispute was whether the agreement of 31st March was binding if it had been agreed that 'a document submitting the whole matters in dispute to arbitration' should be prepared, and the agreement here in question was submitted to him as being such document.

"*Munro* v. *Strain* is an authority, and it has not been overruled, for the point does not appear to have been specifically taken in later cases where an issue was adjusted without specification of the alleged misrepresentation. But I think that these later cases are sufficient to justify the conclusion that *Munro* v. *Strain* does not lay down an inflexible rule to be followed in all circumstances. Accordingly, for the reasons I have indicated, I do not propose to insert the alleged misrepresentation in the issue. I think, however, that the words 'as to its import and effect' should be inserted after the word 'error.'

"The defender suggested that the case was more appropriate for a proof before answer than for a jury trial. It seems, however, to be in accordance with practice to try cases of error induced by misrepresentation by jury. I shall, however, direct the case to be tried by a special jury and men only, as that appears to me to be the appropriate jury in the circumstances of this case."

The defender reclaimed, and argued—The misrepresentation alleged was not such as was in law sufficient to induce an erroneous belief. Only in those instances where fraud was present, which was not the case here, was a lower standard of materiality allowed —*Kennedy* v. *Panama, &c., Mail Company*, (1867) L.R., 2 Q.B. 580, *per* Lord Blackburn at p. 587; *Edgar* v. *Hector*, 1912 S.C. 348, *per* Lord President Dunedin at p. 353, 49 S.L.R. 282; *The Westville Shipping Company, Limited* v. *Abram Steamship Company, Limited*, 59 S.L.R. 539; Bell's Prins., 10th ed., section 13. The following authorities were quoted regarding the effect of misrepresentation as to the nature of a document—Chitty on Contracts, 17th ed., p. 783; Leake on Contracts, 7th ed., p. 238; *Hirschfield* v. *The London, Brighton, and South Coast Railway Company*, (1876) L.R., 2 Q.B.D. 1, *per* Lush (J.) at p. 4; *Selkirk* v.

*Ferguson*, 1908 S.C. 26, 45 S.L.R. 19. The case of *Stewart* v. *Kennedy*, 1890, 17 R. (H.L.) 25, 27 S.L.R. 469, fell to be distinguished from the present case, in which the materiality was much less. As to what constituted misrepresentation in a prospectus counsel referred to Buckley, Companies Acts, 9th ed., p. 91. The case was more suitable for proof than for jury trial. Essential error was not one of the enumerated causes appropriate for jury trial set forth in the Court of Session Act 1825, section 28. Moreover, the issue should contain specifically the alleged misrepresentation complained of—*Munro* v. *Strain*, 1874, 1 R. 522, 11 S.L.R. 583.

Argued for the respondent—[The Court intimated that they did not desire to hear counsel for the respondent on the question of relevancy.] There was abundant precedent for a case of this type being sent to jury trial. The Lord Ordinary had accordingly acted within his well-established powers, and the Court should not interfere with his discretion. The form of issue was in modern times more usually in general terms, and without specification of the alleged misrepresentation. Counsel referred to the following authorities — Maclaren's Court of Session Practice, p. 549; *M'Caig* v. *Glasgow University Court*, 1904, 6 F. 918, *per* Lord Low at p. 923, 41 S.L.R. 700; *Stewart* v. *Kennedy*, 1889, 16 R. 857, as to issues at p. 861, and *per* Lord Shand at p. 865, 26 S.L.R. 625; *Hart* v. *Fraser*, 1907 S.C. 50, 44 S.L.R. 31; Birnie on Issues, pp. 41 and 44; *Munro* v. *Strain* (*cit.*).

At advising—

LORD PRESIDENT — A contract for the purchase and sale of certain ships and shipconstruction materials was entered into between the pursuer and a Goverment department. Difficulties arose with regard to the performance of the contract, and a number of questions came to be outstanding between the parties. Attempts were made to bring those questions to a settlement, but these have only resulted in a fresh crop of disputes. In the month of March 1921 a document was prepared containing proposed heads of agreement upon a number of the matters at issue to which the pursuer offered to give his consent, but after some further negotiation this proposal broke down and was abandoned. In September of the same year a meeting took place at which the attempt to arrive at a settlement was renewed. The pursuer avers that he was willing that the settlement should take the form of a reference to arbitration of the whole points at issue between him and the department, and an arbiter was actually agreed upon. A document was thereupon drawn up by the representatives of the department present at the meeting with a view to giving effect to the settlement which the parties intended to make. Having mislaid his eyeglasses, and being therefore unable to read the document himself, he asked that it should be read over to him, but, as he alleges, instead of this, one of the representatives of the department explained "that the whole thing merely amounted to an agreement to arbitration," and with that statement placed the document before him for signature. He signed it. In point of fact the document is not a mere agreement to arbitration. On the contrary it contains several stipulations unconnected with arbitration and (this is the pursuer's chief grievance) a formal acceptance of the abortive heads of agreement of the preceding March, and then it goes on to refer to arbitration any question not thus included.

The relevancy of these averments as constituting a case of essential error, induced by misrepresentation on the part of the other contracting party, is attacked on behalf of the department. It would have been better pleading if the pursuer had distinctly stated the effect of the representation of which he complains, as deduced from the statement actually made to him, and the circumstances in which it was made. But it is not difficult to gather what it is from the averments as they stand, namely, a representation that the document he was asked to sign was one which settled the questions between the parties by referring the whole of them to arbitration, and that the document contained nothing else. If that representation is proved to have been made, and if it is proved to have been inaccurate in point of fact, then it appears to me that there will result a good case for reducing the agreement on the ground of essential error induced by misrepresentation. The error alleged is, in my opinion, undoubtedly essential, for a settlement of disputed questions which takes the form of a reference of the whole of them to an arbitrator is one thing, a settlement which takes the form of specific stipulations and heads of agreement, and then does no more than make a reference to an arbitrator to adjust parties' rights on that basis, is another thing, One of the heads of essential error as defined in section 11 of Bell's Principles is "error in relation to the *nature* of the contract supposed to be entered into"; and the disparity between the two kinds of settlement just described presents ample room for an "error in substantials." I think therefore the pursuer has stated a relevant case for inquiry. It is not necessary to say anything upon the issue which the Lord Ordinary has disallowed—an issue upon essential error alone. No question upon it has been argued before us.

But there is a question as to the mode of trial. The Lord Ordinary has sent the case for trial before a jury, and not only that but a special jury of men only. I wish to say in the first place that assuming the case is going to jury trial, no question has been raised before us—perhaps no question could competently be raised before us—as to whether the jury should be either special or composed only of one sex. We have not considered the question whether anything in the nature of this case requires or justifies the exclusion of women jurors, or calls for the submission of the questions of fact involved to any other than an ordinary jury. That is not before us, and we have not considered it.

Next, as to the question between proof and jury trial, the Lord Ordinary says that he follows practice in sending this case to a jury. According to my own experience, it would be difficult to affirm any general rule, in cases of essential error induced by misrepresentation, in favour of trial by jury rather than by proof before the Lord Ordinary. But it appears from the books on practice which were cited to us that the Lord Ordinary may be well founded in stating the rule as he has done. If that is so, then the question is whether we should interfere with what he has done. One question of some importance relevant to that matter has been raised. The issue proposed is in general terms—it asks simply whether the contract was signed under essential error induced by misrepresentation, leaving to the jury to gather from the evidence led before them what the misrepresentation is on which the pursuer's case is founded. In *Munro* v. *Strain* (1 R. 522) a strong opinion is expressed that when a case of this kind is sent to jury trial the issue should contain a specification of the misrepresentation alleged; and it is not difficult to see the grounds on which that opinion rests. For when the question of misrepresentation is put to a jury it is essential that there should be no doubt whatever as to what exactly the alleged misrepresentation is. If the facts are simple, and above all if the record contains a clear statement with regard to the precise effect of the misrepresentation, it is of comparatively little moment whether it is repeated in the issue or not, because the Judge who tries the case knows from the record exactly what the misrepresentation complained of is, and is in a position (by restraining irrelevant examination of the witnesses) to protect the jury from confusion. But if the record, while one of those from which a relevant case can fairly be extracted does not precisely define the misrepresentation alleged, then there is a risk, more or less serious, not only of misunderstanding on the part of the jury, but of the protraction and disturbance of the proceedings by disputes and discussions as to whether this or that line of evidence is relevant or admissible in view of the lack of precision in the record. The rule suggested by the opinions in *Munro* v. *Strain* has not been followed in practice probably because the pleadings in such cases are usually framed so as to leave no loopholes for ambiguity with regard to the misrepresentation alleged, and it is too late in the day to set it up now. All the more may it be regarded as a sufficient ground for refusing to send a case of this kind to a jury that the record leaves the alleged misrepresentation so far indefinite as to expose the proceedings before the jury to interruption and confusion. That must, however, be a question of degree, and I can only say that on the whole I think the imperfections of this record are not sufficient to justify us in doing that.

Accordingly I propose that we dispose of the case by simply affirming the Lord Ordinary's interlocutor.

LORD SKERRINGTON—The pursuer's pleadings are not satisfactory, but they are not so unsatisfactory as to compel us to dismiss the action as irrelevant. I confess, however, that I felt doubtful whether, having regard to the state of the pleadings, the action was suitable for jury trial. According to practice the case will be tried upon a general issue. That issue must be controlled by the record, and I was apprehensive that, owing to the indefinite character of the pursuer's averments, time might be wasted at the trial and the attention of the jury might be distracted by discussions as to the meaning of the record. My doubts, however, have been removed by two considerations. In the first place, as was pointed out by one of your Lordships, the Lord Ordinary apparently sees no difficulty in trying this case with a jury. Further, in view of what your Lordship has said as to the construction which ought to be put upon the pursuer's averments, the Lord Ordinary will be able to put a stop to any unnecessary discussion on that subject.

The next question argued was whether an action of reduction upon the ground of essential error induced by misrepresentation ought, according to our practice, to be tried by jury in the absence of some reason to the contrary. Upon that matter I agree with the Lord Ordinary.

LORD CULLEN—I am of the same opinion. On the pursuer's averments I think that the difference between the nature of the document which the pursuer signed and the nature of the document which he erroneously believed he was signing was a material or essential one. And I think the pursuer has relevantly averred that his erroneous belief was induced by a false—by which I mean an incorrect—statement or representation made to him by the representative of the defenders as to what the document he was asked to sign consisted of.

As regards one line of argument advanced by Mr Burn Murdoch, I am unable to see that on the pursuer's averments there is any case here of the pursuer having so spoken or acted as to agree to absolve the defenders from responsibility for any misrepresentation they might innocently make to him, and to pass from any right of challenge of the transaction which might be open to him in respect of such misrepresentation.

As regards the form of trial, I agree with your Lordship that we should not interfere. The reason for interfering suggested by the defender was the complexity of the case and the possibility of the jury becoming confused as to the real issue. But the Lord Ordinary, who is to preside at the trial, apparently anticipates no difficulty in conducting the case with a jury, and that being so I do not think we should be justified in interfering with his discretion.

LORD MACKENZIE was not present.

The Court adhered.

Counsel for the Pursuer — MacRobert, K.C. — Robertson, K.C. — J. Stevenson. Agents—Russell & Dunlop, W.S.

Counsel for the Defender—Fraser, K.C.—Burn-Murdoch. Agent—Henry Smith, W.S.