self the work of the wheel brae. He knew nothing about the signals or the method of packing, and it is just because he knew nothing about the signals and nothing about the method of packing that the accident happened. He really went into the department of the "hanger-on" with which he had no concern. His doing so exposed him to a risk which his ordinary employment did not call on him to face. Therefore I think that this case falls within the category of cases of which *Kerr* is an example, and not within the category of which *Conway* is an instance, and that the judgment must stand.

LORD KINNEAR—I am of the same opinion for the reasons which your Lordship has given. The statement of facts by the learned Sheriff-Substitute shows that the "hanger-on" White had the sole charge of loading the hutches at the foot of the wheel-brae and of giving signals to the man at the top, and that the deceased man Burns took it upon him to perform the duty which was entrusted not to him but to White. On that statement I think that what he undertook to do was not part of his employment. It is found that he did it unsuccessfully, because he loaded the hutch in such a way as to raise the front and derail the hutch, and not only had he loaded the hutch unsuccessfully, but he had failed to give the proper signals, which he does not seem to have known anything about, because it was not part of his business to know. In these circumstances, as I understand the learned Sheriff-Substitute's judgment, he finds that the man exposed himself to an additional risk outside the risks incidental to his employment, and therefore that this accident which he met with was not one arising out of his employment. I think that was a question of fact for the learned Sheriff-Substitute, and I see no ground upon which we should be justified in interfering with his judgment.

LORD MACKENZIE—I think there is sufficient evidence in the eighteenth and twenty-fourth findings, both of which have been referred to by your Lordships, to justify the Sheriff-Substitute in reaching the conclusion that he has. From the facts set out in these two findings I think there is evidence from which it may be inferred that the deceased man usurped the functions of another, and that he suffered in consequence of it. Therefore I agree with the conclusion at which your Lordships have arrived.

The Court answered the question in the affirmative and dismissed the appeal.

Counsel for Appellant—Moncrieff, K.C.—Fenton. Agents—Simpson & Marwick, W.S.

Counsel for Respondents—Horne, K.C.—Strain. Agents—W. & J. Burness, W.S.

Friday, November 29.

SECOND DIVISION.

[Lord Hunter, Ordinary.

DUNCAN, GALLOWAY & COMPANY, LIMITED *v.* DUNCAN, FALCONER, & COMPANY, LIMITED.

Repetition—Error—Contract—Sale—Innocent Misrepresentation.

An agreement for the sale of a quarrymaster's business included among the subjects sold "the sheds, houses, and railways in, on, or about" the quarries "in so far as belonging" to the sellers, the price of the subjects and effects described under this article being the amount put upon them by a valuator appointed under the agreement. The defenders innocently pointed out to the valuator certain buildings as included under this article which did not in fact belong to them, and these he included in his valuation and upon them a price was paid. In an action at the instance of the purchasers against the sellers, *held* that the purchasers were entitled to repetition of the price of the subjects thus erroneously included in the valuation.

Interest—Repetition—Error—Sale.

Where repetition was allowed of the price of certain subjects erroneously, through the seller's innocent misrepresentation, believed by the purchasers under an agreement of sale to belong to the seller, interest was allowed at 3 per cent. from the date of payment.

Duncan, Galloway & Company, Limited, Westhall Quarries, Dundee, *pursuers*, brought an action against Duncan, Falconer, & Company, quarrymasters, Arbroath, and James Wright, Arbroath, and William Duncan, Carnoustie, the individual partners of the firm, as such partners and as individuals, *defenders*, in which they claimed payment of the sum of £360, 14s. 8d., with interest thereon from 1st September 1902 till payment, being the price of certain buildings included in a sale by the defenders to the pursuers under an agreement between them dated 17th July 1902, and to which it was subsequently found that defenders had no title.

The pursuers pleaded, *inter alia*—"(1) The defenders having broken their contract with the pursuers are liable in damages for the breach. (4) The said buildings and others, and portion of railway, having been included in the subjects of sale, and the pursuers having paid the price of the same to the defenders, and the said subjects not having been conveyed or delivered to the pursuers, they are entitled to repetition of the price, with interest. (6) *The pursuers are entitled to repetition, with interest, as concluded for of the sum paid by them to the defenders as the price of the subjects specified in the condescendence, in respect that* (1) *the defenders represented to the pursuers that the said subjects fell to be*

included in the sale by the defenders to the pursuers contracted for by Article First (Quarto) of the Agreement 17th July 1902; (2) *the pursuers paid said price to the defenders on the faith of and under error induced by the said representation*; (3) *the said representation was untrue, and the said subjects were not made over by the defenders to the pursuers.*" [The words printed in italics were added by amendment at the discussion in the Inner House.]

The *facts* of the case appear from the opinion of the Lord Ordinary (HUNTER), who on 31st January 1912 sustained the fourth plea-in-law for the pursuers and decerned against the defenders conjunctly and severally for payment to the pursuers of the sum of £356, 12s. 3d. with interest at the rate of 3 per cent. from 1st September 1912.

Opinion:—"By agreement of purchase and sale dated 17th July 1902, the pursuers purchased from the defenders the goodwill of the business of quarrymasters, carried on by the latter at Carmyllie Quarries in Forfarshire; the tenants' rights in certain leases; and also [Article First (Quarto)] 'The sheds, houses, and railways in, on, or about the said quarries, and all other railways used in connection therewith, in so far as belonging to the defenders, or for which they are entitled to receive value or allowances at the termination of their occupancy.' The amount to be paid by the pursuers was, in terms of article fourth of the agreement, fixed by arbitration and the price paid. Both parties to the agreement were under the belief that all the subjects so valued and paid for belonged to the defenders, or at all events that they were entitled to receive allowances therefor on the termination of their occupation of the subjects. This was not in fact the case. The pursuers' tenancy expired in 1908, and it was then found that certain of these subjects belonged to the landlords, and that part of the railway belonged to the Caledonian Railway Company. In the present action the pursuers seek to recover from the defenders the amounts so paid by them.

"The defenders maintain that the pursuers are not entitled to repetition, because both parties were in error upon a question of law. They contend that the subjects of sale under article 1 (4) of the agreement, were the tenants' rights in the buildings situated on the ground contained in the leases that were being assigned, and that the purchaser took the risk of what might be found in law to belong to the tenants. I do not think this view of the agreement is sound. It appears to me that the defenders sold certain subjects pointed out to the valuator as being the tenants' property. In my view, therefore, the sale so effected involved warrandice that the subjects belonged to the defenders, or at all events that they had a claim for their value on the termination of occupancy.

"The defenders, however, maintain that the agreement must be interpreted as a whole, and that, as there is no case of fraud, the pursuers can only recover by setting aside the whole agreement, which is now impossible, as restitution cannot be made. In this connection they found upon the second part of the first clause, which deals with the payment of £70 for the tenants' right in the leases. They maintain that the amount so fixed would or might have been different if parties had known that the subjects for the price of which repetition is now claimed did not belong to the defenders. I do not think this argument is sound, because it appears to me that the subjects covered by subclause Quarto of Article First of the agreement are severable from the other subjects dealt with. In a case of sale, indemnification falls to be made where there is partial, just as where there is total eviction.

"The question of the extent to which the pursuers ought to be indemnified falls to be considered. The pursuers ask for repetition of the money paid by them, with interest upon the amount so paid at the rate of 5 per cent. from 1st September 1902 until paid. It was strongly argued for the defenders that the pursuers would be fully indemnified by receiving payment of the value of the buildings as at Martinmas 1908. That is all, they say, that the pursuers would have got if the defenders had implemented the terms of the agreement of 1902. In the ordinary case of eviction the subjects are valued as at the date of eviction, but this rule is by no means universal, as is seen from the case of *Cairns* (1870, 9 Macph. 284), where the purchaser was found entitled to repetition of the price paid on accounting for the rents drawn by him during the period of possession. In the course of his judgment the Lord Justice Clerk said—'The inclination of my opinion is that warrandice in the contract of sale implies an obligation in the case of eviction to render back the price for which no equivalent was given, whatever further claims it may confer upon the purchaser.' That statement was not the ground of judgment, but the case shows that repayment of the price may be the proper means of indemnification where the purchaser has to have recourse against the seller under warrandice, express or implied. In the present case I think that there ought to be repetition of the price paid by the pursuers to the defenders for the subjects which were erroneously valued in 1902.

"It remains for me to deal with the question whether the pursuers are or are not entitled to interest upon this amount. The considerations and arguments dealing with claims for interest are to be found, as Lord Shaw said in the recent case of *Greenock Harbour Trustees* v. *Glasgow and South-Western Railway Company* (1909 S.C., H.L. 49), stated with compendious accuracy in the judgment of Lord Fraser in the case of *Blair's Trustees* v. *Payne, &c.* (1884, 12 R. 104). It is there pointed out that interest, in the absence of express stipulation, is due upon money lent. This rule would appear equally to apply where money has been paid in error, and the use thereof has been enjoyed by one not other-

wise entitled thereto. Against this it was said that the pursuers had had possession of the subjects they erroneously thought they were purchasing, and that the use of the subjects might be set against the interest claimed. If possession had been due to the defenders I should have given effect to this plea; but for the period, at all events after the termination of the first year of their tenancy, the possession of the pursuers is traceable to the landlords and not to the defenders. To some extent it may have been different at the beginning of their possession, because they had to make arrangement with the defenders as to acquiring the tenants' interest under the lease. I do not think, however, that I can exclude the claim for interest, but in the whole circumstances of the case I shall limit it to 3 per cent. If parties are agreed that the sum sued for represents the amount paid by the pursuers in respect of the property erroneously valued, as to which the error to which I have referred existed, I shall give decree therefor with interest at 3 per cent. from the date of payment."

The defenders reclaimed, and argued—There was here no breach of contract—*Smith* v. *Harrison & Company's Trustee*, December 22, 1893, 21 R. 330, *per* Lord President Robertson at p. 333, 31 S.L.R. 245. The pursuers, further, were not entitled in the circumstances of this case to claim for loss by eviction from subjects for which they had paid—*Welsh* v. *Russell*, May 19, 1894, 21 R. 769, 31 S.L.R. 611. Neither error in law nor error in fact, if with regard to a matter which the pursuers ought to have known, would found a claim—*Wilson & M'Lellan* v. *Sinclair*, December 7, 1830, 4 W. & S. 398, *per* L.C. Brougham, p. 409. If pursuers' ground of action was that they were induced by the innocent misrepresentations of defenders to pay a bigger price than they ought, this could form no ground for damages, though it might entitle them to rescission *rebus integris*. If, however, pursuers maintained that they had bought what defenders had no title to convey, the remedy was not repetition but indemnification to the extent of the amount of their loss.

Argued for the pursuers and respondents—Pursuers under the agreement of purchase and sale had never got possession of subjects which they had bought with an implied warranty of title. They were, therefore, entitled to repetition of the price of the subjects—*Balfour* v. *Smith & Logan*, February 9, 1877, 4 R. 454, 14 S.L.R. 316; *Dalmellington Iron Company, Limited* v. *Glasgow and South-Western Railway Company*, February 26, 1889, 16 R. 523, 26 S.L.R. 373; Bell's Prin., sec. 120 and 534. Pursuers did not maintain eviction. The maxim *ignorantia juris* did not apply to the present case, and only applied to a very limited class of cases. Pursuers maintained that parties *inter se* were agreed that the subjects in question were included within the terms of the fourth clause, and that the valuation proceeded on that footing.

At advising—

Lord Salvesen—In this case I have come to be of opinion that the Lord Ordinary has reached a sound conclusion, although I do not altogether agree with him in the grounds of his judgment. He has sustained the fourth plea-in-law for the pursuers, which proceeds upon the footing that the buildings, the price of which the pursuers now seek to recover back from the defenders, were included in the subjects of sale under the agreement made between the parties of 17th July 1902. On referring to the agreement, however, I am quite clear that they were not so included. Under head "Quarto" of the first article the defenders sold to the pursuers the sheds, houses, and railways in or about the quarries, but they did so only "in so far as belonging to the parties of the first part (the defenders), or for which they are entitled to receive value or allowances at the termination of their occupancy." Now it is common ground that the buildings, &c., of which the price is in question, although believed by the parties to fall under this clause did not in fact do so as they were the property of the landlord, and there was no agreement with him that the tenants should receive any allowances in respect of same when their lease terminated. The legal position of the matter, therefore, was that the pursuers were entitled to enforce the agreement in every respect, but were not liable to pay for these buildings. What actually happened was that the defenders represented to the pursuers that these buildings were their property, and they were valued in terms of the fourth article of the agreement and paid for accordingly. The true ground of action, therefore, was that the price had been paid under an error in fact induced by the defenders' innocent misrepresentations, and this has now for the first time been embodied in a plea-in-law which we allowed the pursuers to add to their record. I think there are sufficient materials upon record to enable us to sustain this new plea and to give effect to it by ordaining the defenders to repay the sum sued for (subject to the small deduction to which the Lord Ordinary has already given effect). The case falls within the principles laid down in *Balfour* (4 R. 454) and the *Dalmellington Iron Company* (16 R. 523). In the former case the Lord President (Inglis) said—"It is quite true that a party having made a payment in error must, before he can recover, show that the error was not induced by his own fault, but was due to adverse circumstances or to the proceedings of the other party." The facts admitted here bring the case within the last of these alternatives. The defenders represented in good faith that the buildings in question fell under head "Quarto" of the second article of the agreement, and this representation was accepted without inquiry and acted on by the pursuers, and it was not until their own lease terminated that they discovered their error. In the second case cited it was held that the pursuers were entitled to repeti-

tion, although information was in the possession of their manager which would have enabled him at the time to have discovered the mistake, for this information was not present in fact to his mind at the time of payment, and was not of such a character that it ought to have been present. Here all that can be said is, that if the pursuers had taken legal advice and had studied the lease which they took over, they might have discovered that stone and lime buildings erected on the ground of which they were tenants were in law the property of the landlord, and that, apart from agreement, they could have no claim to an allowance from him at the termination of the lease. There is no suggestion that they actually knew they were paying for subjects for which they were not liable, and they might quite well have thought that there was some collateral agreement under which the landlord recognised the defenders' right to these buildings which had been erected by their authors, and had agreed to take them over at valuation. On this ground I think that a clear case for repetition of the price is made out.

In this view it becomes unnecessary to consider what would have been the position if the defenders had actually professed to sell subjects which did not belong to them. Mr Chree's main argument proceeded on the assumption that there had been a sale of heritage of which the pursuers had obtained possession, and from which six years later they had been evicted by the true owner. As I have already pointed out, there were no such sale so far as the buildings in question are concerned, and while the possession of the subjects might be attributed to the defenders' lease until its expiry a few months later, from the time tacit relocation took place the pursuers owed their right of occupation entirely to the act of the landlord in permitting the lease to be renewed. But the defenders' rights under the lease were transferred under head *Secundo* of article 1 of the agreement, and for these rights the parties contracted that £70 should be paid by the pursuers. It is nothing to the purpose that the pursuers have been fortunate enough to induce the landlord to take over at valuation certain workmen's houses which under the lease itself they were entitled to erect and to remove before the expiry of the lease. If these subjects fell under head *Secundo* they have already been paid for; if, on the other hand, they fell under head *Quarto*, a claim might conceivably arise at the instance of the defenders against the pursuers on the footing that they were never valued, and that they are still entitled to an allowance in respect of them. Having in view the conduct of the parties themselves, I cannot regard this as a very hopeful claim, but in any event it does not affect the right of the pursuers to repetition of the price of other subjects for which they paid under a mistake induced by the defenders' representations.

On the question of interest, I was at first disposed to think that it would have been more equitable that no interest should be allowed except from the date when the error was discovered, on the footing that the pursuers enjoyed possession of the subjects until that time without having paid extra rent for them. I am unable, however, to resist the view of the Lord Ordinary that the pursuers' possession of these subjects was in law attributable not to the defenders but to the landlord, and that therefore the claim for interest is well founded at the moderate rate at which the Lord Ordinary has assessed it and to which the pursuers offer no objection. I cannot, however, refrain from thinking that the case would never have reached us if the pursuers had pleaded their case properly upon record, for there is not one of the pleas as they originally stood before the amendment that I could have given effect to. The two first are based on breach of contract, which is obviously out of the question, and the third and fourth on the view that the buildings in question formed parts of the subjects sold under the contract, and that therefore it was implied that the sellers had a good title to same. The real ground of action is sufficiently averred upon record, but was not expressed in any plea, and the argument which was maintained with much plausibility by the defenders would not, I think, have been stateable except on this view. I propose that we should penalise the pursuers by finding neither party entitled to expenses in the Inner House, and *quoad ultra* that we should affirm the interlocutor of the Lord Ordinary, with the variation that we sustain the sixth instead of the fourth plea-in-law for the pursuers.

LORD GUTHRIE — I concur. The reclaimers presented an unanswerable argument against the Lord Ordinary's judgment in so far as it sustains the fourth plea-in-law for the pursuers. That plea proceeds on the footing that the buildings and part railway in question were included in the subjects of sale by the defenders to the pursuers. But what was sold under the fourth article of the agreement of 17th July 1902 was only buildings and railways "in so far as belonging to" the defenders, or for which they were entitled to receive value or allowances at the termination of their occupancy. Now it is common ground that the buildings and part railway in question were neither the property of the defenders nor were the defenders entitled to receive value or allowances for them from the landlord at the termination of their occupancy. The case has been put on a proper basis by the new plea (plea 6) tendered by the respondents at the end of the discussion before us, and for which, fortunately for them, there are sufficient averments on record. In view of the late period at which this plea was added, I think Lord Salvesen's proposal as to the expenses of the Inner House discussion will do justice between the parties.

In sustaining the respondents' new plea we negative the contention on the merits which was strongly urged by the re-

claimers, namely, that the error being one of law, in an erroneous construction of the contract, or in an erroneous application of its scope, the pursuers are without remedy, or, alternatively, this remedy is limited to what their rights would have been had the defenders fulfilled their contract. I concur with Lord Salvesen in thinking that, whatever the source of the error may have been in the case of the reclaimers, the respondents' error was purely one of fact. The question, left unascertained in the fourth article, as to which buildings and railways did and which did not belong to the defenders, and to which buildings and railways they were entitled to receive value or compensation for, was one in the knowledge of the reclaimers. They pointed out the buildings and the part railway to which this case relates to the valuator, as in the one category or the other, and the respondents had no reason to suspect that they were mistaken in their selection.

The other main argument for the reclaimers, founded on the alleged impossibility of separating the fourth article from the other provisions of the agreement, proceeds on the same fallacious view. The respondents' success does not depend on any attack on the terms of article 4. What they are complaining of is the erroneous way in which the reclaimers applied that article.

On the question of interest, I think the Lord Ordinary has taken the right course, although, had he given 5 instead of 3 per cent. I should not have felt inclined to disturb his judgment.

The LORD JUSTICE-CLERK concurred.

LORD DUNDAS was absent.

The Court adhered to the interlocutor of the Lord Ordinary with this variation, that they recalled the interlocutor so far as it sustained the fourth plea-in-law for the pursuers, and in lieu thereof sustained the sixth plea-in-law for the pursuers.

Counsel for Pursuers and Respondents—Maclennan, K.C. — Mitchell. Agents — Adair & Galloway, S.S.C.

Counsel for Defenders and Reclaimers—Blackburn, K.C. — Chree, K.C. — Forbes. Agent—Alex. Ross, S.S.C.

REGISTRATION APPEAL COURT.

Monday, December 2.

(Before Lord Dundas, Lord Mackenzie, and Lord Skerrington.)

MELVILLE *v.* ADAMSON.

Election Law — Lodger Franchise — Procedure — Non-appearance of Claimant Duly Cited—Claimant Previously on Roll —Adjournment—Discretion of Sheriff.

A claimant for admission to the voter's roll as a lodger, who had been enrolled in the previous year, was objected to, but failed to appear at the Registration Court although duly cited. The objector moved for an adjournment and for second diligence, but was unable to allege that there was any change of circumstances since the claimant was admitted to the roll, or that there were now any new facts before the Court. The Sheriff refused the adjournment and admitted the claim.

Held that it was within the discretion of the Sheriff to refuse the adjournment, and that he was entitled to admit the claim.

At a Registration Court for the Eastern Division of the County of Perth held at Perth upon 2nd October 1912, David Adamson junior, preserve maker, Adylinn, Newton Street, Blairgowrie, claimed to be entered upon the register of voters for said division as a lodger in respect of occupation of a bedroom at that address. He was upon the roll for the current year as a lodger in respect of occupation of this room. The claim was opposed on behalf of Lawrence Melville, solicitor, Errol, registered as a voter in said division, but no specific ground of objection to the claim was stated. An execution of citation of the claimant to attend the Court was produced. The claimant was not present. The agent for the objector moved for an adjournment in order that the claimant might be cited of new. The Sheriff stated that he would grant an adjournment if the objector's agent was in a position to state that there was a change of circumstances or new facts not before the Court when the claimant was formerly admitted which he desired to prove by securing the attendance of the claimant. The agent replied that he was not in a position to make such a statement. According to the course of practice which has long prevailed in the sheriffdom, a lodger claimant who claims for the first time in respect of the premises is not admitted to the roll if he is objected to and fails to allow his opponent to sift his claim by attending the Court when required to do so. It was not suggested that the applicant had not been objected to on the occasion of his first admission. The Sheriff (CHRISTOPHER JOHNSTON) refused an adjournment and admitted the claim. Whereupon he was asked to state a Case by the objector's agent.

The *question of law* was—"Whether I was entitled to refuse an adjournment and admit the claim?"

There was appended to the case a list of names of other claimants whose cases had been dealt with by the Sheriff in a similar manner, and which it was agreed should be ruled by the decision in the present appeal.

Argued for the appellant—The granting of an adjournment, although to some extent a matter for the discretion of the Sheriff, was also a matter of right where good cause was shown. The Sheriff was not entitled to refuse an opportunity of leading evidence as to an objection which,