parties to make was that which the respondent contends was made here.

But a difficulty is raised upon the grammatical rule that the word "thereon" must be taken to refer to the last antecedent. Now that rule cannot be applied here, because the very last antecedent is "partners." Nobody can suppose that interest is payable upon the partners of course.

The next antecedent before that is "periods." It is just possible, I suppose, that interest might be payable upon a period.

Then there is another antecedent before that, namely "election," and there is another antecedent before that, which is partners, so that you do not come to the antecedent which the appellants are so anxious to rely upon—that is to say, "instalments"—until you have passed over four other antecedents; that being the case, if you may pass over four antecedents on account of the good sense of the thing, I cannot see why you may not pass over a fifth. I confess that I feel no difficulty upon that score. Further, I cannot help saying that if I had to prepare the deed, in speaking of the instalments, if I had meant that interest should be paid upon the sums paid by instalment, I should not have said that interest should be payable on the instalments, but on the amount so payable by each instalment; that would appear to me to be the more natural expression to use.

I think that that is really all that one need say upon the construction of the clause itself. I cannot quite agree with what has been said by my noble and learned friend opposite (Lord Watson) that you can get no assistance from the other clauses. I think that you can get a little, because it seems to me that in the other clauses where provision is made for the payment of money by instalments it is expressly said that the amount of the instalment shall be that upon which the interest shall be paid from time to time.

I think I may say that in every case it is so. It may be said, Well, then, why did the draftsman make a difference between this case and the others? In the first place, I think it is very likely that he did not think anything at all about it one way or the other, and we are speculating upon what was the meaning of the parties when the fact is that the subject was not present to their minds. But if one is to act upon the general rule, and attribute a meaning to them in the words which they have used, I think it is perfectly possible that the draftsman may have said in this particular case of a deceasing partner, his capital is bearing interest from time to time while he continues a partner, and therefore when he ceases to be a partner it ought to do the same. It is not so with the others.

It seems to me, therefore, that the judgment appealed from is right. It does not seem to me to be a case for a confident opinion. I should not set much value upon any confident opinion expressed by anybody whatever in this case. It is too obvious that intelligent people may take different views of the matter. I should like to say that although I have not referred particularly to the judgments given in the Scotch Courts, I think it will be seen that I have derived the arguments which I have used from those judgments. In my opinion the appeal ought to be dismissed.

Interlocutor appealed from affirmed and appeal dismissed with costs.

Counsel for Appellants—Davey, Q.C.—Webster, Q.C. Agents—Martin & Leslie—Murray, Beith, & Murray, W.S.

Counsel for Respondents — Solicitor-General Herschell, Q.C.—Solicitor-General Asher, Q.C. Agents—Grahames, Currey, & Spens—J. & A. Peddie & Ivory, W.S.

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*Tuesday, December* 12.

(Before Lord Chancellor, Lords Blackburn, Watson, Bramwell, and Fitzgerald.)

OAKBANK OIL COMPANY (LIMITED) *v.* CRUM.

(*Ante*, Dec. 2, 1881, vol. xix. p. 174, 9 R. 198.)

*Public Company—Articles of Association—Payment of Dividend where some Shares fully Paid-up, others not—Companies Acts* 1862 *and* 1867 (25 *and* 26 *Vict. c.* 88, *and* 30 *and* 31 *Vict. c.* 131).

The articles of association of a limited company provided that "the directors may, with the sanction of the company in general meeting, declare a dividend to be paid to the members in proportion to their shares." The articles also provided that "capital" should mean "the capital for the time being of the company," and "shares" the "shares into which the capital is divided." The capital consisted of 60,000 shares of £1 each. Two-thirds of the shares were fully paid-up, and on the remaining third only 5s. per share had been paid. *Held* (*aff.* judgment of First Division) that under the terms of the articles of association dividends were to be paid in proportion to the nominal, and not in proportion to the paid-up capital held by each member.

This Special Case is reported *ante*, Dec. 2, 1881, vol. xix. p. 174, and 9 R. 198.

The first parties, the Oakbank Oil Company, appealed to the House of Lords.

The respondent's counsel were not called on.

At delivering judgment—

Lord Chancellor — My Lords, in this case your Lordships having heard the able and exhaustive arguments which have been addressed to the House by the learned counsel for the appellants, are, I believe, of opinion that it is not necessary to call upon the learned counsel for the respondent.

The question depends, I think, entirely upon the true construction of the contract contained in the memorandum and articles of association of this company. It is unnecessary to determine whether the *a priori* arguments on the one side or upon the other exactly balance each other, or whether in the absence of express terms in the contract requiring to be construed one *a priori* argument would preponderate over another. To me it seems that that consideration is the same on both sides. If we had to consider what was *a priori* a reasonable contract as to dividends in a company of this sort, it would appear to be an unreasonable proposition that if a man made

himself liable for say £100, or whatever might be the nominal amount of his shares, in the event of his money being required to pay the liabilities of the company he should be treated as having no interest in the profits of the company *ad interim*, except to the extent of the amount which he had himself paid, until the sum for which he had made himself liable was actually called up. Under these particular articles, which I for this purpose refer to only by way of illustration, I do not see that it was necessary that anything should be called up in the case of the newly issued shares, at all events unless the directors thought fit to do so, because there is no provision making that obligatory—at least I have not observed one. But really it does not make much difference whether nothing is called up, or only sums of an insignificant amount are called up; the whole liability remains to the extent to which it has not been satisfied by paying it; and to say that a man may make himself liable to a considerable amount for the engagements of the company, which he may eventually be called upon to pay, and has, until he has actually been called upon to make that payment, no interest which can possibly make it reasonable that he should share in the dividend in respect of what has not been paid-up does not seem to be a proposition so plainly and obviously reasonable as to make it wise to approach the construction of any instrument with the presumption that that must be its meaning. On the other hand, I freely allow that there is a great deal to be said for the mode of paying dividends in proportion to what has actually been paid-up, which the Act of Parliament of 1867 plainly shows may sometimes be a proper thing to provide for, or at all events may be provided for. I will not observe upon what Lord Shand says, nor express an opinion as to the balance of probability, but will only say that there is a great deal of reason in the argument that it is a fair thing that the dividends should bear some relation to what has been paid-up; but the only conclusion, I think, from that way of putting the *a priori* argument is this, that we cannot decide the case upon any *a priori* arguments at all; we must look to what the actual contract is. Each party—unless indeed it has been altered since the respondent came into the partnership (which has not happened in this case) —must be taken to have made himself acquainted with the terms of the written contract contained in the articles of association and the Acts of Parliament, so far as they are important. He must also in law be taken (though that is sometimes different from what the fact may be) to have understood the terms of the contract according to their proper meaning, and that being so, must take the consequences, whatever they may be, of the contract which he has made. He must be taken to have ascertained for himself what was meant to be his liability in the company which the law has written for him, and with which law he must be taken to be acquainted.

That being so, the particular question before your Lordships really depends upon the construction of the words "a dividend to be paid to the members in proportion to their shares," as they occur in the 71st article of association of this particular company. My Lords, if the effect be one which is unsatisfactory to the company, it may be, as the Court below have thought, that with regard to any future dividends to be paid by them they may alter that article of association, and take power to declare a dividend of a different character to be paid, it may be, upon what has actually been paid-up upon the shares, but at all events they have not altered the articles, if they have power to do so, and your Lordships must decide this question upon the articles as they stand.

Now, I will first notice an argument of Mr Benjamin, founded upon the word "may" in that article 71—"The directors may, with the sanction of the company in general meeting, declare a dividend to be paid to the members in proportion to their shares." As I understand the argument, it was this, that there would be a power to declare a dividend though nothing was said about it, and that therefore the word "may" there, which is permissive, must be taken to mean that, if the directors like, the dividend which they declare to be paid in proportion to the shares, they may so declare it, but that that is not to exclude them from the power of directing it to be paid in some other manner. My Lords, I cannot accede to that argument. It appears to me that directors and general meetings of companies of this sort can have no implied powers, excepting such as arise by proper implication from the powers expressed in the articles of association. The powers are entirely created by the law, and by the contract founded upon the general law, which enables such companies to be constituted. Therefore I think that the word "may" means that if the directors get the assent of a general meeting they may declare a dividend; but that is not to be any kind of dividend; it is to be a dividend of that kind which the clause contemplates, namely, "a dividend to be paid to the members in proportion to their shares." If therefore a dividend is declared, it must be—whatever is the true construction of those words—one which the members will participate in in proportion to their shares.

Then the whole question is—What is the meaning of the words "in proportion to their shares?" Now, I have looked as far as I could through the whole of these documents—the articles of association, and also the memorandum of association—and I find the word "shares" continually occurring throughout both documents. In the memorandum "the nominal capital of the company" is £20,000 in 400 shares of £50 each. That was at a time when nothing could have been paid-up, and when the word "nominal" was used with strict propriety, because it was not adopted or even subscribed, or probably not subscribed by any others at all events than those persons whose names are underwritten to the memorandum, whose shares amount to a very small proportion indeed of that sum. In the fundamental document of the company the word "shares" is used to signify the aliquot part of the £20,000, the original nominal capital.

Then we come to the interpretation clause. The interpretation clause in the article says that generally where there is nothing repugnant in the context the word "shares" is in the articles to have a meaning substantially the same as that which it has in the memorandum—which it might be expected—that is, that it shall mean "the shares into which the capital is divided." It was very justly observed by the learned counsel who just now so ably addressed your Lordships (Mr Buck-

ley), following Mr Benjamin, that the word "shares" there depends upon the word "capital," but he would not contend that there or elsewhere in the articles the word "capital" meant that part of the subscribed capital which has been paid-up or called-up for the time being as distinct from that part which has not.

I will not take your Lordships through all the clauses of the articles of association, but I think that there are many relating to shares and many relating to other circumstances in respect of which shares confer privileges or powers or obligations, and I cannot find a single place in which there is anything suggesting a different sense of the word shares from that which the interpretation clause mentions. But the very clause which has been so much relied upon in argument as furnishing reasons against the application of that sense to the 71st section—namely, the 6th—appears to me to be an instance of the same use of the word. The 6th clause says—"The directors may, if they think fit, receive from any member willing to advance the same, all or any part of" what?—"The moneys due upon the shares held by him beyond the sums actually called for;" and then "upon so much of the moneys so paid in advance as from time to time exceeds the amount of the calls then made upon the shares in respect of which such advance has been made the company may pay interest." What is the meaning of the word "shares" there? Shares in the subscribed capital, not the part which has been paid-up or the part which has not been paid-up, but manifestly the whole of the subscribed amount of the shares of which part has not been paid-up. Therefore that clause, as it appears to me, instead of contradicting the interpretation placed upon the 71st section by the Court below, confirms it, and although it may be true that it would be an improbable thing in a case in which the calls were unequal that the dividend should be equal between different classes of shareholders, and it might be an improbable thing that the directors should use the power of taking in advance at interest from a member the part not called up upon his shares, yet there is the power, and I am not satisfied that it can be limited in its application to original shares as distinct from shares subsequently issued; but the same power of dealing with the subject of dividend by way of exclusion or otherwise seems to me only generally to form an argument such as that insisted upon by the appellants' counsel. If the money has not been advanced to the company, and therefore does not carry interest, still it may be making, and probably will be making, interest or profit in the hands of the shareholder, and if an equality in respect of dividend (supposing the dividend to be equal) is not an obstacle to the natural and literal interpretation of the 71st section, I do not see any obstacle which arises from the fact that instead of making interest elsewhere the shareholder receives interest from the company for paying voluntarily what he is not obliged to pay. I cannot see how that can make any difference at all.

And with regard to the suggested mode of interpreting the words "in proportion to their shares," as applying to the shares which are numbered in the company, I venture to think that that is a fallacy. The particular numbers, which are used particularly for the purpose of identification and transfer, and to keep the shares from being improperly dealt with, are immaterial for this purpose, inasmuch as this clause does not look to any of those objects, nor does it look to each share separately and singly, but it looks to the aggregate amount of shares held by those persons who are to receive the dividend. That aggregate amount may be determined by two things—first, by the amount of each share, and then by the amount of all the shares held by the shareholders put together as compared with those held by others.

I do not think, my Lords, that there is really any necessity to found anything upon the Act of 1867; but I may say that without some express authority in the original regulations of the company, or in the regulations which this Act enabled the company to make by way of alteration, *prima facie* there would not be a power to pay a dividend in proportion to the amount paid-up on each share in cases where a larger amount was paid on some shares than on others. The fact that the Legislature thought it necessary in 1867, five years after the original Act, to declare it expressly, and to make that power dependent upon the authority to be found in the company's regulations, either as originally made or as altered, is, to say the least, decisive against the supposition which your Lordships are asked by the appellants' counsel to make as to the Act of 1862, the words of which are exactly the same as those which you have in this article—"The directors may, with the sanction of the company in general meeting, declare a dividend to be paid to the members in proportion to their shares." Those words are found in the model set of articles in Table A, which was to enter into the constitution of every company formed under the Act. The appellants say that under the Act of 1862 they can do the very thing which in 1867 it was thought necessary to give express power to do, and to make that power dependent upon the authority contained in the company's regulations. I can only say, my Lords, that having arrived at the conclusion that the natural construction of the words of this article, and that construction which they will receive if you compare the manner in which the word "shares" is used throughout these articles, is in accordance with the judgment of the Court below, I am certainly very much confirmed, rather than otherwise, in that construction by the Act of 1867. Therefore, my Lords, I move your Lordships to dismiss this appeal with costs.

Lord Blackburn—My Lords, I am of the same opinion. I do not think that in dealing with such a subject as this it is quite right to talk of one arrangement being unjust or just, for I think that where a shareholder thoroughly understands the effect of the articles and clauses under which he enters into a partnership to take shares he cannot say that it is either unjust one way or the other. But I was a good deal struck at the first blush of the matter when I saw it by the feeling which Lord Shand very well expresses, that though not unjust it is unequal, as I may call it, to say that a shareholder who has only paid-up 5s. shall receive as great a dividend as a member who has paid-up £1. He is 5s. out of pocket, and he keeps the 15s. to himself, and makes interest upon it, and it does seem unequal that he should be paid as much as the other shareholder. On the other side, it is a very strong argument to say that he is to be paid no more than his proportion upon

what he has paid up. If in the case which I have first supposed there is an equality, there is a very strong argument for saying that the latter case would be unjust and hard upon him; for taking a case, which is not at all an unlikely one to happen, of a company paying 25 per cent., then at the end of five years, after paying 25 per cent., the man who has paid up £1 has received £1, 5s., and therefore has been repaid his whole £1 and more, which is a very handsome interest, while the man who has only paid-up 5s. has only received back one-fourth part of it per annum—that is to say, has only received (I think I am doing the sum rightly) 6s. 3d. for his 5s., though he has made no doubt a profit. Therefore if there then comes a winding-up, the man who has paid £1 is free; he has made his profit and goes away clear; and the man who has made a profit of 1s. 3d. upon his 5s. is obliged to pay 15s., and does pay it. That case, as I said before, is not at all improbable, and it does seem a little uneven and unequal—and, if you like to use the word, you may say unjust—that the man who incurs this risk should get nothing whatever to compensate him for it.

But which is the right or the best course is not, I apprehend, a matter for your Lordships to consider—what the Court below had to deal with, and what we have to deal with, is to see what is the true construction of these articles. They happen to be identical in the manner in which they are framed with the articles in Table A of the Act of 1862. Upon that question I have not been able to doubt that the Court below was quite right in the judgment which it gave, and that judgment should be affirmed. The words of article 71 of these articles (72 in Table A) are—"The directors may, with the sanction of the company, declare a dividend to be paid to the members in proportion to their shares." I can put no meaning whatever upon the words "in proportion to their shares" except that the dividend is to be equal to each member according to the proportion which he has subscribed of the capital money. "Nominal capital" is the phrase used, which is not very applicable when the company is once started; the subscribed capital which the member has paid-up or may be made to pay up is, I think, the right term. The dividend is to be paid to the members in proportion to their subscribed capital. Mr Benjamin endeavoured to argue that the directors have the power under the word "may" to give a dividend in a different proportion. I am quite clear they have no such power at all. They need not give any dividend if they think it inexpedient to do so; but if they give a dividend, they must give it rateably in the way I have mentioned, and in no other way whatever.

Then if the dividend is to be in proportion to the capital which has been subscribed, the thing, I think, is to follow what in my opinion is the plain meaning of the words. It was argued (I confess that I thought I was doing injustice to the argument, for I never could understand how it could be an argument at all) that because there is a clause—clause 7, Table A, and 6 in these articles—which enables a man whose shares are not paid-up to agree with the directors to advance the amount uncalled, or any part of it, to them upon such terms as they may agree upon, that is somehow or other antagonistic to the construction which the Court below has placed upon clause 71. As I said before, I was afraid there might be some argument there which I did not perceive. I can only say, that exercising the greatest acuteness which I could exercise for the purpose, I could not see that there was any argument there at all.

The only result, then, comes round to this, if the words mean what I have construed them to mean, is there any reason in holding that we should force them to mean something else; though there may be inequality, and perhaps more inequality in the one construction than in the other, still I think the question is really which of the two should be adopted,—whether if the parties are ingenious enough to strike it out we should adopt some *tertium quid*—something between the two—which should give to a shareholder who has not paid up the full amount of his shares some benefit without giving him quite the same amount of dividend as if he had paid the money all up. Whether any such thing could be devised or not, or whether it would be consistent with the Acts as they stand, is not the question now before us, and I will not express any opinion upon it.

Now, when one looks at the Act of 1867 it very greatly strengthens my belief that the true construction of these words is not that for which the appellants contend. I do not read that Act exactly as saying that the Act of 1862 did prohibit the third thing in that clause; it rather seems to be this, that the Act of 1862, if it had the effect of preventing it, is not in future to prevent it; it declares that it shall not prevent it in future if on the true construction of the regulations as they stand originally, or of the regulations as altered, it may be done. Now, it is not pretended here that the regulations have been altered so that it may be done. It therefore comes solely to the question on the true construction of the regulations as they were originally drawn, Is this prevented or not? I have already expressed my opinion that upon the true construction of the words, taking them in their ordinary sense, it is prevented, and holding that opinion I think that the judgment of the Court below should be affirmed.

Lord Watson — My Lords, in forming an opinion upon this case I have left out of consideration the comparative injustice or inconvenience of adopting one or other of the modes of paying dividend for which the parties respectively contend. It appears to me that the Legislature has left that as a matter for each company to determine in framing their memorandum and articles of association, or by subsequently modifying these articles, if they have left room for themselves to do so. I am of opinion with your Lordships that the question here turns upon the meaning of the word "shares" as occurring in the 71st of the articles of association of this company, and I have come to the same conclusion as your Lordships, to the effect that the word "shares" in that article is used to signify the amount of subscribed capital which the member has either contributed already or has undertaken to contribute, and that it bears no reference whatever to the different amounts which may have been paid-up under call by the members upon different classes of shares. The noble Lord on the woolsack has anticipated all the reasons which have led me to come to that conclusion, and I therefore say no more.

Lord Bramwell—My Lords, I am entirely of the same opinion. I think that the inequality which has been referred to ought to be examined into no further than for the purpose of showing that it is not unreasonable to interpret these articles of association in the way that we have done. It seems to me that the more reasonable thing to have done, if it had occurred to the parties, would have been to have provided either that the full dividend should not be paid on the shares not fully paid-up, or (which perhaps would have been the more reasonable thing) that interest should be paid by the shareholder upon the unpaid part of his shares; but it does seem to me that it would be an unreasonable thing—though I daresay shares will be issued again upon similar terms, and taken without any anticipation on the part of the public of the consequences—to do what Mr Buckley was compelled to confess would happen, namely, to hold that although there might be a shareholder who had paid nothing at all, and who would never receive any dividend, and would never participate in one way or the other in the affairs of the company until he was called upon to pay their debts, yet he should be subject to that liability. At all events, this might very well happen—he might pay instead of five shillings upon each of these shares, only five per cent. upon it, and then it would be a most unreasonable thing to hold that having no power to receive more than the dividend upon that amount, and having only contributed one-twentieth part of the share, he should nevertheless be liable for the whole amount of it. I think therefore that it is reasonable to look to the alleged hardship or inequality with a view to showing that there is nothing unreasonable in the construction which has been put upon this clause.

And now we come to the clause itself. It is a little remarkable. It says—"The directors may declare a dividend,"—that is to say, a sum to be divided—you may put a stop there—"to be paid to the members in proportion to their shares." Now, Mr Buckley has shown (not that I think there is any great doubt about it) that the word "shares" there does not mean the share named in the Act of Parliament, which is numbered and otherwise particularly described. But when he came to show what it did mean, the task may have been more difficult—that is to say, with reference to the interests of his clients—for he rather, I think, inadvertently dropped the word "interest"—that the dividend, the thing to be divided, was to be paid to the shareholders in proportion to their interest; and then having said that, he endeavoured to make out that "interest" must mean the sum that they had paid and were liable to pay in respect of calls made. Now, that really is to add altogether to the words in the 71st article, and without, as it appears to me, any good reason, because the only reason at all given was this, that if the construction contended for by the respondent is right, then the directors could not avail themselves of section 6 without in truth giving the shareholder from whom they borrowed money a sort of premium or benefit, and making him better off than any of the other shareholders. All I can say is, that if that is so, they must not avail themselves of that section, and instead of borrowing money from their shareholders generally, they must borrow money from any of their shareholders who have not paid up in full. I confess that I see no reason for putting an unnatural meaning upon this very intelligible article 71.

Lord Fitzgerald—My Lords, I too concur in the decision which has been announced, though I confess that I certainly entertained rather the contrary impression by reason of the inequality which was complained of in this distribution of the profits of the company, but having heard the argument, and after more carefully looking at the case, I have come to the conclusion that the decision of the Court below is right. Now, I might pause there without saying more, but I will observe that it is agreed upon on all sides that the whole question depends upon what is the interpretation to be put upon the word "share" in article 71, and I may add further, in accordance with what has been already said, that it appears to me that "share" and "shareholder" must receive the same interpretation wherever you find them in these articles of association. We find in article 41 that a shareholder is entitled to a vote for every share held by him; and it is admitted that the proper interpretation of that "share" is that it means his proportion of the subscribed capital of the company which appears in his name on the register of shareholders, and has no relation whatever to what may or may not have been paid up in respect of it.

Again, when we turn to the qualification of directors, the qualification of a director is 1000 shares in the company. I have only to look at the language with reference to a qualification of that kind, and I cannot fail to see that 1000 of the five shilling shares would equally qualify a director as 1000 £1 paid-up shares.

Then, again, as to the property of a shareholder in a certificated share, that is, a proportion of the subscribed capital of the company registered in the shareholders' list of the company in the name of the individual—there are half-a-dozen other instances in which the term applies, and I see no reason for putting a different construction upon this clause 71 of the articles. In truth, the respondent here insists upon the literal and grammatical interpretation of clause 71; he does not ask the House to interpolate anything at all; he takes it as it is, and asks for its interpretation. On the other hand, upon the part of the appellants it is necessary, in order to arrive at a conclusion favourable to them, to interpolate some words and place them in article 71; and giving the same interpretation to "share" there as they would to it in every other portion of the articles of association they ask us to read it "share in the paid-up capital of the Company." I have come to the conclusion that we cannot do that, and that rules the entire question in favour of the respondent.

I may observe also that when this company found it necessary to raise additional capital they did two things—First, they broke up the original £50 shares and made them £1 shares; then when they came to raise additional capital they did it by a resolution of this kind, using the word "shares" in the manner I have just pointed out, "that the directors be empowered to increase the capital of the company," how? "By the issue of 20,000 shares of £1 each." And what was really done was this—The company did not want then

£20,000; they did want £5000 of new capital, and they obtained it by issuing these shares upon a deposit of five shillings a share, keeping the remaining £15,000 as a reserve to fall back upon; and it is in respect of that £15,000 that the appellants say that the parties holding those shares are entitled to no dividend whatever. But if they had intended that they had ample power under the 24th section of the Act of 1867 by resolution so to declare; they have not so declared; and in my judgment we ought to affirm the decision of the Court below.

Interlocutor appealed from affirmed and appeal dismissed with costs.

Counsel for Appellants—Benjamin, Q.C.—Buckley, Q.C. Agents—Wild, Brown, & Wild—Smith & Mason, S.S.C.

Counsel for Respondents—Solicitor-General Asher, Q.C.—Rigby, Q.C. Agents—Grahames, Currey, & Spens—J. & J. Ross, W.S.

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# COURT OF SESSION.

*Wednesday, December* 13.

## SECOND DIVISION.

[Lord Kinnear, Ordinary.

### MILNE *v.* RITCHIE AND OTHERS.

*Process — Reduction—Title to Sue—Agent and Principal—Title of Agent to Sue—Reduction of Contract by One who is not Himself a Party to it.*

*Held* (*rev.* judgment of Lord Kinnear) that title to sue for reduction of a contract on the ground that it had been induced by fraud was not limited to the parties thereto, but extended to the agent of one of them who had been found liable, on the ground that he had acted in excess of the authority given him, to relieve his principal of an action at the instance of the other party to the contract, and founded upon it.

Lord Rutherfurd Clark *dissented and held* that not being a party to the contract the agent had no title to sue for reduction of it.

William Davison, hotel-keeper, and John Gamble Paterson, club-master, St Andrews, employed John Milne, architect, in the end of 1879, to prepare for them plans, specifications, and a schedule of measurements of two villas which they proposed to erect there, and authorised him to obtain offers from tradesmen for carrying out the work. Schedules for the mason-work, joiner-work, &c., were accordingly issued by Milne to various contractors, and among others a schedule for the mason-work was supplied to James Ritchie, builder, who returned an offer to execute the mason-work. His offer (the amount of which formed the subject of dispute as hereinafter narrated) was accepted by Milne on behalf of his clients Davison and Paterson, and Ritchie then proceeded with the erection of the two villas, and completed them towards the end of 1881.

In February 1882 Ritchie raised an action in the Court of Session against Davison and Paterson for payment of £1924, 14s. 10½d. This sum of £1924, 14s. 10½d. was made up of £1646, 17s. (which Ritchie alleged to be the amount contained in the offer and acceptance constituting the contract made with him by Milne as architect for Davison and Paterson), and of further sums for extras; a sum of £1397 paid to account by Davison and Paterson from time to time during the building operations, on certificates furnished by Milne, and a sum of £132, 11s. 2d., fell to be deducted, leaving a balance of £395, 3s. 8½d. said to be still due. Davison and Paterson defended that action, and after proof Lord Kinnear (Ordinary), on 20th July 1882, decerned against them for a balance of £136, 12s. 5d., against which judgment they reclaimed. On 24th April Davison and Paterson raised an action in the Court of Session against Milne for the relief of that action, and all expenses connected with it, in which they obtained decree in absence on 19th May following, on which they charged Milne. The ground of that action of relief was that the authority of Milne, as acting on their behalf in entering into a contract, was limited to the sum of £1465, 17s. The present action was raised by Milne against Ritchie and against Davison and Paterson on 13th October following for reduction of the acceptance signed by him founded on by Ritchie, and of the decree in absence in the action of relief by Davison and Paterson against him, and of the charge (which he alleged to have been made after he had intimated to them his intention of raising the present action to them), and of the execution of the charge. The grounds of reduction were fraud and essential error, and the pursuer's averments were to the effect that Ritchie's original offer was for £1447, and was finally adjusted between him and the pursuer with the knowledge and authority of Davison and Paterson; that the original offer was then handed by him back to Ritchie to be re-written, and the amount altered to £1465, 17s.; that Ritchie then left the pursuer's office, to which he returned about half-an-hour later with a written offer, which he (Ritchie) said to pursuer was in accordance with the schedule of prices as previously adjusted; that when pursuer opened the paper on which the offer was written, Ritchie, by a fraudulent device, diverted his attention from the amount of the sum in the offer, which he represented to be in accordance with the adjusted schedule, and so induced pursuer, who believed this representation, to write his acceptance of the offer without observing the fact, which he afterwards learned, that the figures were different from those in the schedule, being £1646, 17s. instead of £1465, 17s.; that after affixing his signature he handed the acceptance to Ritchie, by whom it was taken away; that it was not seen again by pursuer until produced in the action at Ritchie's instance against Davison and Paterson.

Ritchie in defence denied the pursuer's allegations of fraud. He averred that the pursuer declined to accept his original offer of £1447 as too low, and told him to reconsider it and send in a fresh one, and that he accordingly prepared a fresh offer, in the form of a letter addressed to the pursuer, for £1646, 17s., which he handed to the pursuer or his clerk at his office, and on the following day received from the pursuer an acceptance in the form of a letter, in which the sum