tion, and from an examination of them it is quite clear what he intended to do. We are warranted from this clause in the trust-deed in looking at any writs under the testator's hand in order to get at his wishes. The words he uses are very broad indeed—"Any separate writing under my hand or signed by me;" and we can look at these writings without requiring to determine whether they are testamentary writs or not. Taking, then, this clause along with the paragraph in the "Notes" to which your Lordship referred, and in which the testator distinctly states that he has cancelled this legacy, I have no hesitation in arriving at the same conclusion as your Lordship, that the testator intended to cancel, and has validly cancelled, this legacy of £10,000.

Lord Shand—The parties are agreed that this codicil of October 1878 and November 1879 is an expression of the testator's intention, and the question therefore comes to be, whether that intention is to receive effect as it was originally expressed, or whether effect is to be given to the alterations which were subsequently made upon it. In considering such a question we are entitled to look at whatever will aid us in determining whether these deletions were intended by the testator to be deliberative merely or final. If we had merely these two documents, the trust-deed and the codicil along with the pencil deletions, I should have felt very great difficulty in deciding what effect was to be given to these pencil scorings, and should have felt that further information was necessary. But a great deal of light is thrown upon these documents by the "Notes" and other holograph writs which have been referred to, which show clearly, I think, that the intention of the testator with regard to these cancellations was final and not deliberative. I take these "Notes" as a record of the testator's purpose in making the pencil alterations, and I think that the words made use of in the passage in the "Notes" to which your Lordship referred point distinctly to a past act of cancellation. If what is contained in that passage was intended merely as instructions for the future, I think the words would have been "will cancel," instead of which they are "have now cancelled." Looking, then, to the wording of this portion of the "Notes," I think it is quite clear that the testator was referring to an act of cancellation which was completed, and which was therefore not deliberative but final.

Lord Adam—We have here a testamentary writing containing a bequest of a legacy, but through this bequest we now find that certain lines have been drawn with a pencil, and the question comes to be, whether the pencil markings have the effect of cancelling the legacy. Had these markings been made with ink they would have been sufficient to cancel the bequest, but being made in pencil have they that effect?

If we had had nothing in the present case but the deed itself and the pencil marking, I for my part should not have been prepared to have held them as sufficient, for I agree with what Williams says (Williams on Executors, p. 112)—"When the question is whether the testator intended the paper as a final declaration of his mind and as testamentary, or whether it was merely preparatory to a more formal disposition, the material with which it is written becomes a most important circumstance." But then it is admitted that we can look at evidence both parole and documentary which throws any light upon the deletions with a view of getting at the testator's intentions regarding them, and the document which aids the inquiry is the testator's "Notes as to Settlement and Alterations." This is a holograph writing referring back to the circumstances under which he had made the alterations, and I can attach no other meaning to it than that it is a statement by himself that he had at the time when he wrote it cancelled the legacy which we are now dealing with—[*His Lordship here read the passage in the "Notes" quoted above*]. I can only read this as an explanation by the testator of what he has already done.

The Court answered the question in the negative, and found that the second parties were not entitled to demand, nor were the first parties bound to make payment of the said legacy of £10,000.

Counsel for First Parties—D.-F. Mackintosh, Q.C. — Goudy. Agents — Fraser, Stodart, & Ballingall, W.S.

Counsel for Second Parties—Balfour, Q.C.—G. W. Burnet. Agents — Fodd, Simpson, & Marwick, W.S.

Friday, March 11.

SECOND DIVISION.

[Lord Fraser, Ordinary.

WATSON'S TRUSTEES *v.* GLASGOW FEUING AND BUILDING COMPANY, *et e contra.*

Deed—Mutual Error—Error in Plan referred to in Deed—Effect on bona fide *Third Party—Register of Sasines.*

In endorsing on a feu-contract as relative thereto a plan of the property feued, a mistake was made as to the roads which the superior had undertaken to make, the plan being so coloured as to make it appear that he had undertaken an obligation much greater than it was really intended by the parties that he should undertake, or than they intended that the plan should show. The feu-contract was signed and recorded without the mistake being discovered, and the property came into the hands of a purchaser from the original feuar. The question was raised between him and the superior whether the latter was bound to make the roads shown on the plan It was proved that the purchaser did not when he purchased know of the obligation apparently created by the feu-contract and plan, and that in the sale to him—the error not having been yet discovered—no such obligation was in contemplation of either party. *Held* that notwithstanding the deed was recorded, the superior was entitled to redress against the error, and was entitled to have the feu-contract reduced in so far as it imported an obligation on him to make the roads in question.

On 24th January 1877 missives of feu were entered into between William Watson, proprietor of the lands of Overlee, near Glasgow, and Messrs Whyte & Binnie, Glasgow, by which the former offered these lands in feu to the latter in two different lots, the first being a piece of ground extending to 3 acres 2 roods and 20 poles, as delineated on the feuing-plan of the lands, at the annual feu-duty of £16 per acre. In reference to this feu of 3 acres Watson came under the following obligation, which he subsequently duly implemented—"I bind myself to make the roads free of charge to you, except the sewers, drains, curbstones, and gutters, which you shall pay me for. I bind myself to make the roads firmly bottomed, and well set and covered with ashes." The second and remaining lot was similarly offered by Watson, at a feu-duty of £20 per acre. It extended to 14 acres 1 rood and 30 poles. In reference to this lot the following was the stipulation—"You" (that is, Whyte & Binnie) "shall be bound to put in roads at your own expense, of the same description as I bind myself to do to you as above mentioned." This offer was duly accepted on the same date by Whyte & Binnie. A feu-contract was thereafter entered into between Watson, on the one part, and Whyte & Binnie and two other persons of the name of William Neilson and Hugh Livingstone on the other, both of whom were taken into the feuing speculation by Whyte & Binnie. The feu-contract, which was dated 3d December 1879 and 5th and 7th January 1880, conveyed over to those four persons (1) the 3 acres 2 roods and 28 poles, which were said to be "delineated and tinged red on a plan thereof, endorsed hereon, and subscribed as relative hereto;" (2) the remainder of Overlee, containing 14 acres 1 rood and 30 5-10th poles, which was described as "delineated and tinged blue on the foresaid plan, endorsed hereon, and subscribed as relative hereto." In regard to the formation of roads the feu-contract contained a special stipulation as follows—"Declaring that the first party (Watson) shall, in so far as not already done, form the roads (including the laying of the sewer-pipes, drain-pipes, cesspools, gutters, kerbstones, but which pipes, gutters, and kerbstones are to be furnished by the second parties) intersecting the pieces of ground above disponed, in so far as delineated and tinged brown on said plan."

Before the date of the missive-offer a plan had been prepared by a Mr Kirkwood. It showed only the roads on the first or 3-acre feu which Watson was to make. It showed no roads on the other or 14-acre feu. The plan which was appended to the feu-contract was intended to be a copy of this plan. But the plan really appended to the feu-contract showed roads through the 14-acre lot also, and thus while under the missive Watson was bound to make roads through the 3-acre lot alone, he was bound according to the plan on the feu-contract to make them through the whole 17 acres.

The mode in which this error occurred was thus explained by the Lord Ordinary—"Whyte & Binnie, and their two associates Neilson and Livingstone, had entered into the feuing speculation in the year 1877, when there was a good deal of building speculation going on in Glasgow, and the first thing of course that they set about doing was to obtain a feuing plan exhibiting the laying out of the ground for feuing. This was prepared for them by Messrs Kyle, Dennison, & Frew, surveyors, Glasgow. These gentlemen were not the persons who made the survey on behalf of Watson, but their services were taken by Watson in regard to the description of the subjects to be inserted in the feu-contract, and in regard to making a copy of the plan to be appended to that deed. Messrs J. & J. Boyd, the agents for Watson, wrote to these surveyors on 22d October 1877—'We send the draft feu-contract herewith, and will thank you to check the descriptions and contents of ground. We shall afterwards instruct you to endorse the plan on the extended deed. Of course you will charge our client with such a proportion of the expense of the survey as you think fair.' It appears from the diaries kept by Kyle, Dennison, & Frew that they had got verbal instructions—and, as explained by Mr Dennison, these instructions came from Mr Boyd—to endorse the plan upon the feu-contract. On the 17th October 1879 there was an entry to the effect—'Endorse plan on feu-contract between Wm. Watson and David Whyte and others, J. & J. Boyd. See former plan and lithograph plan left, also letter by Mr Watson, 26th September 1879, describing line bounding the ground for small houses.' On November 19th there is another entry in these terms—'Delineate on reduced plan, endorsed on deed, all the roads as shown on lithograph plan of Overlee, for J. & J. Boyd.' This lithographed plan shows the whole roads intended to be made by the feuars through the whole 17 acres, and on the same 19th of November Kyle, Dennison, & Frew's time-books had an entry to this effect—'Delineating and colouring on plan, which was endorsed on deed on 20th October last, all the proposed roads shown upon the feuing-plan of Overlee ground.' The surveyors knew nothing of the terms of the missives which had been entered into between Watson and Whyte & Binnie, which limited the former's obligation to make the roads to the 3-acre lot, and having got instructions to delineate and colour all the roads and ground they, or their clerks who did the manual work, naturally conceived that it was their duty to colour the whole road contemplated to be made by Whyte and his associates. The feu-contract and the plan appended were signed on the 15th and 17th of November 1879, but in consequence of an agreement come to among themselves by the feuars it was necessary to re-write the last two pages so as to give effect to the agreement, which had reference to the excluding any person from becoming assignee to the share of any one of the speculators without the consent of the others. A new stamped sheet was accordingly got, the two last pages were re-written, and the contract as ultimately executed and delivered was dated 31st December 1879 and 5th and 7th January 1880. None of the persons who were present at the execution of the feu-contract took the trouble of looking at the plan when they ultimately signed the deed. It was at the end of the deed, but between it and the two pages which were signed there was inventory of writs, and so the error which had been committed in tingeing brown the whole roads upon the property was not then discovered."

The feu-contract was recorded on 31st January 1880.

In March 1880 Whyte and the other feuars, Binnie, Neilson, and Livingstone, entered into a contract with the Glasgow Feuing and Building Company, which company had been registered in December 1879, by which the company agreed to purchase the lands in the feu-contract. By disposition following on the agreement, which was not executed till 24th November and 2d December 1880, Whyte and others conveyed to the company the two lots of ground, "with our whole right, title, and interest, present and future, therein, and with the whole pertinents thereof, but always with the liberties and privileges, and under the real liens, burdens, conditions, restrictions, limitations, provisions, obligations, and others specified or referred to in the said feu-contract." The consideration for this disposition was the payment of the sum of £2378, 6s., and there was excepted from the conveyance such parts of the lands as had been sold to other persons by contracts of ground-annual before the purchase made by the Feuing Company.

In March 1883 Mr Crawford, agent for the Glasgow Feuing and Building Company, discovered the error above explained as to the plan. He was instructed, having laid the matter before the directors, to call upon Watson to make the roads through the whole 17 acres. He did so by letter of 8th March 1883. Watson made the roads through the 3 acres, but refused to do so through the 14 acres.

Watson died on 18th June 1884.

The Feuing Company having gone on with their feuing operations, roads had been made from to time on the 14 acres, and in February 1885 they raised a petitory action against Watson's trustees for £334, as having been expended by them on roads in consequence of Watson's failure to fulfil his obligations.

Watson's trustees defended the action, founding, *inter alia*, on the error as to the plan, which they maintained to be an essential error under which the contract was signed, and they raised an action of reduction of the feu-contract "in so far as the same declares that the said William Watson shall form, or imports an obligation on him or his heirs or successors to form, any roads (including the laying of the pipes, sewer-pipes, drain-pipes, cesspools, gutters, and kerbstones) on the said portion of ground containing 14 acres 1 rood 30 poles and 5-10th parts of a pole or thereby imperial measure, disponed in the second place of the said feu-contract." There was a further conclusion for declarator that no such obligation was incumbent upon Watson or his representatives.

The actions were conjoined.

In the action of reduction the pursuers, Watson's trustees, averred—"(Cond. 8) The mistake which had been made as aforesaid in endorsing the wrong plan upon the engrossed feu-contract was not discovered prior to the execution and delivery of the said deed. It was the understanding and intention of both parties to the contract, at and prior to the execution of the deed, that Mr Watson should only be bound to form the roads within the dotted lines on the said plan prepared by Mr Kirkwood, and in particular that he should not be bound to form any roads, &c., on the said piece of ground containing 14 acres 1 rood and 30 poles, and 5-10th parts of a pole, and that no roads on the said piece of ground should be delineated and tinged brown on the plan. The said feu-contract and plan endorsed thereon were signed by Mr Watson and the other parties thereto under essential error as to their import and effect in relation to the roads, &c., which the superior was bound to form. Both of the parties to the contract believed that the only roads delineated and tinged brown on the said plan were the roads marked on Mr Kirkwood's plan, and situated upon the said piece of ground containing 3 acres 2 roods and 28 poles or thereby, and that no roads upon the said piece of ground containing 14 acres 1 rood and 30 poles and 5-10th parts of a pole were delineated and tinged brown on the said plan, while in fact all the roads on the said plan over the whole ground feued were delineated and tinged brown. Mr Watson being by the terms of the said feu-contract taken bound to form, in so far as not already done, the roads, &c., intersecting the pieces of ground disponed, in so far as delineated and tinged brown on the plan endorsed, it was thus made to appear, erroneously and contrary to the understanding and intention of both parties to the contract, that Mr Watson was bound to form all the roads on the whole ground feued. Mr Watson would not have signed the feu-contract and plan if he had known their true import and effect in reference to the roads, &c., to be formed by him. It was not the intention of either of the parties to the contract that Mr Watson should be bound to form any roads, &c., on the said 14 acres 1 rood and 30 and 5-10th poles."

In Cond. 11 they further averred—"The said Feuing Company at and before the date of their acquiring the said ground from Mr Whyte and his co-feuars had been informed by Mr Whyte and his co-feuars and others, and well knew, that Mr Watson was not bound to form any greater extent of roads than were delineated on Mr Kirkwood's plan, and in particular that he was under no obligation to form roads on any part of the ground feued other than the 3 acres 2 roods and 28 poles or thereby first disponed in the feu-contract, and they acquired the said subjects on that footing, and not in reliance on the existence of any pretended obligation on Mr Watson to form roads on the said piece of ground containing 14 acres 1 rood and 30 and 5-10th poles. It was known to the said company at and before the date of their acquiring the ground that the roads delineated on the plan endorsed on the said feu-contract had, so far as situated on the 14 acres 1 rood and 30 and 5-10th poles, been tinged brown in error, contrary to the intention of both parties to the contract."

The pursuers pleaded—"(1) The feu-contract, including the plan endorsed thereon, having been signed by the parties thereto under essential error as to its import and effect in so far as it purported to impose on the superior an obligation to form roads, &c., on the piece of ground containing 14 acres 1 rood and 30 and 5-10th poles, it was null and void *quoad* such pretended obligation. (2) The feu-contract having been entered into under the common essential error specified, it ought to be reduced or declared null to the effect concluded for. (3) The defenders respectively having acquired their subjects in the knowledge of the essential error referred to, they are not entitled to enforce or to maintain the validity of

the pretended obligation in question. (4) Decree ought to be granted as concluded for, in respect that it would be a fraud on the part of the defenders to enforce the said pretended obligation according to its terms."

The defenders pleaded—"(2) The pursuers' averments are not relevant or sufficient to support the conclusions of the action. (3) The pursuer's averments so far as material being unfounded in fact, the defenders are entitled to absolvitor. (4) The rights granted to the creditors and feuars are not in any view liable to be set aside, and therefore the action ought to be dismissed. (5) The action, so far as it concludes for partial reduction, being incompetent, the defenders ought to be assoilzied."

The Lord Ordinary (FRASER), after a proof, 1st, in the action of reduction, assoilzied the defenders from the conclusions of the summons, and 2d, in the petitory action, appointed the case to be put to the roll for further procedure.

On 7th July 1886 the Lord Ordinary found that the whole sum expended by the Glasgow Feuing and Building Company in making roads was £112, 19s.; decerned against Watson's trustees therefor; and reserved to the Glasgow Feuing and Building Company all claim for any further advances which they might make or be called upon to make in the formation of roads.

"*Note.*—[*After narrating the facts to the effect above stated*]— . . . The question now comes to be, whether redress can be obtained by Watson's representatives against the consequences of the error into which parties fell? The property is now in the hands of an onerous third party, and whatever might have been the pursuer's remedy had the question been raised as between them and Whyte & Binnie, it is contended that the Feuing Company were entitled to rely upon the records as indicating the extent of the property they were buying, and the obligations which the superior undertook. It was averred by the pursuers that the directors of the Feuing Company were aware of the error that had been committed before they made their purchase, and if this had been the case, then, according to several decisions, they could not be allowed to retain the property under such circumstances (*Lang* v. *Dixon*, 29th June 1813, F.C.; *Marshall* v. *Hynd*, 18th January 1828, 6 S. 384; *Magistrates of Airdrie* v. *Smith, &c.*, 13th July 1850, 12 D. 1222; *Morrison* v. *Sommerville and Others*, 21st December 1860, 23 D. 232; *Petrie* v. *Forsyth*, 16th December 1874, 2 R. 214; *Stodart* v. *Dalzell*, 16th December 1876, 4 R. 236). Amongst other matters a proof was allowed of these averments, with the result that the averments were completely disproved. The persons who were said to have had this knowledge were examined as witnesses, and denied it, with the exception of Whyte, who had become a partner of, and had been a director up to 1882 of the Feuing Company. Whyte further states that Gibson, the secretary of the Feuing Company, and the agent of the company, were aware of the error. Now, Gibson was examined and flatly denied this. Mr Crawford, the present agent of the Feuing Company, also deponed that he had no knowledge of the fact till March 1883; and the Lord Ordinary is constrained to believe these two witnesses rather than Whyte upon this point. The whole correspondence and actings of the parties show that it was a new discovery in March 1883.

"There thus being no knowledge on the part of the Feuing Company, they are entitled to maintain the position that as onerous third parties they had a right to rely upon everything which the records disclosed. If there was an error, they are not to be made the sufferers. The consequences of that error must fall upon the person who committed it (*Mansfield (Stuart's Trs.)* v. *Walker's Trustees*, 28th June 1833, 11 S. 813—*affd.* 10th April 1835, 1 S. & M'L. 203). It is said, however, that the Feuing Company in point of fact knew nothing about the obligation as to roads contained in the feu-contract before they made their purchase, seeing that neither the directors nor their agent saw the feu-contract until after the minute of agreement between Whyte & Binnie, Nelson & Livingstone, and the Feuing Company, had been entered into, and the Lord Ordinary holds this to be proved in point of fact. But he is constrained also to hold it to be irrelevant. It is no answer to an onerous third party buying heritable property, to say that he had not gone to the records, and there read the title of the intending seller to him. If he makes a purchase, the law says that he shall obtain right to all that the record discloses, if conveyed over to him. The case of *Steuart's Trustees* v. *Hart* (2nd December 1875, 3 R. 192) shows how this case would have been dealt with by the Court if the question had arisen between the original contracting parties. When an onerous third party, however, appears upon the scene, different principles must be applied, and a different conclusion arrived at.

"The Lord Ordinary has dealt simply with the action of reduction. In the petitory action he has not pronounced any judgment, because he cannot find in the proof which has been led sufficient satisfactory materials for disposing of the claim made by the Glasgow Feuing and Building Company. Perhaps these parties may be able to show the Lord Ordinary that there are such materials, about which however little or nothing was said at the debate. The attention of parties was very naturally directed to the main question raised by the action of reduction, and the pecuniary demand of the pursuers in the petitory action received but scant notice.

"*Note with reference to Interlocutor dated 7th July.*—The Lord Ordinary does not see his way to decern for payment of any sums of money in favour of the pursuers, other than what they have themselves actually expended in making roads, and the sum decerned for is the sum proved by their secretary

"As to expenses, the Lord Ordinary has found neither party entitled to them. The case as against Watson's Trustees is one of the very hardest possible, and they were justified in obtaining at least one judgment upon the matter."

Watson's trustees reclaimed, and argued—The ordinary doctrine by which onerous third parties obtain right to all that the record discloses as to subjects purchased by them was inapplicable here. In the first place, the Feuing Company were not onerous *bona fide* purchasers at all, and a consideration of the proof amply showed that they became owners of the property on the footing that they adopted the actings of the

original promoters from a date anterior to the deed in which the mistake occurred—*Magistrates of Edinburgh* v. *Begg*, December 20, 1883, 11 R. 352. In the second place, even if they were treated as onerous third parties and independent altogether of Whyte & Binnie, the evidence showed that they were affected with sufficient knowledge of the rights of parties with reference to the roads to put them in *mala fide* in taking such a title as put Watson under obligation to make the roads on the 14-acre lot, and in attempting to enforce the obligation—*Wardlaw* v. *Mackenzie*, June 10, 1859, 21 D. 940 (*vide* opinion of Lord President, p. 947; *Waddell and Others* v. *Waddell and Others*, March 17, 1863, 1 Macph. 635). Whyte, who was Watson's agent, acted also for the defenders, so that they must have known all about the mistake, and were dishonest in attempting to enforce it. Watson's trustees were entitled to be restored against the effect of the deed he had signed when under essential error—*Stewart's Trustees* v. *Hart*, December 2, 1875, 3 R. 192; *Stodart* v. *Dalzell*, December 16, 1876, 4 R. 236.

The Glasgow Feuing Company replied—If the case was to be regarded as one of equity they were quite willing to give it. The justice of the case however demanded *restitutio in integrum*. In all cases of mutual error, or error where the person who was a party to it was innocent, the option was given to him of saying whether he would consent to the contract being reformed or whether he would insist on its rescission *in toto* — *Harris* v. *Pepperell*, November 7, 1867, L.R., 5 Eq. 1; *Bloomer* v. *Spittle*, February 12, 1872, L.R., 13 Eq. 427; *Paget* v. *Marshall*, July 2, 1884, L.R., 28 Ch. Div. 255; *Blair* v. *Blair*, November 16, 1849, 12 D. 97. (2) The proof established that the defenders were ignorant of the error, and that Watson or his agent was negligent—in fact, but for such negligence the error would not have occurred. The rule *assignatus utitur jure auctoris* did not apply—the exception that the purchaser on the faith of the record is outside that rule being applicable here—*M'Lellan* v. *Sinclair*, December 7, 1830, 4 W. & S. 398; Bell's Lect., i. 168; *Hawkins* v. *Jackson*, January 30, 1850, 19 L.J. 451.; Erskine, iii. 1, 16; *Hughes & Hamilton* v. *Gordon*, 1819, 1 Bligh's App. 287. (3) Neither were the defenders affected with sufficient knowledge of the rights of parties nor was the purchase made through Whyte acting as their agent. The company was not formed for two years after the original purchase. The case was different fom *Stewart's Trustees* v. *Hart* and *Stodart* v. *Dalzell*, in respect here the proposal was to withdraw altogether a stipulation in the contract. None of the authorities cited on the other side were applicable to the circumstances which had here occurred.

At advising—

Lord Young delivered the opinion of the Court:—The facts of the case are so fully and accurately stated by the Lord Ordinary that I shall abstain from any recapitulation. I agree with his Lordship in the conclusions in fact which he reaches upon the evidence, parole and documentary. These are in substance (first) that there is "a clear error" in the feu-contract called for in the reduction, in so far as it imports an obligation on William Watson to construct roads on the 14-acre lot of ground, he having in fact contracted to form roads only on the 3-acre lot, and (second) that the Glasgow Feuing and Building Company acquired the property in ignorance of the fact that the feu-contract expressed or imported any obligation on Watson as to roads, which they only became aware of a considerable time after their acquisition of the property and the completion of their title.

By the defence to the petitory action at the instance of the Feuing Company, and by the relative reduction at the instance of Watson's trustees, we are asked to rectify this "clear error" in the feu-contract.

It is proved and indeed admitted that Watson's obligation to form the roads on the 3-acre lot was duly implemented. I refer to the Lord Ordinary's exhaustive and accurate narrative for all details, only noticing that the mistake sought to be rectified consists in a blunder on the part of the colourist of the contract plan, he having "tinged brown" not only the roads on the 3-acre lot but also those on the 14-acre lot, and thereby made the words of the contract (which refer to the roads "tinged brown" on the plan) express Watson's obligation about fourfold in excess of the true contract of the parties.

The mistake is thus of the nature of a clerical error, and indeed a plan colourist's error in "tingeing" a road is perhaps of even a more mechanical character. It is not the case of both or either of two parties contracting under the influence of error, for here the parties were under none. It is the case of the instrument which was intended to express their contract, as to which they were quite agreed, failing through the blunder which I have mentioned to express it accurately. I agree with the Lord Ordinary that on satisfactory evidence of such a mistake this Court would not hesitate as between the original parties to rectify it. Neither of them would be permitted to take advantage of such a mistake either by cancelling the contract altogether should he have repented of it, or by taking an unconscionable benefit to the prejudice of the other. In all that I have said I agree with the judgment of the Lord Ordinary.

But the question is not between the original parties, for the property (the subject of the feu-contract) was purchased in 1880 by the Glasgow Feuing Company, who accordingly are the parties now resisting a rectification of the mistake. I think they must be regarded as *bona fide* purchasers for value, and I attach no importance to the argument that the original feuars (Whyte and his three associates) were truly pioneers of the company, their intention from the first being to promote and form such a company as they in fact eventually did, so that (for so ran the argument) they ought to be regarded as agents in advance for the company before its creation. But rejecting this argument, and admitting that a *bona fide* purchaser for value may have, and as a rule has, as strong an equity to resist the correction of a mistake as the party against whom it operates has to demand a correction, and that when the equities of opposing parties are equal the Court will decline to interfere, I am nevertheless of opinion that on the facts of this case there are grounds worthy at least of careful consideration for the pursuers' demand, even in a

question with a *bona fide* purchaser for value, to correct the mistake immediately in question.

And here I would ask leave to explain some expressions which I have used and may continue to use. With us "equity" is part of the common law accompanying and qualifying the administration of it by appeals to just and equitable considerations in every department of it. So also the equitable jurisdiction of this Court is simply part and portion of its common law jurisdiction and not distinguished by a special name. The terms "equity" and "equitable" are nevertheless convenient and useful in our practice as common words in legal language without technical meaning. The equitable rules and considerations, or in one word the "equity," which is part of our common law is none the less real and valuable—perhaps the more—that with us "equity" has never degenerated into a technical system. When therefore I speak of "equity" on the one side or the other, or of "equal equities," I desire not to be understood as expressing any technicalities but merely as referring more briefly and pointedly to considerations of equity and justice (in the ordinary meaning of the words) which the common law requires us to recognise and take account of in given circumstances.

Now, assuming that Watson's trustees have a clear equity to have this mistake to their prejudice rectified, what is the countervailing equity of the Glasgow Feuing Company to resist the rectification and claim the benefit of the mistake? I have already observed, that if equal injustice, or injustice of the same character, will be done to them by correcting the mistake, as Watson's trustees will suffer if it is left in operation, we cannot interfere.

The Lord Ordinary in expressing his own opinion puts the case for the Feuing Company as clearly and forcibly as it can be put. His Lordship says that "as onerous third parties they had a right to rely on everything which the records disclosed," meaning of course that the error is in the feu-contract which is recorded in the Register of Sasines. I rather think that this consideration of the faith due to the "records" (meaning of course simply the Register of Sasines) is the ground of his judgment. For his Lordship says that he "holds it to be proved in point of fact" that "the Feuing Company knew nothing about the obligation as to roads contained in the feu-contract before they made their purchase, seeing that neither the directors nor their agent saw the feu-contract until after the minute of agreement between Whyte & Binnie, Neilson & Livingstone, and the Feuing Company had been entered into." It is clearly proved that neither the agent nor the directors of the company saw the feu-contract or prior to the summer of 1883 had any idea that Watson was under any obligation as to roads. It is equally clearly proved that Messrs Whyte & Binnie, Neilson & Livingstone from whom they purchased did not intend to sell to them or transfer to them as an accessory of their purchase, any obligation as to roads. It is, in short, proved that the sellers to the Feuing Company did not intend to sell, and that the Feuing Company did not intend to buy, any such obligation—so that if in the result such obligation shall be held to have been bought and sold, it will be contrary to the meaning and intention of both the parties to the contract of sale, just as certainly as the original constitution of it by the blundered tingeing of the roads on the contract plan was contrary to the meaning and intention of the parties to the original feu-contract. The fact is indisputable that the blunder was not discovered for upwards of two years after the purchase by the Feuing Company, when it came as a surprise to all interested in the matter.

But the Lord Ordinary while holding this "to be proved in point of fact," feels "constrained also to hold it to be irrelevant," because when an onerous third party buys "heritable property," "the law says that he shall obtain right to all that the record discloses if conveyed over to him." His Lordship's judgment is thus, as I have already observed, put upon the sanctity of the records, as in his opinion sufficient at least under such circumstances as occur here to entitle a party interested to uphold a mistake in a recorded instrument to resist any equity in the sufferer therefrom to have it rectified.

I am unable to concur in this opinion, although admitting that the fact of an instrument being recorded may be a very material circumstance in the question whether the party resisting the rectification of a proved mistake in it has not a strong equity on his side, or in more popular language, whether a real and substantial injustice would not be done to him by the rectification. I should desire so far as possible to confine my observations and the expressions of my opinion within the exigencies of the case before us, and with that view, I have to point out that the mistake immediately in question occurs in the expression of an immediately prestable obligation to form certain roads delineated and tinged brown on a plan. The expression of the obligation occurs in a deed of conveyance, but it does not regard the title to the property thereby conveyed, and would have been as valid if expressed in a separate writing even of a character so informal as a memorandum or a letter. Nor is the legal character of the obligation affected by the circumstance of its occurring in a deed of conveyance which enters the records. A seller's disposition of a house might contain an obligation on the seller to put it in good repair and to paint and paper it before the buyer's entry, which would of course be recorded with the rest of the deed. I should have thought the circumstance immaterial for any purpose. The Register of Sasines is designed to preserve a continuous record of the titles to feudal estate and the burdens on it, and not of such mere incidental obligations as I am now referring to. If the debtor in such an obligation made the road, repaired or painted or papered the house, or paid the expense of the disposition to the buyers, I do not imagine that he would think it necessary to take steps for clearing the record of it by recording a discharge or otherwise. But the obligation itself would continue to stand on the record, and without anything on the record to show that it had been discharged on implement or otherwise. Every such obligation, even the most considerable of the class—an obligation to form a road or to supply the labour, the other party furnishing the material—really results in an obligation for money, and would cease at once on payment of a sum satisfactory to the creditor. But would

the receipt for the money have to enter the records? Take as an illustration the petitory action now before us in which the Lord Ordinary has given decree for £112. Must this decree and a discharge of it be recorded in the Register of Sasines? or if not, will an onerous purchaser from the feuing company be entitled to say that the record discloses the obligation and discloses no discharge, and that the obligation must be made good to him?

Now, I venture to think that these observations, if sound in themselves, do bear on the question before us, for they go to this that a purchaser does not look to the records alone with reference to obligations of the nature and character of that in which the mistake now sought to be rectified occurs. It is foreign to the purpose of the Register of Sasines to record the cause and outcome of such obligations. I am not therefore moved by any considerations of the sanctity of the Register of Sasines in dealing with this case, and I rather think from another passage of the Lord Ordinary's note that his Lordship does not think that this sanctity could have prevailed if it had been proved that the Feuing Company had notice of the mistake before the purchase. But this is very important, for it implies that in the Lord Ordinary's opinion the records will not prevail over the considerations of justice and equity on facts proved by extraneous evidence.

And this leads one to what I shall venture to present as my most comprehensive and final view of the case, which is, that the question of rectifying a satisfactorily proved mistake in a written instrument is a question of real and substantial justice and equity, and so depends on the very truth of the matter in the actual case before the Court. If through the blunder of a copying clerk or of a plan colourist (I give these only as instances) an instrument fails to express what the parties to it intended, the mistake will be rectified unless there be good reason to the contrary. The only reason to the contrary with which we have here to deal is that in the meanwhile a *bona fide* purchaser for value on the faith of the mistake would suffer injustice if the rectification were made. I think this would be conclusive reason to the contrary if it were true in fact. But then I am clearly of opinion that it is not here true in fact. I think it is false in fact, being of opinion that it is proved that the Feuing Company (*i.e.*, their agents and directors) had no intention or thought of acquiring what the mistake, if left unrectified, will give them, and that the discovery of the expressions in which the mistake consists, and of the advantage they might take by them (if allowed to stand), came upon them as a surprise.

The Court pronounced this interlocutor:—

"Recal the Lord Ordinary's interlocutor in the action of reduction; declare, reduce, and decern in terms of the conclusions of the summons; in the petitory action assoilzie the defenders from the conclusions of the action."

Counsel for Watson's Trustees—Asher, Q.C.—R. Johnstone—Alison. Agent—R. Ainslie Brown, S.S.C.

Counsel for Glasgow Feuing and Building Company—M'Kechnie—Shaw. Agent—Thomas Carmichael, S.S.C.

Saturday, March 12.

SECOND DIVISION.

HASTON *v.* THE EDINBURGH STREET TRAMWAYS COMPANY (LIMITED).

Reparation — Master and Servant — Employers Liability Act 1880 (43 *and* 44 *Vict. cap.* 42), *sec.* 1—*Plant.*

While a lad in the employment of a tramways company was, in the execution of his ordinary duty, riding one of their horses, it fell and caused severe injuries to him. It was proved that the horse was in a condition unfit for the work it was put to, and that this was known to persons in the company's service entrusted with the duty of seeing that their horses were in proper condition. *Held* (1) that a horse was part of the company's "plant," and (2) that its use while in a defective and dangerous condition was due to their fault, and *therefore* that they were liable in damages.

The Employers Liability Act 1880 (43 and 44 Vict. cap. 42) provides—"1. Where, after the commencement of this Act, personal injury is caused to a workman (1) by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer, . . . the workman . . . shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of or in the service of the employer or engaged in his work. 2. A workman shall not be entitled under this Act to any right of compensation or remedy against the employer in any of the following cases, that is to say (1), under sub-section one of section one, unless the defect therein mentioned arose from, or had not been discovered and remedied owing to the negligence of the employer, or of some person in the service of the employer and entrusted by him with the duty of seeing that the ways, works, machinery, and plant were in proper condition."

This action was brought in the Sheriff Court of the Lothians by James Haston, a trace-boy in the service of the Edinburgh Street Tramways Company (Limited), and his father as his administrator-in-law, against the said Tramways Company. It was raised at common law, and alternatively under the Employers Liablity Act 1880. The pursuer, who was thirteen years of age, averred that on the first of April 1886, in the exercise of his duty, he was taking two horses down the Regent Road, riding upon one and leading the other by the reins; that while proceeding at a walking pace, when near Abbey Mount, the horse on which he was mounted fell down, throwing him off, and afterwards rolled over him twice; that he was taken to the Infirmary, where it was found that his left leg and ankle were broken, and he was incapacitated from work for three months. He averred (Cond. 4) that the mare in question was "worked out, and broken and gone about the legs, knees, and feet. It was addicted to falling on the street, and had fallen several times about the time this accident took place. It was further subject to disease of the spine, or staggers, or some other ailment which