interdict. That has never been done, and I presume your Lordships will not make that order.

I only desire to add, that if the pursuer thinks he has sustained an injustice during the arbitration proceedings, and means to found on the proceedings in an action of reduction or other form of relief, he should be careful to give the arbiter every opportunity of retracing his steps and allowing what he has originally denied.

LORD KINNEAR concurred.

The Court refused the reclaiming-note.

Counsel for Pursuer and Reclaimer—J. C. Thomson—Readman. Agents—Millar, Robson, & Company, S.S.C.

Counsel for Defenders and Respondents The Ardrossan Harbour Company—C. S. Dickson—Ure. Agents—Blair & Finlay, W.S.

Tuesday, March 7.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

J. & W. WOOD v. TULLOCH.

Contract—Sale—Reduction—Innocent Misrepresentation—Essential Error.

A firm of coalmasters entered into an agreement for the purchase of a property, the agreement providing that the purchasers should have a certain time to put down bores and prove the property, within which time they might resile from the agreement. The purchasers subsequently brought a reduction of the agreement, on the ground that they had entered into it under essential error induced by the defender's—the seller's—misrepresentations. The misrepresentations alleged were that the defender had represented the extent of the property to be 132 acres, and its rental to be £157, whereas the true rental was 125 acres and the true rental £120, 10s. It was not alleged that the defender had made these representations fraudulently. The Court *assoilzied* the defender, *holding* that the pursuers had not stated a relevant case of essential error.

On 3rd March 1891 a minute of agreement was entered into between John Tulloch, proprietor of the property of Clayknowes in Stirlingshire, as first party, and J. & W. Wood, as second party, to the following effect—"The first party sells, and the second party buys, the property known as Clayknowes, situated near Greenhill Junction, in the county of Stirling, extending to one hundred and thirty-two acres or thereby, and including the moveables thereon belonging to the first party, and that on the following conditions, viz.—First, The price shall be £5750, and the cost of the transfer shall be borne by the first and second parties equally: Second, The second party shall be at liberty to put down bores, and otherwise prove the property, within one month of the date hereof, on condition of paying all damages incurred either to the first party or his tenants. The second party shall, 'on or before 3rd April next' (subsequently extended to May 3rd), 'declare whether they intend to go on with the purchase or to resile therefrom.'" . . .

J. & W. Wood made no intimation to Tulloch within the prescribed period as to whether they intended to go on with the purchase or not, but subsequently intimated that they had resolved not to go on with it. Tulloch thereupon raised an action against J. &. W. Wood to have it declared that by the foresaid minute of agreement he had sold them the property of Clayknowes, and to have them ordained to implement the purchase. On 12th November 1891 Lord Kyllachy pronounced an interlocutor in which he found and declared conform to the declaratory conclusion of the summons, and decerned conform to the conclusion for implement; and to this interlocutor the First Division adhered on 18th March 1891.

J. & W. Wood thereafter raised the present action against Tulloch for reduction of the minute of agreement of 3rd March, and of the interlocutor pronounced in the previous action.

The pursuers averred—"(Cond. 1) In the beginning of March 1891 the pursuers and the defender met with the view of considering as to the sale of the estate of Clayknowes. The defender stated to the pursuers at said meeting that the property contained 132 acres, and that the rental thereof was £159, and the pursuers, who had no knowledge themselves as to these matters, accepted the defender's statements and relied thereon. (Cond. 2) The pursuers signed the minute of agreement of 3rd March 1891 in reliance on the defender's said statements. . . . (Cond. 7) Down to this last date (18th December 1891) the pursuers had implicitly accepted and believed, and had relied on the defender's said statements as to the area and rental of the said property, which were of material importance in inducing the pursuers to enter into the said minute of agreement. On proceeding to arrange for the completion of the sale, which it had been held had been made, . . . they discovered that the said statements were incorrect, in respect that the area of said property was only 124·7 acres, or including half of the public road 125·23 acres, instead of 132 acres, and that the rental was only £110, 10s., or taking into account an unused and useless brickwork, £120, 10s. instead of £157. Until after 18th December 1891 the pursuers believed that the defender's said statements were entirely accurate, and acted on this belief."

The pursuers pleaded—"(1) The pursuers having been induced to enter into the said minute of agreement by material misrepresentations as to matters of fact relating to the subject of sale made by the defender, the pursuers are entitled to decree as concluded for. (2) The pursuers having entered

into said minute when under essential error as to the extent and rental of the subjects of sale, induced by the defender's misrepresentations, and having *bona fide* remained under said essential error until after 18th December 1891, decree should be granted as craved."

The defender pleaded, *inter alia*, (1) that the pursuers' averments were irrelevant.

On 20th July the Lord Ordinary (KYLLACHY) sustained the defender's first plea-in-law, and assoilzied him from the conclusions of the action.

"*Opinion*.—The pursuers in this case seek to set aside a certain contract of sale by which they purchased from the defender a certain small estate in the county of Stirling. The ground of reduction is, that the defender at a certain meeting which preceded the sale stated to the pursuers that the property contained 132 acres, and that its rental was £157, whereas in fact, as the pursuers now aver, the true extent is 125 acres, and the true rental £120, 10s. There is no averment of fraud, but the pursuers plead that they are entitled to decree (1) because they were induced to enter into the contract 'by material misrepresentations as to matters of fact relating to the subject of the sale, and (2) because they entered into the contract when under essential error as to the extent and rental of the subjects induced by the defender's representations.'

"The minute of agreement by which the contract was constituted is set out at length in the record. It is dated 3rd March 1891, and it describes 'the property as extending to 132 acres or thereby.' It does not, however, contain any warranty either as to the acreage or as to the rental, and the defender founds upon the fact that it provided a month's trial, during which 'the purchasers were to be at liberty to put down bores and otherwise prove the property,' and to declare off on giving intimation to that effect. The construction of the agreement with respect to this last provision has been already before the Court, it having been decided the other day, on a reclaiming-note from a judgment of my own, that at the end of the month, in the absence of any intimation from the purchasers, the contract of sale became absolute.

"What I have now to consider is whether the pursuers have stated any relevant case for reducing the contract on either of the grounds set forth in their pleas. I am of opinion that they have not. They do not aver fraud; they do not aver warranty. In my opinion they do not aver anything amounting in law to essential error; that being so, I think their averment of misrepresentation is irrelevant.

"I know no authority in the law of Scotland for the proposition that an innocent misrepresentation not warranted, and not inducing essential error, can invalidate a contract. Our rule, as I understand it, has always been that statements by a party made in negotiating a contract are, unless warranted, held to be merely statements of his knowledge and belief, and that if the other party means to rely on such statements his business is to get them warranted, that is to say, to get them made parts of the contract. It is said that a different rule now prevails in England, and that any material misrepresentation is there sufficient to avoid a contract. I am not satisfied that that is so. There are certainly *dicta*, particularly of Chancery Judges, which may be so interpreted, but the judgment of Lord Blackburn in the case of *Kennedy* v. *The Panama, &c., Mail Company*, L.R., 2 Q.B. 587, appears to state the law exactly as it would be stated in Scotland—the rule or principle being that an innocent misrepresentation, even although material, cannot form a ground of rescission unless (1) it is warranted, or (2) had the result of inducing what in the law of Scotland is known as essential error. In any case I am satisfied that this is still the law of Scotland, and I think that the recent judgment of the House of Lords in the case of *Stewart* v. *Kennedy*, 17 R. (H. of L.) 28, may be fairly considered as at least an indirect authority to that effect.

"That leaves it only to be considered whether the error here said to be induced amounted to what our law knows as essential error. I do not, I confess, think this question admits of argument. The largest definition of essential error is that contained in Bell's Principles, section 11, which I observe was accepted and approved by the House of Lords in the case of *Stewart* v. *Kennedy*. But it is quite impossible to bring the alleged error here under any of the heads of that definition. There was no error as to the identity of the subject, or as to the persons contracting, or as to the price, or as to the nature of the contract. The error alleged was as to certain qualities of the subject which it is impossible to assert were either expressly or tacitly essential to the bargain. The acreage and rental of an estate are in general no doubt material elements in a sale of land. But they were not more essential here than in every other case of sale. In point of fact they were less than in the general case, for the sale here was of a mineral estate. How can it be said that the extent of the alleged error, either with respect to the acreage or the rental, made the subject a practically different subject from what was bought and sold. It would really, I think, be difficult to find a better example of what is not in law essential error than the error alleged here.

"I should perhaps add a word with reference to the acreage in the contract. It was not pleaded that that reference amounted to a warranty, and I think it could hardly be so. But it is perhaps important as showing that on this subject the defender's ultimate representation at all events did not go beyond the statement that the estate was 132 acres or 'thereby.' I am not prepared to hold that a discrepancy of seven acres is outside the latitude expressed by these latter words. At all events it seems quite settled that when a purchase is not made with reference to extent and measurement, and when the

measurement is not warranted the sale stands good notwithstanding considerable discrepancies between the actual quantity and that specified—(See Bell's Prins., sec. 893, and cases there cited). . . .

"I shall sustain the defender's first plea-in-law, and assoilzie him from the action as laid with expenses."

The pursuers reclaimed, and argued—The pursuers' averment was that they had entered into the contract sought to be reduced under essential error induced by the defender's misrepresentations as to the extent and value of the subject of sale. That error affected the substance of the contract, and was essential error in the sense that that term was understood in Scots law. An averment that the misrepresentations had been made fraudulently was not necessary—Bell's Prin., secs. 11 and 893; *Stewart* v. *Kennedy*, March 10, 1890, 17 R. (H. of L.) 25; *Stewart's Trustees* v. *Hart*, December 2, 1875, 3 R. 192; *Wilson* v. *Caledonian Railway Company*, July 6, 1860, 22 D. 1408; *Adamson* v. *Glasgow Waterworks Commissioners*, June 23, 1859, 21 D. 1012; *Hannay* v. *Creditors of Garbaly*, 1785, M. 13,334; *Gray* v. *Hamilton and Others*, 1801, M. *voce* "Sale," No. 2; *Torrance* v. *Bolton*, 1872, L.R., 8 Ch. App. 118; *Fane* v. *Fane*, 1875, L.R., 20 Eq. 698; *Peek* v. *Berry*, 1889, L.R., 14 App. Cas. 337. No doubt Lord Blackburn had laid it down in *Kennedy* v. *Panama, &c., Mail Company*, 1867, L.R., 2 Q.B. 387, that innocent misrepresentation inducing error was not a sufficient ground of rescinding a contract unless there was a total failure of consideration, but that *dictum* was not consistent with the law of Scotland or the later English authorities. Where there was misrepresentation the Court would be inclined to presume that the contract would not have been entered into but for such misrepresentation—Pollok on Contracts, 549.

Argued for the defender—The error alleged was not error *in essentialibus* of the contract, and the Lord Ordinary was right in finding that the pursuer had stated no relevant case. On the pursuers' own showing the rental was not the immediate basis of the price, and it was plain that the pursuers in entering into the contract relied neither on the amount of the rental nor the extent of the acreage. The subject was dealt with as a mineral estate, and time was given to the pursuers to satisfy themselves as to its value. In none of the cases quoted by the pursuers had a contract been reduced on such grounds as were here put forward. In *Torrance's* case there was an absolute failure of consideration, for the purchaser thought he was getting an absolute reversion while he was only getting an equity of redemption. *Fane* v. *Fane* was a case of a settlement between father and son, where the son, who had no separate legal adviser, agreed to a re-settlement of the family estates under material error induced by the father's misrepresentations. Such a case belonged to quite a different category from the present. So far as the extent of the subject was concerned, the statement in the contract was qualified by the words "or thereby," and these qualifying words were sufficient to cover the alleged discrepancy between the actual and the stated acreage.

At advising—

LORD PRESIDENT—I agree with the Lord Ordinary, and do not desire to add to the exposition of the grounds of judgment given in his Lordship's opinion.

If the agreement be not open to reduction, we do not require to consider the argument of the defenders against the reducibility of the decrees, for the pursuers do not seek reduction of them if the agreement be left standing.

LORD ADAM—The misrepresentations founded on in this case are not said to have been made fraudulently. If that had been said, it would probably have led to a different conclusion, but as they are not said to have been fraudulent, they must be assumed to have been innocent statements of the defender's honest belief. Then, as the Lord Ordinary has said, it is not alleged that the defender warranted the statements in any way, nor does it appear from the agreement itself that they were in any way made the basis of the contract. What the essentials of a contract of sale are is well known. As the Lord Ordinary has said, they are the person, the subject, and the price, but it is not said that the purchasers were in error as to any of these points. That being so, the question is, are the statements in question so material, being innocent, as to affect the mind of the purchaser in such a way as to induce error *in essentialibus*. I agree with the Lord Ordinary that though they may have affected his mind to a certain extent, they cannot be said to have done so to the extent of inducing essential error.

LORD M'LAREN concurred.

LORD KINNEAR—It is material to observe, as was pointed out by Lord Adam, that it is not averred that the statements founded on were made fraudulently or recklessly. They may have resulted from a perfectly innocent mistake on the part of the seller as to the rental and extent of the subject of sale, and I do not conceive them to be so material as to induce essential error. Every averment of the kind with which we are here dealing must be read with reference to the particular contract said to have been induced by the alleged misrepresentations. I agree that reading the contract along with the pursuers' statements of the representations made by the defender, there is no such material difference as to justify us in holding that the pursuers have made a relevant statement of error *in essentialibus*.

The Court adhered.

Counsel for the Pursuers—C. S. Dickson—Dundas. Agents—Smith & Mason, S.S.C.

Counsel for the Defender—Macfarlane—Salvesen. Agents—John C. Brodie & Sons, W.S.