discharged from said steamship it fell back into the hold and was so damaged as to be practically destroyed; (5) that said damage was not occasioned by or through the fault of the defenders or the wilful negligence of them or any of their servants; but (6) was occasioned either through the neglect of one of the persons in the ship's service engaged in the discharge of said steamship or through accident: Find in law that the defenders are not liable in damages for the injury done to said organ as aforesaid: Therefore dismiss the appeal, assoilzie the defenders from the conclusions of the action, and decern."

Counsel for Pursuers — Ure — Salvesen. Agents—J. B. Douglas & Mitchell, W.S.

Counsel for Defenders—Dickson—Aitken. Agents—Webster, Will, & Ritchie, S.S.C.

Friday, March 17.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

EDINBURGH UNITED BREWERIES, LIMITED, AND ANOTHER *v.* MOLLESON AND ANOTHER.

Title to Sue—Reduction—Right of Sub-Vendee to Reduce Original Contract.

A entered into a contract of sale with B, who re-sold the subjects at a profit to C, to whom A conveyed them. It subsequently appeared that a fraud had been perpetrated upon B, for which A was civilly although not personally responsible. C, with the concurrence of B, brought an action against A for the reduction of the contract between A and B and of the disposition from A to C—the contract between B and C not being impugned.

Held that the pursuers had no title to sue.

Opinion expressed that had B offered to take back the subjects and repay C in full, or even had repaid the profit and assigned his right to sue to C, he or his assignee would have had a good title.

Contract — Construction — Sale Dependent on Amount of Profits—Resolutive Condition.

An agreement was entered into upon 11th November for the sale of a brewery at the price of £20,500, of which £3700 was to be paid at once, and the remainder at 31st December. It bore, *inter alia*, that the "arrangement" proceeded upon the basis that the nett profits of the concern had averaged £3750 for the last two years, and that in the event of its being ascertained that this was not the fact, the arrangement should be at an end, and the £3700 repaid. Also that the purchaser should be entitled to have the books, &c., examined by an accountant with the view of verifying the amount of the profits.

Held that the "arrangement" referred to the preliminary steps towards the completion of the contract, and did not mean the contract of sale, executed or unexecuted, and that said contract was not conditional upon the profits being as stated; but that upon the books, if honestly kept, being examined, and the purchaser satisfied as to the profits, the condition was fulfilled, and that the contract was not open to reduction, except on the ground of fraud, after payment of the remainder of the price.

Fraud—Misrepresentation—Implied Truthfulness of Business Books—Responsibility for Falsification of Books by Clerk.

Held that a condition that business books should be exhibited to an intending purchaser for the purpose of having the stated amount of the profits checked, was not fulfilled by exhibiting books falsified for his own ends by a managing clerk employed by the seller, although the seller himself was entirely ignorant of the fraud and the falsification had not been made in view of the sale.

David Nicolson, brewer and wine merchant, Edinburgh, in consequence of failing health, executed a trust-deed in favour of James Alexander Molleson, C.A., Edinburgh, in January 1887, under which he conveyed to his trustee, *inter alia*, the Palace Brewery, Edinburgh, and certain maltings and bottling stores connected therewith.

Mr Molleson entered into an agreement, dated 4th and 11th November 1889, with W. H. Dunn, London, acting for the London Contract Corporation there, for the sale as at 31st December 1889 of the brewery and the stores and stocks, &c., connected therewith. The sum to be paid for the stores, stocks, &c., was to be determined by an arbiter, who subsequently fixed £10,566, 10s. 1d. as the price.

Under the first article of the agreement Dunn, the first party, agreed to give, as at 15th November 1889, £20,500 for the brewery itself, but subject to the explanation given in the 10th article, which was in the following terms—"The arrangement herein set out proceeds upon the basis that the nett profits from said brewery and wine businesses amounted during each of the two years ending 31st December 1887 and 31st December 1888 to £3750 or thereabout upon an average, and in the event of its being ascertained that this is not the fact, this arrangement shall be at an end, and the second party shall be bound to repay the said sum of £3700. The first party, with the view of verifying the amount of the profits for said two years, shall, immediately upon delivery hereof, be entitled to have the books, accounts, and vouchers connected with said businesses examined by an accountant named by him."

Article 4 provided—"The price shall be payable as follows—The sum of £3700 upon

the date on which these presents duly executed by him shall be delivered by the second party (Molleson) to the first party or his agent, and the balance on or before 31st December 1889." . . .

Article 5 stipulated that "in the event of the balance of the price not being paid on or before said 31st December, it shall be competent to the second party to retain the said sum of £3700 as his own, and to declare the bargain at an end, and to refuse to proceed further therewith; declaring, however, that this shall not affect the right of the first party to terminate the arrangement in accordance with article 10 hereof."

The 6th and 9th articles contemplated the disposition by article 7 being either to Dunn or his nominee. Articles 3, 7, 8, and 9 regulated the management of the brewery from 15th November to 31st December 1889.

The business books were put into the hands first of a firm of English accountants, and then of Messrs Moncreiff & Horsbrugh, C.A., Edinburgh, with the result that the profits were discovered to be somewhat short of £3750 for the last two years. After some correspondence, however, Dunn agreed that the sale should proceed, with the purchase price at £20,500 as before.

By agreement dated 14th December 1889 Dunn contracted with the Edinburgh United Breweries, Limited, without reference to the profits, to sell to them the said brewery and stocks for the sums he had agreed to pay to Molleson, together with £8000 which he was to receive over and above. The agreement with Molleson was recited, and it was agreed that he should transfer to the company all rights, interests, and benefits which he possessed under said agreement.

The United Breweries entered into possession of the Palace Brewery as at 15th November 1889, and a disposition dated 31st December 1889 was granted by Molleson & Dunn in their favour. It narrated that it had been in contemplation that a company should take Dunn's place, and that an agreement between Dunn and that company existed, but that with its terms Molleson had no concern and no knowledge; and it gave £28,500—£20,500 to Molleson and £8000 to Dunn—as the consideration presently paid by the United Breweries for the Palace Brewery, and for which discharge was granted. In 1891 it came to the knowledge of the United Breweries that the balance-sheet for the year 1888—one of the years whose profits were referred to in the agreement of 11th November 1889—had been tampered with by the managing clerk employed by Mr Molleson, and that the profits for that year were made to appear about £1200 more than they really were. The books were manipulated by increasing the indebtedness of the different agencies, and decreasing the liabilities. The necessary alterations in the general ledger, and to some extent in the subsidiary ledgers, were very skilfully made, but such subsidiary books as the Ales Account were left untouched, so that an exhaustive following up of the different entries into the various trade ledgers would have revealed the fraud. The fraud was perpetrated in the early part of 1889 by the clerk, to give a fictitious appearance of prosperity to the business, so as to ensure its being kept going and his being retained in his employment, and was not made in prospect of a sale. It was doubtful whether any fraudulent manipulation went on while the examination was being conducted by the accountants or not. That examination was such as accountants were accustomed to make in the circumstances for checking profits, but was not of the nature of an audit, and did not contemplate the possibility of fraud. The accountants were referred by Molleson to the managing clerk as a person able and willing to give them any information they might desire.

Upon learning that the books had been falsified the United Breweries and Dunn in August 1891 brought an action against Molleson as Nicolson's trustee, and as an individual, and against Nicolson, to have the following deeds reduced, viz., the agreement of 4th and 11th November 1889, and to have the pursuers reponed and restored thereagainst *in integrum*, and to have the defenders ordained to repay the sum of £20,500 and the sum (for stocks, &c.) of £10,566, 10s. 1d., both with interest, the pursuers always giving up to the defenders the possession of said brewery and maltings, and casks purchased . . . and accounting to the defenders for the profits of said business after deduction of all expenses. Alternatively it was asked that Molleson, as trustee foresaid, and as an individual, or the defenders conjunctly and severally, should be ordained to pay £10,000 as damages. The London Contract Corporation, Limited, for whom Dunn acted, were subsequently sisted as pursuers in the cause. The agreement of 14th December 1889 was in no way infringed, or sought to be reduced.

The pursuers averred that "Mr Molleson was aware of the extreme importance of the said balance-sheets, and had the means, if he chose to use them, of ascertaining that they had been falsified as above mentioned. He either knew or ought to have known that the same were false, and were fraudulently concocted in order to show said excessive profits. Whilst in that position he handed the said false balance-sheets to the pursuers for the purpose of getting them to enter into the contract in question on the basis of the profits thereby shown. Mr Molleson thereby induced the pursuers by false and fraudulent representations to enter into the said contract." Further, that "it was upon the faith and fraudulent representations made in the balance-sheets as to the sales, expenditure, and profits, that the agreements and sale proceeded. The calculation of purchase price was in the knowledge of all parties made upon the basis of the figures brought out in said balance-sheets, which have now been discovered to have been fraudulently concocted." They also averred that as the accounts of the Palace Brewery had been kept separate they were in a position to

make *restitutio in integrum*. The defenders denied that the deeds sought to be reduced were induced by false representations made on their behalf, and that the calculation of the purchase price was made upon a basis of the past profits. They explained that the purchase price was fixed solely with reference to the value of the specific subjects sold by Molleson and Dunn, and they denied that *restitutio in integrum* could now be made.

The pursuers pleaded—"(1) The said agreement and disposition having been induced by representations made by the defenders, which representations were false in essential particulars, decree of reduction of said deeds, and for payment as concluded for, falls to be granted, with expenses. (2) *Separatim*, in respect of article 10 of said minute of agreement, and in respect that the profits therein set forth as the basis of the transaction were not correct, decree of reduction should be pronounced as concluded for."

The defenders pleaded—"(1) The pursuers, the Edinburgh United Breweries, Limited, have no title to sue. (2) The pursuers' statements are irrelevant and insufficient to support the conclusions of the summons. (5) The pursuers' statements being unfounded in fact, the defenders are entitled to absolvitor. (6) In respect that the deeds sought to be reduced were not induced by false representations made on behalf of the defenders, decree of reduction ought not to be pronounced. (8) The pursuers are not entitled to decree of reduction, in respect that they cannot now give *restitutio in integrum*. (10) The pursuers having, in any view, suffered no loss in the premises, the defenders are not liable in damages."

The Lord Ordinary (KYLLACHY) allowed a proof, the import of which sufficiently appears from the facts given above, his Lordship's opinion, and the opinion of Lord M'Laren.

Upon 13th July 1892 the Lord Ordinary assoilzied the defenders from the conclusions of the summons and decerned. . . .

"*Opinion.*—In this case it is not necessary that I should recapitulate the facts. In the view which I take, the material facts are hardly in controversy. I shall endeavour to state shortly my conclusions upon the several points on which, in my view, the case turns.

"1. I do not consider that there is in this case room for a challenge of the contract of sale on the ground of misrepresentation — fraudulent or innocent — inducing the contract. The suggestion is that the pursuers were misled by misrepresentations as to the profits of the brewery during the two years preceding the sale. In point of fact I do not think it is proved that antecedent to the contract any representations on that subject were made. But in any case it is quite certain that no representations were made beyond those embodied in the contract; and with respect to these it seems to be enough that they were so embodied. Being so, they could not induce the contract, except of course in the sense in which every contract is induced by its terms. Being made parts of the contract, they ceased to be representations, and became proper warranties or conditions—warranties or conditions falling to be performed according to their terms, and giving rise, in the event of a breach, to just such rights and remedies as the contract provides.

"2. This being so, the first question is, what is the just construction of the tenth article of the contract, taken of course in connection with the other articles, and particularly with article fifth. Is the condition which is expressed in that tenth article this—that if it shall be ascertained that the profits for the two years mentioned fell below £3700 on an average, the contract, performed or unperformed, executed or unexecuted, shall be null and void. Or, is the existence of the supposed profit made a condition of the contract only in this sense — that notwithstanding the terms of the contract, the purchaser shall have an opportunity of examining the books and accounts of the brewery, and if upon such examination it appears that the profit is overstated, the transaction shall be off, and he shall not be bound to pay the price?

"It is obvious that these are two constructions of the contract widely different, and involving widely different legal results. In the one view the bargain is that if at any time, either before or after performance, it shall be ascertained that the profits of the two years in question fell short of the stipulated average, there shall be rescission, and, so far as possible, restitution. In the other view, the bargain is only this, that if the profits upon the inquiry provided are found to have been overstated, the purchaser shall be relieved from performance of the contract. In both views the sale is conditional, but in the one case the condition applies only to the completion of the transaction. In the other case it affects the whole rights flowing from the contract, and continues to do so for an indefinite time to come.

"I confess that in choosing between those conflicting constructions I cannot avoid giving some weight to the consideration that an agreement to the effect maintained by the pursuer was not antecedently probable. It may not perhaps be legitimate to point, as the defenders do, to the fact that the price of the brewery was fixed, not at so many years' purchase of the profits (as in the case of Bell's brewery, bought at the same time), but with reference to certain valuations of the brewery premises and plant. But apart from that altogether, it does not seem to me antecedently probable that to a sale admittedly made for the purposes of winding up a trust, there should have been attached a condition, having reference to certain past profits of a business, without there being also provided some definite time within which the fulfilment or non-fulfilment of the condition should be ascertained. It was natural enough that, attaching importance to the matter of profits, the purchaser should stipulate for an in-

quiry into that matter before the transaction was completed, and for liberation from the contract if the result of the inquiry was unsatisfactory. But it would, as it strikes me, have been an unusual and hardly reasonable arrangement that the purchaser should not only have time and opportunity for full inquiry, but should also have the right reserved to him at any future time, according as the bargain turned out well or ill, to open up some perhaps intrinsic question affecting profits, and if successful, to cut down the executed contract and compel restitution. It so happens that the challenge here is made within about two years of the completion of the transactions; but for the purposes of the present point the period might have been five years or ten years, or indeed any period within the years of prescription.

"Apart, however, from considerations of probability, it appears to me that the terms of the agreement, when fairly construed, pretty plainly indicate what the parties really meant. The question, as I have said, turns mainly on the provisions of clause 10, read in connection with clause 5, and perhaps it really turns upon this—What is the true meaning of the sentence in clause 10 which declares that if the profits are found short 'this arrangement shall come to an end?'

"Now, I observe, to begin with, that the expression which I have just quoted ['this arrangement shall come to an end'] is a quite appropriate expression, if all that is meant is that in the event supposed the transaction assumed to be still in progress towards completion shall proceed no further. On the other hand, I doubt whether it is quite the appropriate expression if what is meant is that the contract, executed or unexecuted, shall, with all rights flowing from it, be liable to be set aside as null and void.

"It is after all, however, in the machinery which this part of the contract provides for working out the purchaser's rights that we find, as it seems to me, the best guide to the true intention of parties. For observe what we find provided.

"In the first place, there is to be an interval of over six weeks between the date of the agreement and the date of payment of the price and delivery of the disposition. The agreement is dated 4th and 11th November; the date of settlement is to be the 31st December 1889. In the next place, during this interval the purchaser is to have access to the whole books, accounts, and vouchers, with the view to verifying the profits by means of an examination by the accountant. And then, lastly, while there is an express provision for repayment of the purchaser's deposit in the event of a shortcoming being ascertained, there is no corresponding provision in the same event for repayment of the price. I cannot, I confess, see sufficient reason for these provisions if the condition as to the amount of the two years' profits was to remain indefinitely operative. Such provisions seem to me to be intelligible only on the assumption that while the existence of the stated profits was a condition of the contract, it was also a term of the contract that the fulfilment or non-fulfilment of the condition should be determined before the contract was executed. The opposite view seems to involve this, that the provided interval and right to examine the books were not at all introduced with a view to explicating the stipulated condition, but were, on the contrary, mere additional safeguards, put in the option of the purchaser, in order that if so minded he might more or less satisfy himself as to the profits before parting with the price. That is the opposite view—and the only possible opposite view—and it was pressed upon me by Mr Asher as the true view. I can only, however, say that it is not a view of the contract that recommends itself to my mind. All things considered, I prefer to hold that the settlement of 31st December foreclosed, and was intended to foreclose, all further reference to the question of profits. . . .

"3. I have next, however, to consider whether the pursuer has made out a case for getting behind the settlement of 31st December—that is to say, a case founded on what occurred between the date of the contract and the date of its execution; and it is here, I may say, that I have had most difficulty. The material facts are, as I have said, hardly in dispute, and they are these.

"The books of the brewery were, so soon as the agreement was signed, duly placed at the disposal of the purchaser, and were first examined on his behalf by a firm of London accountants, and next by a firm of accountants in Edinburgh. The examination resulted in a good deal of discussion, chiefly with respect to certain items of depreciation and discounts, but in the end the accountants were satisfied that the profits for each year were at least £3300; and the purchaser in the end waived the difference between that sum and the stipulated £3700, and the condition of the agreement being thus held as satisfied, the price was duly paid, and the disposition was granted. Possession also was duly given, and the purchaser (or the company which he formed) has since occupied the brewery premises and carried on the business.

"Recently, however—that is to say, in the course of last summer—it transpired, by the confession of a clerk, that the balance-sheet of the year 1888 had been falsified to the extent of £1000; that the general ledger, and to some extent the subsidiary ledgers, had been falsified so as to correspond with the balance-sheet; and that these falsifications had escaped the notice of the pursuers' accountants when they examined the books. The falsifications had been made not at all in connection with the sale, but in the early part of 1889, before any sale was in prospect; they had been made by the managing clerk and a subordinate in order to deceive Mr Molleson, and to obviate the risk of an immediate sale of the brewery, which it was apprehended might follow if the profits were found to be falling off. The falsifica-

tions were of this nature. The object was to exaggerate the assets of the concern by exaggerating the sums due by the several agencies. This was effected by erasing in the general ledger certain of the weekly debits which made up the debit side of each agency account, and by substituting larger figures, which received effect in the summations. The result of course was that in each case an exaggerated sum was carried into the assets side of the balance-sheet. And then, to make the profit and loss account square with the balance-sheet, a further operation was performed. The ales account in the ledger was not tampered with. The true balance at the credit of that account was duly carried into the profit and loss account. But an equivalent alteration was made in another way, viz., by reducing to the extent of £1000 the sums paid away during the year in discounts and expenses. In other words, the books were made to balance by a number of erasures, alterations, and under-summations in certain accounts in the general ledger, which were kept for the expenses and discounts of the several agencies, and which accounts were entitled, 'London Agency Expenses Account, Newcastle Agency Expenses Account,' &c., &c.

"There were thus, it will be seen, a double set of falsified entries in the general ledger; and with regard to one set, viz., the increased debits to agencies, there seems to be no doubt that to a partial extent corresponding falsifications were made in one set of subsidiary books, viz., the trade ledgers. With that exception, however, the subsidiary books, from which the general ledger was posted, remained untouched, and afforded, if they had been referred to, ready enough means of discovering the falsifications. In particular, it is clear (1) that the over-debits to agencies must have been discovered had there been an exhaustive comparison between the erased entries in the general ledger and the corresponding entries in the various trade ledgers. It is also clear (2) that the same result must have followed if any one of the erased entries had been compared with the corresponding entry in the ales abstract book, which book recorded the weekly sales to each agency. It is further clear (3) that the under-statement of expenses must have been discovered if any one of the erased entries in the general ledger had been compared with the corresponding entry in the cash-book, of which cash-book an abstract was duly made up every week. It may be added (4) that if any one of the over-debits in the general ledger had been followed into the corresponding cross entries in the ales account in the general ledger, the fraud would have been discovered at least upon an analysis of the component parts of the particular cross entry. On the other hand, the frauds were certainly so perpetrated that they were quite likely to be overlooked if the accountants employed to check the balance-sheet were unsuspicious of fraud, and were not made suspicious by the erasures, and did not think it necessary to go into the details of customers' accounts, or only thought it necessary to do so by taking a specimen entry here and there.

"Now, these being the facts, and the pursuers' accountants having in fact failed to discover them, what is the legal result? Is the purchaser entitled to be restored against his performance of the contract, and to be placed in the same position as immediately after the contract was signed? Or, is the true view of the matter this—that both parties being in entire good faith, the seller must be held to have performed his contract by handing over the books and accounts of the business as they stood; while, on the other hand, the purchaser must be held to have taken his chance of obtaining from those books and documents materials for determining the true amount of the profits for the two years in question?

"Now, I have to observe that here again the question in my judgment turns on the construction of the contract, and particularly upon the construction of the 10th article. Outside the contract, and apart from what was provided in the contract, I do not discover that any communication of importance passed between the purchaser and the seller between the date of the contract and the 31st December, the date of settlement. The seller handed over the books as the contract provided. The purchaser examined them as the contract contemplated. Certain discussions took place about depreciation and discounts. And that was all. Whatever representations, therefore, may have been implied in the contract, there were no representations made outside the contract. If the pursuer is to have redress it must be in respect of some representation expressed or implied within the contract, representations by which he (the purchaser) was misled.

"Are there, then, any representations, or rather warranties or conditions, with respect to the books, or the examination of the books, or the state of the books, which can be held to be implied in the contract? Certain things may, I think, fairly enough be held to be so implied.

"In the first place, I should not have much difficulty in holding it to have been an implied condition that the books were, so far as the seller knew, honestly and correctly kept. If the seller knew the contrary the whole agreement was a fraud. Neither should I have much difficulty in holding that it was an implied condition that the books, accounts, and vouchers contained within them sufficient materials for ascertaining correctly the profits of the business for the two years in question. If, for example, the books had been so kept that it was impossible to say what the profits were; or, if they were so falsified that no examination, reasonably possible, could have discovered the true profits, I should not have had much difficulty in holding that an implied condition of the contract had been violated.

"But the facts do not, in my opinion, enable me to say that either of those propositions can be affirmed. The seller did not know—it is not suggested that he

knew—that the books were otherwise than correct. The only persons who knew were the two clerks who for purposes of their own deceived the seller, and those clerks were not in this matter in any way identified with the seller. They were not his agents in the sale; they had nothing to do with the sale. They did not, according to their own statement, even know that the question of profits entered into the sale. The case, so far as they are concerned, is the same as if before the sale they had left the seller's service and gone into the service, say, of the purchaser. Nor will it, in my opinion, suffice to say that the seller might have known or ought to have discovered the errors which the books contained. The question at this point is a question of good faith; and it is not possible, in my opinion, to say that the seller had not rational grounds for believing what the pursuer's accountants who examined the books found no reason to doubt. The case of *Derry* v. *Peak* has displaced, I must hold finally, the refinements which constituted the supposed doctrine of constructive fraud.

"Neither, again, is it possible to affirm that the books as a whole did not contain full materials for ascertaining the profits, or that no examination within reasonable limits could have got behind and corrected the falsifications. All that can be affirmed is that, kept as the books were, it would have required an examination, more or less thorough, to have given the pursuers the full information which they required.

"The question, therefore, truly is, whether it can be gathered from the agreement that it was a condition implied—that is to say, mutually assumed, if not expressed—that the books of the firm contained no errors, or at least no errors that were not easily discoverable. I can see no grounds for so holding. I can find nothing in the agreement to suggest any particular standard according to which the purchaser's examination of the books and accounts were to be conducted. He was to have access to the whole books, accounts, and vouchers, and he was to examine them as he pleased. That was the only engagement expressed, and I can see nothing in the nature of the transaction to justify the implication of anything further. In particular, I can see nothing to justify the implication that the purchaser was to be entitled to assume either the accuracy or the honesty of the brewery clerks; or that he was to be entitled to dispense with checking (*e.g.*) the posting into the general ledger, or the summations by which the balances in the general ledger were brought out.

"For these reasons I am not able to hold that the pursuers are entitled to re-open the executed contract, and to raise now the question whether the condition as to the amount of profits has been fulfilled. It may or may not be that the profits of the two years in question fell short of the stipulated average. The parties on that subject are still at issue. I do not find it necessary to decide that question.

"I am of opinion, on the whole matter, (1) that the purchaser entered into the contract relying, not on outside representations, but on the terms of the contract; (2) that in so far as the contract contained conditions applicable to the matter of profits, it defined the redress which the purchaser should obtain if these conditions were not fulfilled; (3) that that redress did not include the rescission of the contract after its execution; (4) that for the purpose of making good the redress contemplated the contract provided certain means and opportunities of inquiry, which the purchaser accepted as adequate; and (5) that apart from fraud on the part of the seller, which I hold disproved, the purchaser is not now entitled to complain of the failure of those means and opportunities to protect his interests.

"In this view of the case it is unnecessary for me to decide the various interesting and difficult questions which upon a different view I should have had to consider. Had these questions been open, I should, I confess, have had a good many difficulties. On the one hand I should have had difficulty in affirming the defenders' contention that the pursuers have no title to sue; or their other contention, that the profits, rightly estimated, did in fact come up to the stipulated average. I should also have had difficulty in affirming their contention that, assuming everything else in the pursuers' favour, the remedy of rescission and restitution is barred by change of circumstances and lapse of time. On the other hand, I should not have been prepared, without a good deal of further argument, to accept the alleged doctrine said by the pursuers to be now established in England, viz., that an innocent misrepresentation, not made matter of contract, and not inducing what our law recognises as essential error, may yet be sufficient to invalidate an executed contract. All these are questions which, if the case goes further, may have to be considered. In the meantime I decide the case upon the broad ground whichI have endeavoured to indicate."

The pursuers reclaimed, and argued—(1) They had a title to sue. All the parties interested in the agreements were here, and *restitutio in integrum* could be made. The law relied upon by the respondents was not impugned, but it applied only to cases of a succession of independent contracts. Here it was throughout in contemplation that the United Breweries should take Dunn's place, just as if the contract had been in the first instance between them and Molleson. (2) Article 10 contained a distinct warranty that the profits had averaged £3750. If not, the arrangement, which meant the contract of sale executed or unexecuted, was to be at an end. The examination of books was only to give additional assurance to the purchaser. (3) The examination by the accountants was as carefully made as the circumstances required. It was admittedly and necessarily not as exhaustive as an audit. (4) The amount of the profits was material to the contract. An essential

error on the part of the seller inducing the contract was sufficient ground for reducing the contract, even although innocent—Bell's Prin. sec. 11; *Newbigging* v. *Adam*, 1888, L.R., 13 App. Cas. 308; *Derry* v. *Peek*, 1889, L.R., 14 App. Cas. 337; *Stewart* v. *Kennedy*, June 25, 1889, 16 R. 857, and 17 R. (H. of L.) 1. How much more when, as here, there had been fraud. (5) Molleson, although personally entirely innocent, was responsible for his clerk to whom he had entrusted the books, and to whom he referred the accountants as able to give full information. He could not take advantage of his servant's fraud, although not committed with the view of benefiting him—*Trail* v. *Smith's Trustees*, June 3, 1876, 3 R. 770; *Clydesdale Bank* v. *Paul*, March 8, 1877, 4 R. 626; *Shaw* v. *Port Philip and Colonial Mining Company*, 1884, L.R., 13 Q.B.D. 103. (6) As the books had been falsified, even upon the respondent's construction of article 10, the condition therein contained had not been fulfilled, for the books (necessarily, that is, honest books) had not been submitted at all.

Argued for the respondents—(1) The reclaimers had no title to sue. The Lord Ordinary had failed to deal with that plea, and yet it was a complete defence to the action. There was no privity of contract between Molleson and the United Breweries. Molleson's contract was with Dunn, and he had no interest or concern with Dunn's contract with the United Breweries, which was a perfectly independent one, not made with reference to the profits. It was clear Dunn alone could not succeed in this action, for he had not only not suffered but was *lucratus* to the extent of £8000. The United Breweries had no title alone, and by getting Dunn to act along with them they could not acquire a better title than Dunn had—*Blumer* v. *Scott*, January 16, 1874, 1 R. 379; *Campbell* v. *Morrison*, December 10, 1891, 19 R. 282. (2) There was no guarantee that the profits had averaged £3750, but only a resolutive condition that if they were found not to amount to so much the contract was to be at an end. After the examination of the books and the completion of the contract by the disposition of 31st December 1889, the condition had no further effect. The warranty was then exhausted—*Queensberry Executors* v. *Maxwell*, October 12, 1831, 5 W. & S. 771; *Ovington* v. *M'Vicar*, May 12, 1864, 2 Macph. 1066; *Peak* v. *Gurney*, 1873, L.R., 6 Eng. & Ir. App. 378. (3) The reclaimers were themselves in blame for the negligent way in which the accountants had examined the books. Had they traced the entries written upon erasures into the subsidiary books the fraud would have been detected. (4) The condition in article 10 had been fulfilled. The books had been exhibited which, if carefully examined, would have shown the true amount of the profits. The wrong entries might have been the same although innocently made. It was to guard against inaccuracies that the books were exhibited—*Attwood* v. *Small*, 1838, 6 Cl. & Fin. 232. (5) The contract was not made upon the basis of profits although they were in consideration. Errors therefore in them were not errors *in essentialibus* inducing the contract. (6) That the entries were made fraudulently made no difference in Molleson's legal position. He was not responsible for the falsifications of the managing clerk, which were made by him outwith the scope of his employment, not to benefit Molleson but for his own ends—*Limpus* v. *London General Omnibus Company*, 1862, 1 H. & C. 526; *Barwick* v. *English Joint-Stock Bank*, 1867, L.R., 2 Ex. 259; *British Mutual Banking Company* v. *Charnwood Forest Railway Company*, 1887, L.R., 18 Q.B.D. 714.

At advising—

LORD M'LAREN—This is an action of reduction of a sale of certain heritable property, plant, and going business, known as the Palace Brewery. The business was that of Mr David Nicolson, brewer in Edinburgh, but in consequence of failing health incapacitating him from the supervision of his business, Mr Nicolson in the year 1887 conveyed the property and business to Mr Alexander Molleson, Chartered Accountant, as trustee, with a view to its eventual sale as a going concern. By agreement dated 11th November 1889, Mr Molleson sold the property and business to the second named pursuer, William Henry Dunn, who is understood to be an agent for a company or syndicate who purchase commercial undertakings with a view to re-sale at a profit. But for the purposes of this action Mr Dunn may be taken to be the purchaser under this agreement, which is the deed first libelled in the reductive conclusions. Mr Dunn sold the undertaking to the first-named pursuers, who for the sake of brevity may be denominated the "United Breweries." The conditions of the sub-sale are embodied in an agreement dated 14th December 1889, and it may be well to take note of the fact that this deed is not impugned, nor is the contract contained in it alleged to be subject to challenge on any ground. In fulfilment of the agreement of 11th November 1889 Mr Molleson, with the consent of Dunn, conveyed the Palace Brewery and brewing business to the sub-vendees, the United Breweries, by a disposition which is dated 31st December 1889, and 1st January 1890, being the deed second libelled in the reductive conclusions. The deed narrates that the price was settled by the payment of £20,500 to Mr Molleson, and £8000 (being the profit on the re-sale) to Mr Dunn. The summons also contains conclusions for the repayment of the price and interest, which are of course consequential on the conclusions for rescission of the contract of sale, and need not be further referred to.

The case is peculiar in this respect, that while the action is laid on fraudulent representation, no personal fault is attributed to Mr Molleson, who is known to be a gentleman of high standing in his profession. But the case against him is that he employed Andrew Smith Geddes to keep the books of the brewery while the brewery was under his management as trustee; that

Geddes for his own purposes falsified the books and balance-sheets; that Dunn was induced to become a purchaser in reliance on the apparent profits exhibited on the face of the books and balance-sheets, and was in this sense deceived by representations for which it is said Mr Molleson is civilly responsible. So far as I understand, Geddes had no motive for falsifying the books beyond the wish to please his employer and keep his situation by giving an aspect of fictitious prosperity to the business. I mention this only that I may not do injustice to Geddes by omitting to notice this mitigating circumstance, for of course his motive for committing the fraud has no bearing on the question in dispute.

By the agreement of 11th November the price of the heritable property and plant was fixed at £20,500, and provision was made for a transfer of the stock of casks and materials at a valuation. A sum of £3700 was to be paid down, and the balance of the price was to be paid on 31st December, at which date a deed of conveyance was to be granted in favour of Dunn "or his nominee." The only clause of this agreement which I think it necessary to read is the 10th clause, which is expressed thus—"*Tenth*, The arrangement herein set out proceeds upon the basis that the net profits from said brewery and wine businesses amounted during each of the two years ending 31st December 1887 and 31st December 1888 to £3750 or thereabout on an average; and in the event of its being ascertained that this is not the fact, this arrangement shall be at an end, and the second party shall be bound to repay the said sum of £3700. The first party, with the view of verifying the amount of the profits for said two years shall, immediately upon delivery hereof, be entitled to have the books, accounts, and vouchers connected with said businesses examined by an accountant named by him."

It appears to me that the first member of this sentence contains a representation, which, if it had stood unqualified, might be regarded as a representation amounting to an efficient cause of the contract, to the effect that the profits of the business during the two years mentioned amounted to £3750 per annum, or thereby.

Whether such a representation, if proved to come from the party in whose interest it is made, would be a ground for dissolving the contract it is not necessary to determine, because I agree with the Lord Ordinary in his construction of the 10th article. I think the true meaning and object of this article was to foreclose any claim of restitution on the ground of error as to the value of the subject of sale as a profit-earning subject—a very proper provision when it is considered that Mr Molleson was a trustee having no personal knowledge of the business or of the profits actually earned. While, therefore, it is recorded that the contract was made on the basis of profits, it is plainly provided that the existence of profits is a matter to be ascertained by the purchaser himself, and for this purpose the books are placed at his disposal, and a period of nearly two months is allowed for their examination.

These provisions, as I think, make it clear—1st, That the seller makes no representation except that the books show an apparent profit of £3750; and 2nd, that the purchaser is to verify this apparent profit by examination of the books for himself, and to take the risk of any innocent errors which such examination should fail to disclose.

I do not think it necessary to elaborate this point because the subject is fully considered by the Lord Ordinary, in whose reasoning on this point I entirely concur.

The next question is whether Mr Molleson as vendor is affected by the fact that false entries were made in the books by his clerk Geddes for the purpose of bringing out an apparent profit in excess of the real profit. I pass over the evidence as to how this was done, because it is all clearly explained in the Lord Ordinary's judgment, and there is no dispute about it. In condescendence 7 the excess is stated at £1250; the exact sum is immaterial to the present inquiry, and it is admitted that the effect of the false entries was largely to increase the apparent profits of the business.

Now, as I read the 10th article, under which the purchaser undertook to verify the profits, it was a condition of this undertaking that the books of the brewery had to be delivered to the purchaser for examination, and I think that this condition was not fulfilled by delivering dishonest books. To put into a purchaser's hands books which were systematically falsified, which did not contain the information to which he was entitled, is to my mind just the same as giving him no books. It is true that if the purchaser had not got the books he would not have completed the purchase, while the furnishing of misleading books had the effect of inducing the purchaser to complete the transaction. But this is a distinction out of which the seller can make nothing; for the essential fact is that he did not furnish the purchaser with the materials for verification of profits which he undertook to furnish; but being himself imposed upon, presented the purchaser with false statements of the transactions of the brewery, and in this question false information cannot be better than no information. But this is not all. Mr Molleson's partner personally introduced Geddes to King, Mr Ellerman's assistant, one of the gentlemen employed by Dunn to examine the books. Mr King says—"The gentleman said that Mr Geddes was managing the brewery, and would give us any information we required, and would produce books to us." Mr Geddes was thus accredited as the agent of the seller for this purpose. There is some evidence to the effect that the books were being tampered with in the progress of the investigation, with a view to elude discovery of the fraud. But I do not go into this. We know that in an examination of mercantile books the assistance of the book-keeper is often indispensable, and of course this assistance would not be rendered by

Geddes in such a way as to facilitate the detection of the fraud which he had practised, but presumably with the opposite intention.

In connection with this subject, it was much pressed upon us that a thorough audit of the accounts of the brewery would have led to a detection of the fraudulent entries, whence it was inferred that the error into which the purchaser fell as to the value of the business was not attributable to failure on the part of the seller to exhibit proper books, but was due to the purchaser's negligent examination of them. Now, an audit of accounts and an examination of books for the purpose of ascertaining profits are different operations. On this point there can be no better authority than that of Mr Young of Turquand & Co. The purchaser here had no occasion to undertake an audit, because he was not to get the profits of the two past years. He was only to make such an examination as would be reasonably sufficient for the purpose of ascertaining the profits. I think he was entitled to assume that the books had been checked in the usual way. He was not asked, and had no call to test the books for dishonesty. He employed two firms of experienced accountants, a London firm and an Edinburgh firm. They examined the books in the way which they say is usual in such investigations, and did not discover the fraud. Supposing the defence of negligent examination of the books to be a relevant defence, I cannot concur in the opinion expressed by the Lord Ordinary that this defence is established as matter of fact. I do not doubt that if a considerable number of entries had been traced through all the subsidiary books to their sources the accountants would have come upon discrepancies which would have led to the discovery that the books were falsified. But the accountants were only employed to make such an examination as was necessary to ascertain profits, on the assumption that the books put before them contained a true record of the transactions of the brewery. Strictly speaking, they had no business to examine the books for any other purpose, though of course in such an inquiry some latitude is permissible. But to say that if the examination had been carried further, and with a different purpose, the fraud might have been discovered, is in my apprehension an observation which does not touch the true merits of the case. I come then to the conclusion that Mr Dunn could not be barred by the 10th article from challenging the sale on the ground of fraudulent representations as to the profits of the business, because he only agreed to take the risk of profits on the condition that books containing a true record of the brewery transactions should be submitted to him for examination. I also think that in this matter Geddes was an agent of the seller to furnish the information which the books professed to contain, and to give necessary explanations; and without entering on the question whether this was a fraud committed by Geddes within the scope of his employment, it is clear that the defender, although meaning to assist Mr Dunn in ascertaining the profits, did not in fact exhibit the record of the transactions of the brewery which Mr Dunn was entitled to see.

But while I hold it to be established that a fraud was committed inducing Mr Dunn to enter into the contract with the defender for the purchase and sale of the subjects described as the Palace Brewery, it does not follow that the pursuers severally or collectively are in a position to enforce the claim of restitution which is the subject of the action. Other elements have to be considered—the element of injury to one or other of the pursuers, the possibility of making complete restitution, and the conduct of the pursuers as entitling or disentitling them to specific relief.

It is not irrelevant to the present inquiry to take note of the obvious truth that in mercantile transactions purchasers are much less concerned with the truth of the representations made to them by their vendors than they are with the question whether they can see their way to a resale at a profit. In the ordinary course of business goods or stocks may be sold and re-sold to successive purchasers many times in the course of a few days, each purchaser making an element of profit on the two contracts in which he is immediately concerned. The ultimate purchaser, it may be, finds that he has made a bad bargain, but that as regards his immediate vendor, whose integrity is unimpeachable, he has no ground of complaint. Has this ultimate purchaser the right to inquire into all the transactions of the exchange from the time when the goods left the manufacturer's or importer's hands to the moment when they came into his hands, to his loss, in order to find out whether any of these sales was tainted by fraud? If he has not such a right independent of the consent of intermediate vendors and purchasers, then does he acquire the right of reducing a contract to which he is not a party by getting permission to use the names of intermediate contracting parties who have not been called on to make restitution, and who have no interest whatever in the dispute? I am here stating the present question in its most general form, because the present is a limiting case in which there are only two contracts, the first between Mr Molleson and Mr Dunn, and the second between Mr Dunn and the United Breweries. But if the right claimed by the United Breweries be well founded, the principle obviously admits of indefinite extension, and there is no reason why a purchaser from the United Breweries, under a contract which is unimpeached, should not have the same right of action against Mr Molleson which the United Breweries have according to the conception of their claim.

I do not suggest that the impracticable character of the line of inquiry indicated, or the attendant inconvenience, ought to interfere with the theoretical recognition of the right, if such right exists; but it is well

perhaps in approaching a new question to have in view the full scope and measure of the extension of the purchasers' right to rescind which we are asked to enforce—because it is an extension in a practical sense, whether a legitimate extension or the contrary being the question.

Now, if this action had been brought by the United Breweries without the concurrence of Mr Dunn, the mere statement of the claim would be sufficient to expose its essential unsoundness. Mr Dunn did not sell to the United Breweries on the basis of profits, and it is admitted that the sale to that company is unimpeachable. The United Breweries were not parties to the contract between Mr Molleson and Mr Dunn, and it is evident they can have no title to reduce a contract in which they are not interested on the ground that their vendor had been imposed upon. It is noticeable that we have no evidence as to the formation of the contract of sale to the breweries. No witness connected with that undertaking has come forward to say that he was imposed upon by false representations.

The really important question is, whether Mr Dunn has a right to reduce his contract of sale—such a right as he in the actual circumstances of the case can communicate to his sub-vendee. By arrangement with the United Breweries Mr Dunn is able to offer restitution, and he says that he is not required as a condition of his claim of restitution to prove actual damage. I agree that it is not necessary that he should be able to prove pecuniary loss; it is enough for his purpose that by means of fraudulent representations for which his vendor is civilly responsible he has been induced to enter into a contract to which he would not have given his consent if the information for which he stipulated had been put before him.

But the special feature of the case is, that Mr Dunn re-sold the subjects at a profit, and he is not proposing to relinquish the profit which came to him indirectly through the false impression which the books of the Palace Brewery produced on the minds of the purchasers from him. The disposition by Mr Molleson to the United Breweries bears to be in consideration of the sum of £20,500 paid by the purchasers to the seller, and of the further sum of £8000 paid to Mr Dunn, being the difference between the first and the second contract prices, and although the sub-sale does not bear to be on the basis of profits, there can be little doubt that the promoters of the Breweries Company relied on Mr Dunn's judgment, and on the examination of the books which had been made in his interest by the two firms of accountants, Messrs Ellerman, and Messrs Moncreiff & Horsburgh. Now, Mr Dunn, on the discovery of the fraud which had been practised on him, was under no obligation to cancel the sale to the United Breweries. He had sold to them in good faith, after due inquiry as to the profits or value of the business, and without warranty. But it is conceivable that he, or the gentlemen for whom he acted (because I understand that Dunn in this matter was the agent of a syndicate), it is conceivable that he or they might have taken the view that they could not conscientiously hold the United Breweries to a bargain under which a sum of £8000 was paid which certainly would not have been paid but for the mutual error as to the value of the business into which the parties had fallen as a consequence of Geddes' fraud.

Now, if Mr Dunn or his constitutents had taken this view of their obligations, and had begun by offering to repay the £28,500, the price of the Palace Brewery, and to take back the brewery, reserving their claims of restitution against Mr Molleson, or if Dunn had even proposed to repay the £8000, which in the case supposed he could not conscientiously retain, and to assign his claim of restitution against Mr Molleson in order that the United Breweries might obtain redress, he would have found in me a convinced partisan of the duty of restitution. Because in the case supposed, where the sub-sale is rescinded and the price repaid, Mr Dunn is remitted to his rights under the first contract, and he is really defrauded in this sense that he is left with an unprofitable concern on his hands which he has been induced to purchase through fraud. And it would be no answer to him to say that he had the means of recouping himself by holding the United Breweries to their bargain. I think that a purchaser in such a case is entitled to say—I refuse to take a benefit which has been obtained by fraud; I am not going to relieve myself of loss by throwing it on a purchaser who relied on my judgment, and on the information which I put before him in good faith, but which now turns out to be untrue. I will neither hold my purchaser to his engagements, nor will I submit to be bound by the deception which has been practised on myself. Again, if the claim had been made in such circumstances I think the defender could not have resisted it on the ground that Geddes was not acting within the scope of his employment, because the defender could not then keep the price without making himself a party to the fraud.

I am not imputing any blame to Mr Dunn or to the parties whom he represents, because they have not begun by making restitution. I do not know that they have been asked to do so. I only wish to put their case in a clear light. I understand Mr Dunn's position to be this, that he means to keep the £8000 which he was enabled to make by the exhibition of forged books and fraudulent balance-sheets to Mr Ellerman and Mr Horsburgh, and at the same time to try to cut down his title to the subject of sale on the ground that the title is vitiated by this very fraud.

One answer to the claim is that Mr Dunn, on his own showing, has sustained no injury. We do no not inquire into fraudulent transactions merely to ascertain that representations were in fact made, but in order to give relief to suitors

who can show that they have been wronged. I have said that if Mr Dunn's case were that property had been thrown on his hands, or voluntarily taken back by him, this would be injury, because he is entitled to be relieved of property which he has been induced by fraud to purchase presumably at a price exceeding its true value.

But Mr Dunn has re-sold the property on terms very advantageous to himself. He does not say that he would have got a better price for the property if its true value as appearing from the business books had been disclosed to him; such a statement would be absurd on the face of it. The truth is that the fraud did not touch him at all, but only hit the ultimate purchaser, the United Breweries Company, and Mr Dunn is not an injured person, but a party taking benefit by the fraud, and suing for restitution against another party who has also involuntarily benefited by it.

Now, the remedy of restitution against a contract obtained by fraud is an equitable remedy and is carefully guarded by restrictions which are intended to prevent its abuse, and which may sometimes lead unavoidably to incomplete justice being done in individual cases. It is not a universal or a perfect remedy. But I think we do no injustice to anyone in maintaining unimpaired the principle, that no person can claim the equitable remedy of rescission who is not prepared to do equity, and in particular, that the right of relief against fraud is denied to him who is seeking to retain a benefit procured by fraud. It is not necessary to refer to authorities on this elementary doctrine. There is really no question as to the legal principles which regulate the right of restitution. The circumstances under which we are called to apply them are peculiar, and I do not know that much aid is to be got from the study of particular cases. But I think it clear that if Dunn were suing by himself alone it would be a conclusive answer to his claim that he had sold the subjects at a price calculated on the erroneous value attributed to the subjects, that he had not repaid the price to his sub-vendee, and that he had therefore made a profit out of the fraud. The circumstance that he had bought back the property and was thus enabled to offer restitution would not in my judgment improve his position.

Now, plainly Dunn can communicate no higher right to the United Breweries than he himself possesses. The United Breweries have no direct claim of any kind either against Molleson or against Dunn. Whatever right of action they may acquire through Dunn by being joined with him as pursuers must be measured by his right. In relation to him they are gratuitous alienees of his right of rescission such as it is, and as, in my opinion, Dunn is not in a position to claim restitution, it follows that the action considered as an action at the instance of the United Breweries must also fail.

The LORD PRESIDENT, LORD ADAM, and LORD KINNEAR concurred.

The Court adhered.

Counsel for Pursuers and Reclaimers—Sol.-Gen. Asher, Q.C.—Shaw—Greenlees. Agents—Philip, Laing, & Company, S.S.C.

Counsel for Defenders and Respondents—Lord Advocate Balfour, Q.C.—Ure. Agents—Davidson & Syme, W.S.

Thursday, July 7, 1892.

OUTER HOUSE.

[Lord Wellwood.

NATIONAL BANK OF SCOTLAND *v.* LORD ADVOCATE.

Revenue—Stamp-Duty—Banker's Licence—Payment in Error—Condictio indebiti—Stamp-Duties Management Act 1870 (33 *and* 34 *Vict. c.* 98), *sec.* 14.

By the provisions of the Act 55 Geo. III. c. 184, sec. 24, the Act 7 Geo. IV. c. 67, sec. 13, and the Act 7 and 8 Vict. c. 32, sec. 22, a banker is bound to take out the following licences for the issue of promissory-notes for money payable to the bearer on demand, viz., a district licence for every town or place at which he shall by himself or his agent issue such notes or bills, with this exception, that no banker who on or before 6th May 1844 had taken out four such licences which were at that date in force for the issuing of notes at more than four separate towns or places (the law at that date not demanding in any case more than four licences, and including in the fourth licence all towns or places of issue above three), should be required to take out more than four licences for the towns or places specified in such licences in force on 6th May 1844.

The National Bank had on 6th May 1844 four licences in force, one of the places to which these were applicable being the town of G. In 1871 the bank opened a branch at S., and took out a separate licence. By an Act passed in 1872, S. was included in the municipal boundary of G., but the bank by inadvertence continued to take out a licence and pay duty in respect of S. till 1890. In that year they claimed repayment of the duties so paid, in respect that S. having been since 1872 included in G., such licence was unnecessary, and the duty had been paid in error.

Held that the licence-duty being a stamp-duty, could not, under the provisions of the Stamp-Duties Management Act 1870, sec. 14, be recovered unless the application for relief was made within six months after the date of the licence.

Opinion that apart from this provision, the bank having annually applied for a licence, and paid a duty which in ordinary course would be applied to public purposes year by year, while it