disputes that the money was paid. The question is, whether the agreement on which the payment proceeded is voidable on the ground of minority and lesion. For the reasons already stated I think that question is left by the statute to be decided upon the ordinary rules of the common law.

The second point is that it is impossible for this Court to determine whether the pursuer was prejudiced or not, because we cannot tell what compensation an arbiter would have awarded or might now award. I agree with your Lordship that this contention is not sound. It may be possible to find that a sum fixed by agreement is less than a reasonable arbiter could have awarded, although the precise sum to be given by such an arbiter cannot be ascertained. But apart from the question of amount, the pursuer avers a special ground of prejudice from the terms of the contract. He says he assented to the agreement on the footing that he was to be kept on in the defenders' employment, and the argument accordingly is that if he had known what he was about, he would not have accepted a small sum down in full of his claims. It is admitted that the agreement as concluded gives the pursuer no right to future employment, and also that his averment of his understanding of the agreement would not be sufficient to support an action on the ground of error or misrepresentation. But these are just the conditions which give him a remedy on the ground of minority and lesion if he was in fact a minor and has in fact been prejudiced.

The Lord Ordinary may very probably be right in thinking that the pursuer may have some difficulty in proving his averments, but I agree that he has made relevant averments which he should be allowed to prove if he can.

LORD M'LAREN was absent.

The Court adhered.

Counsel for the Pursuer and Respondent —George Watt, K.C.—Mercer. Agent—John A. Tweedie, Solicitor.

Counsel for the Defenders and Reclaimers —Campbell, K.C.—T. B. Morison. Agent —R. S. Rutherford, Solicitor.

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*Saturday, June 4.*

## SECOND DIVISION.

[Lord Kyllachy, Ordinary.

## FERGUSON *v.* WILSON.

*Contract—Contract Induced by Misrepresentation—Reduction—Esssential Error —Innocent Misrepresentation—Fraud—Partnership.*

In December 1902, A, an engine manufacturer, advertised for a partner. B replied to the advertisement, and at an interview with A in January 1903 the latter informed him that his business was "booming and bursting to get out," and supplied him with the balance sheets for 1899, 1900, and 1901. After examination of these, B's father, who was advising B, pointed out to A that the balance sheet for 1901 showed a falling off in profits. A in answer explained to B and his father that this was accounted for by a branch of the business having been given up during that year, but that the business was progressive, that 1902 was the best year he ever had, and would show the largest profit which the business had ever produced. On the faith of this statement B signed an agreement to enter into partnership and initialled a draft contract of partnership.

When the balance sheet for 1902 was made up it showed not a profit but a loss.

In an action for the reduction of the agreement and draft contract brought by B against A, *held*, after a proof, (1) that B could not reduce the contract on the ground that, in signing the agreement, he was under the impression that it was only provisional, there being no proof that this impression was due to any representation made by A, but (2) that B entered into the contract under essential error induced by A's misrepresentation as to the profits of 1902, and was therefore entitled to reduce the contract without proof of fraud on the part of A.

In December 1902 Charles Fyfe Wilson, a gas-engine and oil-engine manufacturer in Aberdeen, carrying on business under the firm name of C. F. Wilson & Company, advertised for a partner, specifying in the advertisement the amount of capital which the new partner would require to bring into the business, viz., about £2500. James Lewis Ferguson replied to the advertisement, and after negotiations between Mr Ferguson and his father on the one side and Mr Wilson on the other a minute of agreement between the parties was signed and a draft contract initialled on 27th January 1903.

In June 1903 Mr Ferguson raised an action against Mr Wilson concluding for the reduction of the minute of agreement and the draft contract.

The pursuer pleaded — "The pursuer having been induced to sign the said minute of agreement and initial the said draft contract of copartnery—(1) Under essential error; (2) Under essential error induced by the defender; (3) Under essential error induced by the false and fraudulent representations of the defender—is entitled to have the same reduced."

The defender pleaded—"(1) No relevant case. (2) The averments of the pursuer, so far as material, being unfounded in fact, the defender is entitled to absolvitor with expenses."

A proof was led.

The facts leading up to the contract are stated in detail in the opinion of the Lord Ordinary (KYLLACHY).

On 31st December 1903 the Lord Ordinary reduced, decerned, and declared in terms of the conclusions of the summons.

*Opinion.*—"I have considered this case with a good deal of anxiety, because it touches, if it does not raise, some legal questions of delicacy, and may also in some views involve questions of character. The action is brought to reduce an agreement of partnership into which the pursuer was, as he alleges, induced to enter under essential error induced by misrepresentation. And the error alleged is, in the first place, with reference to the legal effect of the agreement, which the pursuer says he subscribed on the footing that it was merely provisional, and in the next place, with reference to the history and position of the business, which has, it is said, been found to be essentially different from what was represented.

"I may say at once on the first point that I think it quite possible that the pursuer and also his father were in fact under a misapprehension as to the footing on which the agreement was signed, and the relative draft contract of copartnery initialled. But I can find no ground for holding that there was on this matter any misrepresentation by the defender, or by his agent, or that they or either of them were responsible for such misunderstanding as may have occurred. The two documents are quite explicit, and the relation between them is quite plain; and I incline to think that the misapprehension, if it existed, was due really to this, that the pursuer had the idea that because the contract was not to be executed until stock was taken and the amount of the defender's capital ascertained, the same thing applied to the agreement by which the partnership was constitued as from its date.

"I may say also that, making the usual allowance for colour and inaccurate recollection, I see no ground to impute to the testimony on either side want of veracity or even candour. In particular, I formed the impression that the defender gave his evidence as to matters of fact fairly and candidly. Indeed, putting aside certain discrepancies as to what passed at the signing of the agreement, there is substantially no conflict between the parties as to matters of fact.

"But having all this in view I have felt unable to resist the conclusion that the pursuers subscribed the agreement under error—error which was in the circumstances essential; and, further, that this error was induced by representations made by the defender with respect to the history and position of the business—representations which were contrary to the fact.

"The representations which induced the contract, and which I think were in the circumstances essential, were, I think it is proved, these: The defender at the first interview with the pursuer on 10th January 1903 informed the latter in conversation that the business was not only profitable but was increasing; that it was 'booming and bursting to get out,' and that the current year was or would be the best the defender had ever had. That, I think, is established. Subsequently on the same day the pursuer obtained from the defender's agent, and took away with him, copies of the last two balance-sheets of the business—the one covering the two years 1899 and 1900, and the other covering substantially the year 1901. The balance-sheet for the year 1902 had not yet been made up, but it fell to be so early in February, so that the year to which it applied if not closed was on the eve of being so. The balance-sheet for the two years 1899 and 1900 shewed a profit of £1173, or £586 per annum. The balance-sheet for 1901, however, shewed a profit of only £462. The pursuer's father, who was advising and finding the required capital for the pursuer, on examination of the balance-sheets, at once saw that on the above figures the business was not progressive, and also that when the profit of the last year was reduced by interest on capital, it left, as he expressed it, 'no living for two partners.' Considering this as prohibitory, he at the meeting between himself and the pursuer and the defender on 17th January pointed out this difficulty to the defender, when the latter's reply was (1) that in the last year there had been a loss in winding up and selling off the stock of a certain branch of the business, viz., the agricultural implement branch, which had been given up in May 1901; and (2) that having that in view, the business was in fact progressive, and that, as mentioned to the pursuer, the current year—the year just closing—was the best year he ever had, and would shew the largest profit he had ever had. I think it must be taken that he also added that the profit would be at least £600, or that he would be much surprised if it was not at least £600. In short, I think it must be taken that the defender, by way of meeting the pursuer's father's difficulty, represented that, notwithstanding the apparent decline in the year 1901, the business was not only profitable but progressive—progressive both as regards volume, and as regards profit; and that in particular the current year—the year almost closed—was the best year he had ever had. It was on the faith of this statement that the pursuer's father withdrew his objection and the matter was allowed to proceed.

"Now, assuming these representations to have been untrue, it cannot, in my opinion, be doubted that they related to a matter which was essential—essential not only in itself but recognised as essential by the parties. A growing and profitable business is one thing, a backgoing and unprofitable business is for the purposes of a contract of partnership another thing; and that the pursuer and his father so thought, and made it quite plain they did so, appears sufficiently from what I have stated. Nor will it do to say that the matter was not one of fact but of expectation and belief. For in the first place I think it is plain, both on the evidence and on the record,

that the defender's statement that the business was an increasing business (increasing that is to say both as regards volume and as regards profit) was made without qualification and as a statement of fact. Moreover, it seems to me that when a statement is made by the owner of a business with respect to the business done and the profits made in a year which is just closing, he must be held to be speaking from 'book,' from data before him, and not merely from general expectation and without knowledge.

"The question accordingly is whether the representations made were untrue—not merely untrue in the sense of being inaccurate and perhaps loose, but in the sense of being untrue in substance and fact.

"Now as to this, the broad facts seem to be these:—Taking the business as a whole, and taking the whole period embraced in the balance-sheets, the turn-over in each year was as follows:—

1899, . . . £5846 } £9804.
1900, . . . 3958 }
1901, . . . 4345
1902, . . . 2859.

"Again, excluding the agricultural implement business, which as I have said was (at least for the most part) given up in May of 1901, the figures were roundly these:—

1899 }
1900 } . . £5500 (£2750 per annum).
1901, . . £2508.
1902, . . £2730.

On the other hand, the profits, as brought out by the balance-sheets prepared by the defender or his clerks, including the balance-sheet prepared with the pursuer's assistance in February 1903, were as follows:—

Profit, 1899 } £1173, 7s.
1900 }
Do., 1901, £ 462, 19s. 9d.
Loss. 1902, £ 300, 8s. 9d.

Or correcting the three balance-sheets by (1) distributing equally over the three periods certain legal expenses amounting to £282 mentioned in the proceedings; (2) placing back to the debit of the year 1901 a sum of £183 borrowed in that year from Mr Laing, but omitted to be had in view in the 1901 balance-sheet; and (3) placing against the profits of each year, *inter alia*, interest on borrowed capital and discount on bills, the true figures would be as nearly as possible these:—

Profit, 1899 }
1900 } . . £1173
108
——£1065.
1901, . . £ 462
311
——£ 151
Loss, 1902, (about) £ 200.

"It is true that the pursuer's accountant brings out a loss on the year 1902 of, in round numbers, £517, while on the other hand the defender's accountant brings out a profit of £21. But the pursuer's figure is reached (I think questionably) (1) by charging against the year in question £240 of the £282 of legal expenses above mentioned, and (2) by charging also against the same year a sum of £144 for depreciation; while on the other hand the defender's figure is brought out by debiting (I think erroneously) to capital (1) the whole £282 of legal expenses, and (2) a further sum of £94 made up of discounts and losses on returns during the year. These figures, however, are not in this matter essential, and on the best consideration I have been able to give to the matter, it appears to me that in taking the loss of the last year at the sum I have stated, viz., £200, I have dealt not unfairly by the defender. Nor, I may add, do I think it possible materially to affect this result by importing, as proposed by the defender, into the accounts for the year 1902 a calculated profit (45 per cent.) on work in progress, and more or less nearly completed in February 1903. It is true that the valuation of work in progress at February 1903 was £1613, while the work in progress in February 1902 had been only £827, the figures applicable to engines alone being respectively £1220 and £635. But in the first place the difference as regards (practically) finished work did not, as I make out, exceed about £232. (Four engines at £58—£232.) And in the next place there are no means of estimating the difference as between the two periods in respect of work not merely in progress but sold or ordered. It appears to me that (assuming the introduction of this matter to be at all legitimate) it is only the latter comparison that can here be of any importance.

"On the whole matter, therefore, I think the pursuer has proved that he signed the agreement in question under essential error induced by misrepresentation. And, holding this to be sufficient, I do not find it necessary to consider whether the misrepresentations were either in the moral or the legal sense fraudulent. That would I think, depend on the question whether fraud (at all events in the legal sense) can be affirmed where representations are made which are not known to be false, but are yet not known to be true, or believed to be true upon reasonable grounds. For my impression I confess is, not that the defender knew the facts and misstated them, but that believing strongly in the future of his business, and having in no way applied his mind to the matter upon which he spoke, he spoke rashly and without knowledge, and did so knowing, or being bound to know, that he would be understood as speaking from actual knowledge. But taking the view which I take, it is not, as I have said, necessary to decide that question. I consider, as I have already indicated, that the error which induced this contract was, considering the nature of the contract, essential error—error perhaps sufficient, if mutual, *per se* to rescind the contract, but certainly sufficient to do so both according to our law and the law of England if induced by misrepresentation — misrepresentation even in the moral sense innocent. The authorities on the subject will be found collected and considered in the comparatively recent case of *Wood* v. *Tulloch*, March 7, 1893, 20 R. 477, 30 S.L.R. 497. It appears to me that, if I

am right upon the facts, the decision at which I have arrived is entirely consistent with the authorities."

The defender reclaimed, and argued—The pursuer had failed to discharge the onus laid on him. Before the pursuer could succeed he must prove either of two grounds of rescission—(1) Fraud on the part of the defender, or (2) misrepresentation of existing facts which were material to the contract and which were made by the defender without caring whether they were true or false—*Bellairs* v. *Tucker*, 1884, 13 Q.B.D. 562, opinion of Denman, J., 574.; *Derry* v. *Peek*, 1889, 14 App. Cas. 337 opinion of Lord Bramwell, 350. The pursuer had not succeeded in proving either of these grounds. The fact that the defender took an unreasonably favourable view of the prospects of his business was not a ground for reduction. The pursuers' case was based not on misrepresentation of fact but misrepresentation of opinion. He attempted to introduce a warranty into a contract where none existed.

Argued for the pursuer and respondent—The decision of the Lord Ordinary was sound. In an action of damages on the ground of fraudulent representation, such as *Dunnett* v. *Mitchell*, December 7, 1887, 15 R. 131, 25 S.L.R. 124, or in action, of deceit, such as *Derry* v. *Peek*, *supra*, fraud required to be proved. But where rescission of the contract was alone sought a pursuer required to prove only misrepresentation of fact in order to succeed—*Adam* v. *Newbigging*, 1888, 13 App. Cas. 308. The pursuer here had proved that he had signed the agreement under essential error induced by the defender's misrepresentation of matters of fact. That was enough for the decision of the case in his favour.

At advising—

LORD JUSTICE-CLERK—The defender, who is a gas-engine and oil-engine manufacturer in Aberdeen, advertised for a partner, specifying in the advertisement the amount of capital which it would be expected that the new partner should bring into the business, viz., £2500. After negotiations between the pursuer and his father with the defender, an agreement was signed and a draft contract initialled. It is part of the pursuer's case, as stated on the record, that the signing of the agreement was conditional on the making up of a balance-sheet of the business up to date, and his bringing out a result consistent with the defender's representations. I agree with the Lord Ordinary in thinking that the pursuer and his son may have been under some impression such as they allege on this matter, but I also agree with him that there is no ground for holding that if any such impression existed it was caused by any misrepresentation of the defender, or by Mr Hadden, his agent, and they cannot be held responsible for any mistake upon the part of the pursuer or his father as to the footing on which their signatures were attached to the agreement, this having been done with the usual and proper formalities for a binding agreement.

But the question remains whether the pursuer signed the agreement under essential error, that essential error being induced by the representations made by the defender to cause him to do so, such representations being not in accordance with the true facts of the case.

The circumstances were that the defender supplied the pursuer with balance-sheets covering three years down practically to the end of 1901, and that the result of these was that the business in the first two years had yielded an average profit of £586 a-year, but that in the third year this had fallen to £462. This appears to have at once attracted the notice of the pursuer's father as not indicating a progressive business, and therefore being hardly consistent with the defender's statement made at a previous interview that the business was "booming and bursting to get out." The defender met this objection by explaining that a certain branch of his business had been given up in the third year, which accounted for the falling off, and that the business still being carried on was progressive—the fourth year then closing having been his very best year—and would show the largest profit it had ever produced, and named £600 as a minimum certainty, as he would be much surprised if the profit was not at least that amount. It was by these statements that the difficulty which the pursuer's father expressed was overcome.

It is to be noted that these statements were made within about a fortnight of the time when in ordinary course the state of the business would be tested by a balance. The practical materials for truly ascertaining what was the truth as to the last year's trading were available, and had they been put together and a tentative balance struck, it would have been impossible for the defender as an honest man to make the statements which he did. I cannot hold that if a trader in such circumstances expresses himself as the defender did here, that he can shelter himself against an accusation of misrepresentation by the plea that he was merely giving an ignorant and speculative opinion as to the state of his own affairs by which he is to be in no way bound. I agree with the Lord Ordinary that if he makes such a statement with a view to obtaining assistance in the business from another he must be held to speak as from knowledge of fact, and that what he says must be held to be a representation of facts. I do not think as the case presents itself there is ground for supposing that the defender in making the statements he did was guilty of misrepresentation with fraudulent intent. I think it probable that the defender took a sanguine view, based perhaps on the busy condition in which the works had been, and the increase in the number of employees, that the business was going ahead, and expressed himself in eagerness and not in bad faith. Being anxious to obtain the aid of capital, he may be held to have taken up and expressed a sanguine view without testing it, and I think may have

done so without fraud. But it was undoubtedly a misrepresentation — he not knowing the true state of the facts—and representing a view of the facts which was intended by him to be accepted as true, in his knowledge, by those he was dealing with.

There having been misrepresentation, will it save the defender from a judgment rescinding the contract that no fraud has been proved? I do not think so. The pursuer asks nothing but that it be rescinded, and to that I consider him to be entitled. I adopt the language of Lord Watson in the case of *Adam* v. *Newbigging*, holding it to apply directly to this case. He says—"I entertain no doubt that these said representations, although not made fraudulently, are sufficient to entitle the respondent to rescind the agreement. . . . He relied and was entitled to rely upon the assurances which he had received as to the satisfactory condition of the business, until he became aware of the true state of the facts."

I would therefore move your Lordships to adhere to the interlocutor of the Lord Ordinary.

LORD YOUNG concurred.

LORD TRAYNER—I agree with the Lord Ordinary.

The LORD JUSTICE-CLERK read the following opinion of LORD MONCREIFF, who was present at the hearing but absent at the advising:—The pursuer concludes only for reduction—rescission of the contract; he makes no claim for damages. Therefore the case of *Peek* v. *Derry*, which related to an action of deceit, that is, an action of damages on the ground of fraudulent misrepresentation, does not apply. Proof of fraud is not required in this case.

Therefore if the pursuer has succeeded in proving that he was induced to agree to enter into partnership with the defender by misrepresentations made by the latter on matters material to the contract and facts which were or should have been known to the defender, it is immaterial whether the misrepresentations were made innocently or not.

The pursuer's challenge was made at once on seeing the balance-sheet for 1902. The alleged contract between the pursuer and the defender was entered into at the very close of the financial year 1902. The defender must therefore have known on the 10th and 17th January 1903, the dates of his meetings with the pursuer and his father, whether the profit from his business during the year 1902 would or would not exceed that for the immediately preceding year. He knew that he had been obliged to reduce the price of engines considerably, and he also knew that wages had increased. These were questions of fact which should have made him hesitate before giving the pursuer and his father the assurances which he gave; and at least he was not justified in concealing those material facts from the pursuer who had no means of ascertaining them. It must be noticed that the representations were not prospective; they related to the past year. The defender knew enough to know that his profits for 1902 could not have increased whatever might be his prospects for the future.

The truth seems to be, that finding that the pursuer's father was not disposed to put money into the business unless he received an assurance that the profit for 1902 would exceed that for 1901, the defender made the reckless assertion that 1902 would prove to be the best year he had had, and that the profits would probably reach £600. I believe with the Lord Ordinary that there was a positive loss on that year; but taking the most favourable view for the defender the profit fell far short of that for 1901.

I am of opinion that the pursuer is entitled to be quit of his bargain.

The Court adhered.

Counsel for the Pursuer and Respondent —Wilson, K.C.—Graham Stewart. Agents —Davidson & Syme, W.S.

Counsel for the Defender and Reclaimer —Campbell, K.C.—T. B. Morison. Agents —H. H. M'Gregor, S.S.C.

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*Tuesday, June 7.*

## FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

## OCEAN STEAM TRAWLING COMPANY, LIMITED *v.* GEESTEMUNDE HERRING AND HOCHSEE-FISCHEREI COMPANY.

*Statute—Implied Repeal—Fishing—Warrant to Recover Compensation by Foinding and Sale—Sea Fisheries Act* 1883 (46 *and* 47 *Vict. cap.* 22), *sec.* 20 (2)—*Sea Fisheries* (*Scotland*) *Amendment Act* 1885 (48 *and* 49 *Vict. cap.* 70), *secs.* 1 *and* 8.

*Held* that section 20 (2) of the Sea Fisheries Act 1883 is not impliedly repealed by section 8 of the Sea Fisheries (Scotland) Amendment Act 1885, and that it is competent for a Sheriff, dealing with the compensation to an injured party in respect of an offence against the Sea Fisheries Acts, to grant warrant for the recovery of the sum adjudged as compensation by distress, or poinding and sale of the sea fishing-boat to which the offender belongs, and her furniture and tackle, as provided by section 20 (2) of the Act of 1883.

The Sea Fisheries Act 1883 (46 and 47 Vict. cap. 22), sec. 20 (2) enacts—"Any fine or compensation adjudged under this Act may be recovered in the ordinary way, or, if the Court think fit so to order, by distress, or poinding and sale of the sea fishing-boat to which the offender belongs, and her tackle, apparel, and furniture, and any property on board thereof or belonging thereto, or any part thereof." . . .