Tuesday, October 22.

SECOND DIVISION.

PATTULLO *v.* CAITHNESS FLAGSTONE COMPANY, LIMITED.

Expenses — Company — Winding - up — Creditor's Petition for Judicial Winding-up—Company's Petition for Supervision Order—Company Successful—Creditor's Expenses.

One of the creditors of a company presented a petition for the judicial winding-up of the company and the appointment of an official liquidator. Thereafter the company passed an extraordinary resolution in favour of a voluntary winding-up under the supervision of the Court and appointed a liquidator. They also presented a petition for a supervision order and lodged answers to the creditor's petition. Answers to the company's petition were lodged by the creditor. At the hearing of the petitions and answers parties agreed that the voluntary liquidation should be continued under supervision, but the creditor moved that the liquidator appointed by the company should be superseded. The Court granted the supervision order but refused the creditor's motion.

Held that the expenses of the creditor in his petition for judicial winding-up prior to the date of the petition for the supervision order were expenses in the winding-up.

On the 12th of July 1907 James Adam Pattullo presented a petition for the judicial winding-up of the Caithness Flagstone Company, Limited, and for the appointment of an official liquidator. The petitioner was a creditor of the company to the extent of over £500, as the registered holder of two debenture bonds by the company, the interest on which, due on 15th May and 11th November 1905, had not been paid.

On 30th July 1907, at an extraordinary general meeting of shareholders, an extraordinary resolution was unanimously passed in favour of a voluntary winding-up subject to the supervision of the Court, and Thomas Dingwall, C.A., Edinburgh, was appointed liquidator and subsequently accepted office.

On August 12th, 1907, the company lodged answers to the petition of Pattullo, in which they maintained that a compulsory winding-up was unnecessary and incompetent, and on the same day they presented a petition craving that the voluntary winding-up already resolved on should be continued under the supervision of the Court. Answers were lodged by Pattullo in which he submitted that Mr Dingwall was not an independent and unbiassed party, and that some other person should be appointed liquidator by the Court.

The petitions and answers were heard together, and parties' counsel stated that they had agreed that the voluntary liquidation should be continued under supervision. Counsel for Pattullo, however, moved that Mr Dingwall should be superseded by a liquidator appointed by the Court. Counsel for the company opposed.

The Court refused to grant the motion.

Thereafter counsel for Pattullo moved that the expenses he had incurred should form part of the expenses of the winding-up, arguing that his petition was a legitimate and appropriate method of bringing the whole matter into Court, and that there was no necessity for another petition at the instance of the company. Counsel for the company opposed.

The following cases were referred to:— *Drysdale & Gilmour* v. *Liquidator International Exhibition*, November 13, 1890, 18 R. 98, 28 S.L.R. 91; *Pattisons, Limited* v. *Kinnear*, February 4, 1899, 1 F. 551, 36 S.L.R. 402; *Elsmie & Son* v. *Tomatin Spey District Distillery, Limited*, January 30, 1906, 8 F. 434, 43 S.L.R. 324; *M'Gregor* v. *Ballachulish Slate Quarries, Limited*, October 16, 1907, 45 S.L.R. 9.

LORD JUSTICE-CLERK — We allow the expenses of initiating the petition for a judicial winding-up, but not of any after proceedings.

LORD STORMONTH DARLING and LORD LOW concurred.

The Court pronounced the following interlocutor:—

"Refuse the prayer of the petition and decern: Find the petitioner entitled to his expenses up to 12th August last, and find that these form expenses in the winding-up."

Counsel for the Petitioner—Murray—Lyon Mackenzie. Agents—M'Neill & Sime, S.S.C.

Counsel for the Respondents—Hunter, K.C. — D. Anderson. Agents — John C. Brodie & Sons, W.S.

Thursday, October 24.

FIRST DIVISION.

[Lord Johnston, Ordinary.

SELKIRK *v.* FERGUSON.

Contract—Error in Essentialibus—Difference between Draft and Signed Agreement—Error Induced by Other Party.

The owner of the patent rights in a machine, which he proposed to assign to a company, entered into an agreement for the working of the machine. As drafted, the agreement stipulated that upon the assignment his obligations under the agreement should cease, but as signed, it stipulated that notwithstanding the assignment his obligations should continue. The patent-owner knew that alterations had been made on the draft, but did not read the extended deed before signing, accepting the opinion of a law agent

acting for a third party that the alterations were not essential.

Held that the patent-owner was not entitled to resile (1) on the ground of essential error alone, inasmuch as there was no error on his part as to the deed he was signing, or (2) on the ground of essential error induced by the other party to the agreement, inasmuch as the other party's conduct was not proved to have in any way induced error.

On 17th January 1906 J. H. Selkirk, advertising contractor, Bouverie Street, London, raised an action against Alexander Ferguson, 108 West Regent Street, Glasgow, in which he sued for £2000 as damages for breach of contract. The contract in question was with regard to the working of a patent advertising machine, The Animated Poster, the patent rights in which belonged to the defender, who had proposed, after arranging for the working, to form a company to take up the patent, and with this view sold an option to a Mr Cohen. As originally drafted the contract contained a provision that the defender should have right to assign his interest in the patent to a company, "and upon such assignment being carried into effect the said A. Ferguson shall not be under any further liability hereunder." As signed, the contract provided—"but notwithstanding such assignment the liability of the said A. Ferguson under this agreement shall remain and have effect."

The defender had resiled from the contract, and now, *inter alia*, pleaded—"(4) The defender should be assoilzied with expenses, in respect that (1st) the said agreement was entered into by defender under essential error induced by pursuer; (2nd) said essential error was induced by fraudulent misrepresentations and concealment on the part of the pursuer; and (3rd) said agreement is not binding on defender, but is null and void."

The circumstances under which the contract was signed are given in the opinion (*infra*) of the Lord Ordinary (JOHNSTON), who on 1st December 1906 assoilzied the defender.

Opinion. — "The defender Alexander Ferguson is a whisky blender and dealer in Glasgow, and he has also apparently dabbled in patents and in company promotion, in the latter of which, though an unskilled hand, he is not exactly a tyro. In 1904 he had got hold of the patent for a system or method of pictorial advertising which was termed 'The Animated Poster,' and he posed as 'The Animated Poster Syndicate,' the syndicate being himself. In company promotion there seems to be some magic about the term 'syndicate.' Looking to what sort of inane devices in the way of advertising succeed in this advertising age, I think that Ferguson had some ground for his sanguine view that the patent which he had acquired, if it caught on, might prove a financial success when sufficiently worked and financed. But he himself could neither work nor finance it. Accordingly he set to work on the lines of company promotion. But there was no use attempting to promote the company until he had provided for the working.

"The pursuer, John Hirst Selkirk, was in 1904 an advertising contractor of capacity and experience, though the ramifications of his business have brought to grief the company into which he has since turned his business. A Mr Slight was Selkirk's manager. Having through other business got into touch with Mr Slight, the defender in the end of 1904 opened to Selkirk his project, with a view of making a contract with Selkirk to work the patent. Slight was impressed with the prospect of the invention, and so, on its being communicated to him, was Selkirk, and meetings and correspondence followed. The end towards which Ferguson was working is disclosed in his letter to Slight of 6th December 1904—'If you would be prepared to guarantee us advertisers, we would be prepared to guarantee the capital.' What he wanted was a contract with Selkirk which would promise to produce custom for his invention. When he had secured that, though he had no capital to finance it, and did not directly disclose that fact to Selkirk, he would set about promoting the company, which, on the strength of the promise of the working contract with Selkirk, would finance the invention. And in this he very nearly succeeded, and would probably have done so had he been prudent enough to employ a solicitor. He did make a contract with Selkirk, and he did get people with means to take an option, for which they paid him, to exploit the patent financially by promoting a company. But in three days he found himself obliged to resile from the contract into which on 1st March 1905 he entered with Selkirk and Mr Cohen, and his associates, who had acquired the option, afterwards declined to avail themselves of it.

"The pursuer Selkirk now sues the defender Ferguson for damages for breach of the contract, which he puts at £2000. I cannot say that I have any sympathy with Ferguson's conduct throughout the crucial part of the negotiations, but I have nevertheless come to the conclusion that he was entitled to resile. His defence was virtually a recision on the ground of essential error, and the necessity for reduction was waived.

"A meeting between Ferguson and Selkirk took place in London about the middle of December 1904, the result of which was the adjustment of terms of offer by Selkirk addressed to 'The Animated Poster Syndicate, Glasgow,' and forwarded by Selkirk to Ferguson on 23rd December 1904, and repeated with some variation on 2nd January 1905. The offer was substantially that Selkirk, on having the organisation and control of the enterprise committed to him for three years, and in consideration of salary and expenses, was to guarantee advertisements to keep 100 machines employed. It was open for acceptance for two months. And it was accompanied by a collateral letter stipulating for a share of

the profit Ferguson might make on floating his company.

"It is immaterial to follow the correspondence of the next six weeks. On 10th February 1905 Ferguson again went to London, was introduced by a Mr Vincent to Mr Cohen, and received apparently such encouragement that on 20th February he wrote to Selkirk accepting his offer of 23rd December previous.

"Matters then passed into the hands of Mr Slark, of Slark, Edwards, & Company, solicitors, Southampton Street, Strand, who was agent for Mr Cohen and his associates, and in fact prepared to interest himself along with them. Now two things had to be done, first to adjust a working agreement between Ferguson and Selkirk in such terms as would be acceptable to Mr Cohen. For it was clear that a satisfactory agreement between Ferguson and Selkirk must be a condition-precedent to Mr Cohen taking the matter in hand, even on an option contract merely.

"Mr Slark was then entrusted with the matter, and the clue to the trouble which has since arisen is that he was employed by Mr Cohen alone, and in his own mind was charged with Mr Cohen's interest alone, while Selkirk and his agent (Mr Davis) understood him, at least down to a very late point, to be acting for Ferguson, and Ferguson himself understood him, though I do not think that he was justified in doing so, to be acting indirectly for him.

"Mr Slark says that the conveyancing part of the business, at any rate, first came into his hands on Wednesday, 22nd February, that a draft agreement was prepared by him, and that the parties met at his office on Saturday the 25th, but that, as he was much engaged, he arranged that they should meet at his house on Sunday afternoon, the 26th. This was necessary, as he was leaving for America on the evening of Tuesday the 28th, and Ferguson for Scotland on the following day, Wednesday the 1st March, and the business was therefore urgent. Now the witnesses to what occurred on these four or five days by no means agree with one another. I believe them all to be perfectly honest and to be speaking to the best of their recollection, but that recollection to be inaccurate. I except Mr Davis, Selkirk's agent, who intervened for a very brief period and who speaks with perfect precision. But I must add, that although Mr Slark admits failure to recollect a good deal, I am satisfied that his evidence of what he does recollect is to be preferred to either that of Ferguson or Selkirk. He is a clear-headed man of business, and was perfectly free from bias, having no concern with either one side or the other.

"What I believe to have occurred was this. The draft agreement had been prepared by Mr Slark's firm of Slark, Edwards, & Company, was probably before the parties on Saturday the 25th, and was certainly before them on Sunday the 26th. It consisted of nine articles, the eighth of which has an important bearing upon the present question. Many of the details of this draft were discussed on Sunday the 26th, and though he denies ever having seen it, a copy bears pencil marks initialled by Selkirk. The result of the discussion on Sunday afternoon, the 26th, was understood to be substantial agreement on all points, and the adjustments necessary were to be embodied in an amended draft by Mr Slark's firm. Accordingly Mr Slark, after the meeting separated, or at latest next morning, jotted in red ink on the copy the substance of the proposed alterations to be embodied in more formal language by the draughtsman, and a clean copy of the amended draft was to be sent to each of the parties. This was done on the forenoon of Monday the 27th February, and No. 31 of process in its original condition is the copy of the revised draft sent to Selkirk. I do not think that that sent to Ferguson has been recovered, but there is no doubt that after reading it he returned it to Slark, Edwards, & Company approved, without comment or alteration. Selkirk, on the other hand, after going over his copy with his manager Slight, sent for his agent Mr Davis on Monday afternoon and directed him to revise it on his account. Mr Davis according to his custom put no revise on the clean copy draft sent him, which was in typewriting, but made a manuscript copy upon which he put his revise. I do not need to touch upon his revise generally, but on article eighth he made an alteration which he deemed essential to his client's position, and which had an important and far reaching effect.

"The article as it originally stood bore that Mr Ferguson should have right to assign his interest in the patent to a company with a capital of not less than £10,000, and upon his doing so, that Selkirk should accept such company in place of Ferguson for the purposes of the agreement, 'and upon such assignment being carried into effect, the said A. Ferguson shall not be under any further liability hereunder.' This was altered to read 'but notwithstanding such assignment the liability of the said A. Ferguson under this agreement shall remain and have effect.' There cannot be two opinions as to the materiality of this alteration. Having revised the draft Mr Davis took it on Tuesday, the 28th February, to Selkirk and discussed its terms with him and Mr Slight, pointing out the importance in Selkirk's interest of the alteration on article 8. They then drove to Mr Slark's office, where they expected to meet Ferguson, but not finding him there, Selkirk and Slight along with Mr Davis had an interview with Mr Slark and discussed Davis' revised draft, Slark in his own mind acting solely for Mr Cohen and considering the alterations from that point of view only, the other three believing him to be acting for Mr Ferguson. Mr Davis' alterations were accepted, though some of them not without hesitancy, by Mr Slark, and a tenth article was added which was also somewhat material. The meeting occurred about 4·30 in the afternoon of Tuesday the 28th, and it was arranged that Selkirk and Slight should return in an hour

in the hopes of meeting Ferguson. Davis, assuming that he had done his part, left the revised draft with Mr Slark and did not return, and had nothing more to do with the business, except that when he got Selkirk's counterpart of the extended and signed agreement he transferred the alterations to the copy of the amended draft, which he intended to exchange for his own office copy left with Slark, Edwards, & Company.

"What next happened was that about 5·30 the same afternoon Selkirk and Slight returned to Mr Slark's and found Ferguson there. It is somewhat remarkable that Mr Slark should have forgotten the first meeting on the afternoon of Tuesday the 28th, could not remember Davis having been with him, but remembered very distinctly what occurred at the second meeting with Ferguson, Selkirk and Slight alone without Mr Davis. But I think that he gives an accurate account of the second meeting. I explain his failure to recollect by the fact that he was leaving for Dublin *en route* for America at eight o'clock that evening, and had a great press of business to get through before doing so, and I think that there is every reason to believe that his description of the meeting, as a short and very summary one, is correct. And I believe him and Ferguson as against Selkirk that the draft was certainly not read over to Ferguson. It is not possible to determine whether Ferguson had, as he avers, any prior assurance by telephone from Selkirk earlier in the day that he had made no material alteration on the draft; but I think that expressions were used at the second meeting of Tuesday the 28th, parties being at cross purposes, which led Ferguson to believe that in Mr Slark's opinion there were no important alterations. His attention was not drawn, as I believe it would have been had Mr Davis been present, to the material alteration on article 8. Now, there was in course of this second meeting something said by Mr Slark to the effect that Ferguson had better have the draft agreement gone over by his own agent, to which Ferguson replied that he did not think that necessary, which led Selkirk for the first time to understand that Mr Slark was not acting for Ferguson, and I think that it would have been prudent and more honest on Selkirk's part if in these circumstances he had drawn Ferguson's attention to the alterations on article 8, of the importance of which his agent Mr Davis had convinced him. However, he did not do so, and the parties separated on the understanding that Davis' revise, with the tenth article added, to which I think, by the way, attention was drawn, should stand as the final form of the agreement, should be extended after Mr Slark's departure, and should be signed by the parties on their attending at the office next forenoon, Mr Slark's partner, who practically knew nothing of the business, seeing to the execution. The parties attended accordingly on the forenoon of Wednesday the 1st March, and the agreement, extended in duplicate, was placed in their hands. Selkirk and Slight at once carried off his part of the agreement along with Mr Davis' revised draft to another room, and there carefully compared it before signing. It is impossible to account for or excuse the folly and neglect of Ferguson, who sat, while they were away, with his counterpart of the agreement lying before him, without asking for the means of comparing it with any draft, and without ever reading it. But so apparently he did, and so accordingly, when the others came back, he signed the agreement in blind reliance on Messrs Slark, Edwards, & Company's engrossment being correct, and that the adjusted draft contained no material alterations or differences, except in the addition of article 10, from the draft which he himself had revised and approved. But however one must condemn Ferguson's conduct at this stage, it is impossible to come to any other conclusion than that he signed a document in terms materially differing from those of the document which he believed he was signing. It is no question of the misunderstanding of the import and effect of the document, it was error as to the document itself, and I cannot therefore hold Ferguson to be bound by his signature. I think further that his conduct immediately after the signature was consistent with the *bona fides* of his mistake. At the meeting for signature he was pressed for time to catch the afternoon train for Glasgow. On arriving there the first thing that he did on returning to business was to show his counterpart of the agreement to his partner Mr Mount. Mr Mount at once drew his attention to the very serious position in which he was left under clause 8 as executed, and he at once without loss of a day wrote repudiating the agreement as it stood, thus sacrificing the whole of his labour for months previous to bring this arrangement to a point, risking and ultimately forfeiting the agreement which he had obtained with Mr Cohen and his associates, and sacrificing all prospect of any advantage from his patent.

"As therefore I am unable to hold that there was any valid agreement between Ferguson and Selkirk, I shall assoilzie the former from the conclusions of the action for damages for breach of contract at Selkirk's instance, but in respect of Ferguson's inexcusable conduct at the signing of the agreement I shall find neither party entitled to expenses."

The pursuer reclaimed, and argued — There was no essential error on the respondent's part as to the actual deed he was signing, and that being so he was not entitled to have it reduced. *Esto* that if one signed a bond thinking it was a conveyance he was entitled to plead essential error, that principle did not apply here. The Lord Ordinary was in error in so thinking. The respondent's failure to notice the alteration was due to his own fault in omitting to compare the extended agreement with the draft, or even to read over the deed before signing it. No misrepresentation as to the terms of the alteration had been proved, nor had any "induc-

ing." Where a party was not in error as to the actual deed he was signing, his erroneous belief as to its terms would not entitle him to have it reduced unless that belief had been induced by the representations or misrepresentations of the other contracting party—Bell's Prin., section 11, approved in *Stewart* v. *Kennedy*, March 10, 1890, 17 R. (H.L.) 25, at p. 27, 27 S.L.R. 469, at p. 471; *Young* v. *Clydesdale Bank, Limited*, December 6, 1889, 17 R. 231, 27 S.L.R. 135.

Argued for respondent—The Lord Ordinary was right. The alterations were of so material a character as to make the deed a different document from that which the respondent thought he was signing. The reclaimer was in honour bound to point out the alterations made, for the parties here were not dealing at arm's length. They were prospective partners discussing an arrangement for their mutual benefit, and were therefore in a fiduciary relation to each other. In such circumstances there was a duty on each to see that the other knew the whole facts in which they were mutually interested. Reference was made to *Hogg* v. *Campbell*, March 12, 1864, 2 Macph. 848, at pp. 857–8.

At advising—

Lord PRESIDENT—This is an action at the instance of an advertising contractor called Selkirk against Alexander Ferguson. Ferguson had come into possession of certain patents in regard to an advertising apparatus, to which was given the soubriquet of "animated posters." Ferguson conceived that the invention was one out of which money could be made, but he was not in a position to work it. He had not a connection which would enable him to secure advertisements, and he was not in a position to get up a company with the necessary capital to provide the machines and the expenses. He knew a man Slight, who was an agent of Selkirk, and through Slight he entered into negotiations with a view to seeing whether Selkirk would take up the matter. Selkirk professed himself willing to do so, so far as the advertising part was concerned, but he was not in a position to provide the money or to raise a company for the manufacture of the machines. Ferguson then proceeded to approach Cohen with a view to getting up a company, but in order to show Cohen that there would be advertisements for them, he thought it better to enter into an agreement with Selkirk dealing with the provision of advertisements. Accordingly Selkirk and Ferguson entered into the agreement which is the basis of this claim.

Under this agreement Ferguson bound himself to pay the costs of providing the machines, and to pay a salary to Selkirk; on the other hand, Selkirk bound himself to manage the business and to use his best endeavours to procure sites for the machines and provide advertisements at a minimum price. This agreement was duly signed. I need not go further into the negotiations between Cohen and Ferguson than to say that they were eventually broken off, Cohen electing not to go on and forfeiting a sum of £100. As a matter of fact no company has been formed, but Selkirk, alleging himself to have been all along ready and willing to do his part, sues Ferguson on the contract for damages in respect of his breach. Ferguson admits that he is not willing to go on with the contract, but he puts in a defence which is an avoidance of the contract on grounds which would infer its reduction. This is to the effect that there was a material alteration in the contract as signed from what was in the draft, that he signed it under error, that it was essential error, and I think that he is bound to say that the error was induced by the representations of the other party to the contract. He puts his ground of defence quite clearly in his fourth plea-in-law, where he says— . . . [*quotes supra*]. . . .

As regards the law on this point I do not think there can be any doubt. The law of this class of case was most distinctly laid down by the House of Lords in *Stewart* v. *Kennedy*, 17 R. (H.L.) 25, and, if I may take a single sentence from Lord Watson's opinion, I should quote this passage:—(p. 29)—"Without venturing to affirm that there can be no exceptions to the rule, I think it may be safely said that in the case of onerous contracts reduced to writing, the erroneous belief of one of the contracting parties in regard to the nature of the obligations which he has undertaken will not be sufficient to give him the right, unless such belief has been induced by the representations, fraudulent or not, of the other party to the contract."

That, I think, disposes of the third branch of the plea in defence here, but leaves untouched the first two branches I have read. I have laid greater stress on this because I have found difficulty in the ground of judgment of the Lord Ordinary. The alteration, which the defender here says was a material alteration, as to which he was in essential error, provided for Ferguson's continued liability although his interests were assigned to a company with a capital of £10,000 fully paid up. The parties had had a long meeting at which the draft was gone over, and each took away a copy to consider it. As the draft stood, Ferguson on assigning to such a company was to be no longer bound. Selkirk had his draft revised by his solicitor, who made the alteration. He made it in order to provide for the possible event of the company to which the interests were assigned being a bogus company. The parties had a meeting to adjust the agreement, which was of a somewhat hurried character, and there was a final meeting at which it was signed. In the view I take I do not think the discrepancies about what took place at the meeting are of any moment. The Lord Ordinary has disposed of the case, not upon the ground that any false representations were made by the other party to the contract, but on the ground that the defender signed one deed thinking he was signing another. I think his Lordship there is applying a doctrine of law in a way in which it has never been applied before. The understanding which

I think has always obtained as to what is error *in essentialibus* in this branch of law is that it applies where a man has signed a document of some sort thinking it is another sort of document. Mr Bell in his Principles (sec. 11) gives in so many words an illustration—"as, for example, if one sign a conveyance believing it to be a bond or security or a testamentary deed"; and there is a very well-known leading case in England where a person signed a deed, being told it was a release of rents, whereas it was a release of all claims. There there was a mistake as to the document; not so here. If the matter can be treated as the Lord Ordinary has done, in every case where there has been an alteration of any materiality it could be said that it is not the document. It is the same document with an alteration upon it. I think the Lord Ordinary has imported into his judgment something which has to do with a different class of case from this.

I should like to say also that I cannot agree with what the Lord Ordinary says—that there cannot be two opinions as to the materiality of the alteration. I think there is room for a difference on the matter, and that it was perfectly possible for one to form an opinion that it was not material. On paper it was a decided alteration. But practically it probably was not. It was not a term of the contract which would necessarily come into operation, for the company might never be formed. And if it was formed, the security of the company with £10,000 paid up was practically ample to protect Ferguson for a liability for a salary of £10 a-week for three years.

I do not think the Lord Ordinary's judgment can stand. But that leaves the case, which is quite well set forth in the defences, that the error in which the defender was as to the actual difference in the documents was induced by the misrepresentations of the other party to the contract. The pursuer cannot object to his own account of what passed being taken, and that account seems to me to negative any idea that there was any representation by the other party which led the pursuer to sign. By that account he referred the question to Slark, and he was content to abide by Slark's opinion. He knew that there were alterations. He chose to be guided by Slark's view that these were not material—a view which, as I have already pointed out, might, I think, be quite an honest one. And then, though having the opportunity of reading for himself, he did not do so. In such circumstances I think there are no grounds for reduction.

LORD KINNEAR—I entirely concur, and I have the less hesitation in concurring because I think that on the question of fact the Lord Ordinary has not arrived at any different conclusion from that which we have formed, and that if he had held that the true issue was whether the defender had been induced to enter into the contract which he signed by the representations of the pursuer he would have given the same verdict as your Lordship has proposed. The view which he takes of the defender's conduct is even more unfavourable than that which your Lordship has expressed, for after examining the whole proceedings at the meeting he says "It is impossible to account for or excuse the folly and neglect of Ferguson." In a later passage he refers to his "inexcusable conduct at the signing of the agreement," and on that account refuses to award him expenses in spite of his success in the action. The Lord Ordinary cannot have meant to decide that the defender's signature was obtained by the pursuer's representations, since he finds that his conduct in signing was inexcusable, due entirely to his own folly. The judgment of the Lord Ordinary therefore comes to rest upon the opinion in law which he expresses when he says—"However one must condemn Ferguson's conduct at this stage, it is impossible to come to any other conclusion than that he signed a document in terms materially differing from those of the document which he believed he was signing. It is no question of the misunderstanding of the import and effect of the document, it was error as to the document itself, and I cannot therefore hold Ferguson to be bound by his signature." I understand this to mean that the contract actually signed by Ferguson was not his deed because he believed he was signing an instrument of a different character. Now there is authority to the effect that when a man signs one document thinking it to be another and different document he is not bound by his signature. The early English case to which the Lord President referred—*Moroughgood's* case—is an excellent illustration. There may be an element of fraud in such cases, but in the more recent decision of *Foster* v. *Mackinnon* the law is expounded in a sense which seems to coincide with the Lord Ordinary's view, for it is said that an instrument executed in the belief that it is one thing while in fact it is another is invalid not only on the ground of fraud but on the ground that the mind of the signer does not accompany the signature, or in other words that he never intended to sign, and in contemplation of law never did sign, the contract to which his name is appended. But this is quite a different case. The defender knew the contract that he was signing. He knew that alterations had been made on the draft, and that the document which he was asked to sign was the deed so altered. He did not know what the alterations were, but he asked if they were material, and on being told by Mr Slark that they were not he thereupon signed the deed. In these circumstances to say that he signed a totally different deed from the one which he thought he was signing appears to me to be out of the question. The deed he signed was exactly the deed which he thought he was signing—to wit, a contract in the terms of the draft he had seen, but with alterations the nature and importance he did not know, but which he was content to accept in reliance on the opinion of Mr

Slark. The true issue is whether the error under which he signed was induced by the other party to the contract, and on that issue the judgment of the Court must be for the pursuer.

LORD DUNDAS concurred.

LORD M'LAREN and LORD PEARSON were not present.

The Court pronounced this interlocutor:—

"Recal the said interlocutor: Decern against the defender for payment to the pursuer of the sum of £250: Find the pursuer entitled to expenses, and remit," &c.

Counsel for Pursuer (Reclaimer)—Crabb Watt, K.C.—R. Scott Brown. Agent—John Robertson, Solicitor.

Counsel for Defender (Respondent)—M'Kechnie—A. J. Louttit Laing. Agent—David Philip, S.S.C.

Friday, October 25.

FIRST DIVISION.

GOWANS *v.* ADAMS.

Administration of Justice — Agent and Client—Duty of Agent Ceasing to Act for Party to a Cause to Furnish Opposite Party with Former Client's Address.

Where an agent has ceased to act for a party to a cause, it is his duty to furnish the opposite party's agent with his former client's address.

In an action at the instance of Gowans, a trustee on a bankrupt estate, for a balance alleged to be due on certain Stock Exchange transactions, the Lord Ordinary granted decree as craved.

The defenders, Mr and Mrs Adam, reclaimed.

On the case being called in the short roll on 23rd October, counsel for the respondent alone appeared. He stated that his agents had received intimation from the agents who had hitherto acted for the reclaimers that they no longer represented them, but that they had, however, intimated to their former clients that the case had been put out for hearing. He further stated that his agents had asked to be furnished with the reclaimers' address, but it had not been supplied, and that consequently his agents had been unable to give any intimation to the opposite party.

The Court (the LORD PRESIDENT, LORD KINNEAR, and LORD DUNDAS) continued the case till 25th October, and directed the Clerk of Court to write to the former agents of the reclaimers requiring them to appear at the bar at 10 o'clock on the 25th instant in order to explain their failure to furnish the respondent's agents with the address of their former clients.

On 25th October the reclaimers' former agents appeared by counsel, when the LORD PRESIDENT stated that the Court was quite satisfied with an explanation contained in a letter which had been written to the Clerk of Court.

His Lordship added:—I only wish to add that I should like it clearly understood by agents practising in the Court, that in every case in which they cease to act for a party it is their duty to furnish the agent for the opposite party with the address of their former client, if it is known to them, so as to enable that party to move the Court to proceed if further attendance is not made. For the Court will not deal with the case as if all parties had been properly convened when no appearance is made for one of the parties, and the Court is told that the only intimation he has received of the hearing is intimation from his former agents; the intimation must be given to him by his opponent.

[Intimation having been duly given to the reclaimers, and no appearance being made, the Court on 30th October refused the reclaiming note with expenses.]

Counsel for Respondent—D. M. Wilson. Agents—Fraser & Davidson, W.S.

Counsel for the former Agents of the Reclaimers — Orr, K.C. — R. Macaulay Smith. Agents — Clark & Macdonald, S.S.C.

Saturday, October 26.

OUTER HOUSE.

[Lord Mackenzie.

LAFFERTY *v.* CALEDONIAN RAILWAY COMPANY.

Process—Act of Sederunt—Date—Date when Act of Sederunt Comes into Operation—Court of Session Act 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 106.

Held that an Act of Sederunt dated 20th March 1907 came into operation on that date, although it was subject to alteration by Parliament for a period of thirty-six days thereafter in terms of the Court of Session Act 1868 (31 and 32 Vict. cap. 100), sec. 106.

Opinion that an Act of Sederunt dealing with procedure is retrospective, in the sense that it would apply to an action raised before its date.

Expenses—Appeal for Jury Trial from Sheriff Court—Expenses in Sheriff Court—Act of Sederunt, 20th March 1907, *sec.* 8.

The Act of Sederunt 20th March 1907, section 8, enacts—"Where the pursuer in any action of damages in the Court of Session, not being an action for defamation or for libel, or an action which is competent only in the Court of Session, recovers by the verdict of a jury £5 or any sum above £5 but less than £50, he shall not be entitled to charge more than one-half of the taxed amount of his expenses, unless the judge before whom the verdict is obtained