ment, however, we were referred to the authoritative case in the House of Lords of *M'Cartan* v. *Belfast Harbour Commissioners* ([1911] 2 I.R. 143) in which the case of *Donovan* and also the case of *Cairns* came up for consideration. In that case the House of Lords refused to disturb the verdict of a jury given in what appear to me to be quite similar circumstances to the present. Lord Dunedin in the course of his opinion, reviewing the different authorities, expresses approval of the opinion of the Lord Ordinary in the case of *Cairns*. That being so I think it would be a waste of time on our part if we were to have any further argument upon a question which is now authoritatively decided.

The LORD PRESIDENT was absent.

The Court discharged the rule and of consent applied the verdict.

Counsel for the Pursuers—Watt, K.C.—J. A. Christie. Agents—Murray Lawson & Macdonald, W.S.

Counsel for the Defenders—Wilson, K.C.—Skelton. Agents—Gillespie & Paterson, W.S.

Friday, July 18.

SECOND DIVISION.

[Lord Ormidale, Ordinary.

SHANKLAND & COMPANY *v.* JOHN ROBINSON & COMPANY.

Contract — Essential Error — Representations Made by Seller Rendered Untrue—Failure to Inform Intending Buyer of Change.

A firm of straw-rope manufacturers, relying on the truth of representations made by the prospective sellers that the Government would not interfere with the sale and delivery of articles about to be exposed at an auction sale, arranged to purchase a traction engine at the auction sale. After these representations had been made, and before the auction sale took place, it came to the knowledge of the sellers that Government intervention inhibiting the delivery of or impressing the articles was possible, although they still had good grounds for believing it very unlikely. The sellers failed to inform the buyers of this, and they in reliance on the original representations proceeded to effect their proposed purchase. On their failure to obtain delivery of the engine owing to action by the Government, the buyers stopped payment of the cheque which they had sent to the sellers, who thereupon sued for the price of the engine. *Held* (*dis.* Lord Salvesen) that the defenders were entitled to rescind the contract, the concealment of the change of facts having induced essential error in their minds with regard to the subject-matter of the contract.

Shankland & Company, merchants and contractors, Glasgow, *pursuers*, brought an action against John Robinson & Company, straw-rope manufacturers, Wigan, *defenders*, for payment of the sum of £587 10s., the price of a traction engine alleged to have been purchased by the defenders from the pursuers at a sale by auction on 17th January 1918.

The pursuers pleaded, *inter alia* — "(1) The sum sued for being due and restingowing by the defenders to the pursuers, decree should be pronounced as craved."

The defenders pleaded, *inter alia*—"(6) The pretended sale by auction having been entered into and the bids made by the defenders under essential error induced by the false and reckless representations and assurances of the pursuers, the sale is void or voidable and ought to be set aside."

The following *narrative of the facts* is taken from the opinion of the Lord Justice-Clerk :—"While the pursuers' averments are not as precise and pointed as they might have been, the record, fairly read, sets forth that Mr Robinson was in urgent need of an engine which he could have for immediate use by his company, and that on seeing the pursuers' advertisement, and being aware of the demands the Government were making for such engines as he wanted, and of the powers they had of commandeering them, he went to Hamilton on or about 9th January in order to ascertain from the auctioneers—whose address was the only one given at which inquirers could get information—whether if he bought the engine he might rely on getting delivery of it after the sale, so as to have it conveyed to England without interference by the Government. He went to Hamilton accordingly, and there saw both Mr Reid, the auctioneer's clerk, and also Mr Shirlaw, the auctioneer, himself. I think it is established by the proof that he fully explained his position to both of these gentlemen, and especially the importance which he attached to delivery being given immediately after the sale on payment of the price, without any impediment due to Government interference. In my opinion it is proved that both Mr Reid and Mr Shirlaw gave him the assurances he required and stated to him that the arrangements which had been already made removed any risk of Government interference, so that he could rely on getting delivery without delay or difficulty after the sale of any article he bought, so as to enable him to have them sent off at once to England for the use by his firm in the ordinary course of their business. In all this I think all the parties acted perfectly honestly and in entire good faith. On the day after this Mr Robinson interviewed Mr D. Shankland at Cupar on the same subject. At Cupar Mr Robinson made the same inquiries and got the same information and assurances, all parties again being perfectly honest and acting in the best of faith. I think it is also proved that but for the information and assurances Mr Robinson would not have bought the engine. Up to this time the Government had not interfered in the matter. But on 15th January

—two days before the sale—Lieutenant Freeman went to Cupar and there and then intimated that he wanted to secure the engine in question for the Government. The pursuers were so impressed with the seriousness of Lieutenant Freeman's views as to taking the engine, and so alarmed at the attitude taken up by him, that Mr Shankland on the next day, 16th January, went to Edinburgh to see Colonel Gordon, who was Lieutenant Freeman's superior officer. There were two interviews on the 16th January with Colonel Gordon. At these interviews Colonel Gordon said that so far as he and his department in Scotland were concerned the sale of the engine and its delivery to the purchaser would not be interfered with. But he also said that he did not know what the views of the War Office in London were on the subject, and that the decision lay entirely with them. He further stated that he would communicate with the London War Office and let the pursuers' law agents know the result by telephone that evening. He, however, stipulated that his representative would attend the sale the following day, and that the pursuers should supply that representative with the names and addresses of the purchasers, so that if the War Office wanted the engine they would know where to get it, and to this the pursuers agreed. The same evening a telephone message was sent from Colonel Gordon's department in Edinburgh to the pursuers' solicitors of the following import, as stated in evidence by the receiver, Miss Whigham—"It was all right about the sale to-morrow; it could take place, and that one of their representatives would be present. He said the sale would not be interfered with." It does not appear from the proof who actually sent the message, and it did not say that any reply had been received from London. Who sent the message has not yet been cleared up very satisfactorily. But the pursuers and their advisers understood the message to mean that London had replied to Colonel Gordon, and that the sale and delivery of the articles would not be interfered with by or on behalf of the Government. They cannot, I think, be blamed, at least for allowing the sale to proceed in view of this message. In point of fact, however, no reply had been received from London and the agreement about the Government representative attending the sale and the pursuers giving the names and addresses of the purchasers to the Government representative was still understood by the pursuers to be an effective obligation. The sale went on next day and the defenders, who had received no notice of what had passed on 15th and 16th January, bought the engine in question at the price of over £500, which is the sum now sued for. After the sale Lieutenant Freeman asked for the names and addresses of the purchasers in terms of the foresaid agreement, but it was explained to him that there was no time to get these written out for him on the afternoon of the 17th but that the required information would be given at Edinburgh next day. There was some unpleasantness with Lieutenant Freeman on the subject, and he wired to Edinburgh stating that his request for the names and addresses had been refused. He was in consequence instructed to stop the delivery of any of the articles sold, and he did so; while the pursuers telegraphed to Edinburgh that there had been no such refusal and that they would give a note of the names and addresses to Colonel Gordon's department at Edinburgh next day, and they did so. Lieutenant Freeman, however, on the 17th January called in the police at Cupar and stopped all deliveries, and this restraint on the delivery of the engine was never withdrawn. On 30th January the Government actually commandeered or impressed the engine and they have retained it ever since, and the defenders, who had forwarded their cheque on the 19th January in payment of the price of the engine, finding they could not get delivery, stopped payment of the cheque and bought another engine elsewhere. In the whole matter I think all parties acted in entire good faith. But a very serious legal question is raised by the facts, viz., that while Mr Robinson had had representations made to him on 9th and 10th January which induced him to believe that in consequence of what had passed between the sellers and the Government he would have no difficulty in getting delivery of anything he bought, subsequent development of facts showed that Lieutenant Freeman was most anxious, and so far as he was concerned had determined if he could, to keep the engine; that while Colonel Gordon did not agree with him as to this the question had been referred to the War Office in London, who were to decide whether the engine was to be kept or not for the Government; that in order to make an adverse decision by the Government effectual if such a decision were arrived at, the sellers were to give the Government the names and addresses of the purchasers at the auction so that the goods could be followed up; that the decision from London was not arrived at before the sale; and that, despite the above telephone message, the arrangement about the names and addresses was still recognised by the pursuers as in force. Nothing of all this was communicated to Mr Robinson, who bought still in the belief, induced by the pursuers' representations made as aforesaid to him on 9th and 10th January, that he would get delivery immediately after the sale. But for this belief I think it is proved that Mr Robinson would not have been a bidder at the sale. After the sale—on the afternoon of the 17th—delivery was actually interpelled, as I have pointed out, by the Government owing to the misunderstanding before referred to, and the defenders never got the engine because it was impressed by the Government."

Proof having been allowed and led, the Lord Ordinary (ORMIDALE) on 4th February 1919 assoilzied the defenders.

Opinion.—[*After narrating the averments and facts his Lordship proceeded*]—"It is necessary to have regard to what, after all, was the effective cause of the embargo being

placed on the removal of the engine immediately after the sale. That in my opinion was the failure of the pursuers to implement the condition imposed by Colonel Gordon on the sale being allowed to proceed, namely, that the names and addresses of the buyers should be handed to the military representative of his department present at the sale. No doubt a list of the names and addresses was delivered to the forage department the following day, but the request for it on the day of the sale by Lieutenant Freeman was point blank refused. . . .

"Now in breach of this condition, as I have said, the names and addresses were refused to Lieutenant Freeman, and for no reason other than that it was inconvenient. Had there been no refusal there is nothing to suggest that any embargo would have been laid on the removal of the engine, and it is undoubted that in laying on the embargo Lieutenant Freeman was acting within the scope of his authority. It was the embargo then laid on—not the impressment order served in the end of January—which prevented the delivery of the engine to the defenders, who, themselves in complete ignorance of the difficulties that had arisen, sent their cheque the following day and gave instructions about the railing of their purchase.

"In these circumstances the pursuers are not in my judgment entitled to recover the price of the engine. They themselves were directly responsible for their failure to give delivery. I cannot hold that among the risks taken in terms of the conditions of sale was the risk of the pursuers by their own conduct disabling themselves from removing the engine from the sale-yard. The risks contemplated by the contract were risks outwith the power of the sellers to avoid, and did not include the very special and extraordinary risk called into existence, in the first place, on the eve of the sale by the deliberate act of the sellers, and, in the second place, allowed by them to materialise by their failure to do something which it was well within their power to perform.

"I shall accordingly assoilzie the defenders."

The pursuers reclaimed, and argued—The averments on record had disclosed no sufficient reason for the judgment which the Lord Ordinary had pronounced. The pursuers had given expression to a belief that the Government would not interfere with the sale or delivery of the traction engine. They had every reason to believe that expression to be true, and it was true. Nothing had to their knowledge occurred prior to the sale to render it untrue. But further, the statement was no essential part of the contract, and did not constitute a representation the fallacious character of which was to justify the course which the defenders followed. The buyers ought to have reckoned with the risk of the engine being commandeered by the Government. Counsel referred to the following authorities:—*Romanes* v. *Garman*, 1912, 2 S.L.T. 104, *per* Lord Dunedin; *Menzies* v. *Menzies*, 1893, 20 R. (H.L.) 108, *per* Lord Watson at p. 142, 30 S.L.R. 530; *Woods* v. *Tulloch*, 1893, 20 R. 477, *per* Lord Kyllachy, 30 S.L.R. 479; Ker on Fraud, p. 49.

Argued for the defenders—The pursuers having failed to deliver the engine, the *onus* was on them to explain why they had not done so—Bell's Prin., sections 113, 114, and 400. The defenders had stipulated for immediate delivery, and it was a condition of the contract that the Government would not interfere with the sale or delivery of the engine. The pursuers ought to have informed the defenders as soon as they discovered the probable intention of the Government to commandeer the engine. The contract ought to be rescinded, as it had been entered into under essential error, which had been induced by the pursuers' misrepresentations as they were with their later knowledge. Counsel referred to the following cases:—*Jacobs* v. *Scott & Company*, 1899, 2 F. (H.L.) 70, 36 S.L.R. 611; *Menzies* v. *Menzies* (*cit.*), *per* Lord Watson at p. 142; *Hart* v. *Fraser*, 1907 S.C. 50, 44 S.L.R. 31; *Laing* v. *Provincial Homes Investment Company, Limited*, 1909 S.C. 812, *per* Lord Kinnear at p. 826, 46 S.L.R. 616; *Crossan* v. *Caledon Shipbuilding, &c., Company, Limited*, 1906, 43 S.L.R. 852; *Lipton Limited* v. *Ford*, (1917) 2 K.B. 647; *Brownlie* v. *Miller, &c.*, 1880, 7 R. (H.L.) 66, *per* Lord Blackburn at p. 82, 17 S.L.R. 805; *Stewart* v. *Kennedy*, 1890, 17 R. (H.L.) 25, *per* Lord Watson at p. 28, 27 S.L.R. 469; *Woods* v. *Tulloch* (*cit. sup.*); *Romanes* v. *Garman* (*cit. sup.*).

LORD JUSTICE-CLERK—[*After the narrative of the facts given above*]—I think Mr Robinson when he offered for the engine at the sale did so under essential error, in the meaning of that term as expressed by Lord Watson in *Menzies* (20 R. (H.L.) 142), where he says—"Error becomes essential whenever it is shown that but for it one of the parties would have declined to contract." Having regard to what was said in the case of *Jacobs* (2 F. (H.L.) 70), particularly by Lord Halsbury, to the opinions in the case of *Blakiston* (21 R. 417), and to Lord Blackburn's judgment in *Brownlie* v. *Miller* (7 R. (H.L.) 79), I have come to be of opinion that the pursuers are not entitled to recover the sum sued for, and accordingly that the reclaiming note should be refused.

In my opinion, even in the state of the pursuers' knowledge and belief on the evening of the 16th January after the receipt of the telephone message, the pursuers ought to have disclosed to Mr Robinson what had transpired at the meetings of the 15th and 16th January, and I think that they were not excused for failing to do so by the honest mistake which they made as to that message in so far as they thought that a message of some kind had been received in Edinburgh from London with regard to the impressment of the engine.

I ought, I think, to add that I could not adopt the ground of judgment on which the Lord Ordinary proceeded. I think it was neither sufficiently averred on record nor was it in my opinion established in fact.

LORD DUNDAS—This is a substantial case, and it has been keenly fought. But having

listened to the arguments and considered the evidence I think it comes to turn on narrow issues, and that the grounds of judgment may be expressed with brevity.

The defender Mr Robinson has, in my judgment, established that on the 9th and 10th January 1918 he received verbal assurances from Mr Shirlaw, Mr Reid, and Mr D. Shankland to the effect that matters had in fact been so arranged with the military authorities that if he should buy the engine in question at the ensuing sale there would be no difficulty in the way of his obtaining delivery of it for immediate use in England for the purposes of his business, and that he made it clear that except on this footing he would not think of bidding for the engine at all. The assurances were given in perfect good faith, and, indeed, there did not at that time appear to be the slightest ground for apprehension that there would be any such difficulty. But the position of matters had, I think, materially altered before the sale took place on 17th January. On the 15th Lieutenant Freeman had intimated his intention to impress some of the machinery, including this engine, for Government purposes. On the 16th the matter was brought before his superior officer Colonel Gordon at an interview (or interviews) between him and representatives of the pursuers. Colonel Gordon's attitude was that so far as he himself was concerned the sale might go forward and would not be interfered with, but that he could not answer for the authorities in London, that he would telephone to London for instructions and let the pursuers' agents know the result, and it was arranged that the pursuers should supply the military authorities with a list of the addresses of purchasers of the machinery and plant in order that the Government might follow these up if so advised. On the evening of the 16th the pursuers' agents received a telephone message, which I do not doubt came from Colonel Gordon, and which they understood, as they expressed in their letter of that date to Colonel Gordon, to mean that notwithstanding Lieutenant Freeman's impress the War Office in London had instructed Colonel Gordon to allow the sale of machinery, including this engine, to proceed on the 17th, and that the sale would accordingly not be interfered with by Colonel Gordon's department, but that an official from that department would be present at the sale. It was not, I think, unnatural that the pursuers' agents should suppose that the impress or embargo had been definitely removed by the War Office. The fact, however, seems to have been that the London authorities had not given Colonel Gordon definite instructions, and had not finally made up their minds. In point of fact their representative attended the sale in order to get from the pursuers a list of the purchasers' addresses, so that the Government might be in a position to follow up the articles if they so desired.

Now I think that in these circumstances it was the duty of the pursuers, looking to their previous assurances to Mr Robinson, to inform him before he bid for the engine of the exact position of matters, and in particular that a Government official was present, by arrangement, at the sale for the express purpose of receiving a list of the addresses of purchasers so as to enable the Government to follow up the articles if they should desire to do so. They did not so inform Mr Robinson, acting (as is admitted) in perfectly good faith. If they had done so there seems, I think, on the proof to be no doubt that Mr Robinson would not have become a purchaser. He says so distinctly in the concluding sentences of his evidence.

Concealment of material facts, or failure to disclose them, however innocent, may be just as good a ground of action, or of defence, as innocent misrepresentation. In *Menzies* v. *Menzies* (1893, 20 R. (H.L.) 142) Lord Watson observed, in conformity with what his Lordship had more fully expressed three years before in *Stewart* v. *Kennedy* (1890, 17 R. (H.L.) 25)—"Error becomes essential whenever it is shown that but for it one of the parties would have declined to contract. He cannot rescind unless his error was induced by the representations of the other contracting party, or of his agent, made in the course of negotiation, and with reference to the subject-matter of the contract. If his error is proved to have been so induced, the fact that the misleading representations were made in good faith affords no defence against the remedy of rescission." I may refer also to the case of *Blakiston* (1894, 21 R. 417), to which the Lord Justice-Clerk directed my attention. It seems to me that when we contrast the assurances or representations made by or on behalf of the pursuers in perfectly good faith to Mr Robinson on 9th and 10th January with the conditions in fact subsisting at the time of the sale on the 17th, we must hold that the pursuers in failing, however innocently, to inform Mr Robinson of these facts, induced error in his mind with regard to the subject-matter of the contract which was essential, because but for it Mr Robinson would not have become the purchaser of the engine; and that the defenders are in a position to rescind the contract and refuse payment of the price.

I am, therefore, for adhering to the interlocutor of the Lord Ordinary. Though my conclusion is the same as his Lordship's, my ground of judgment is different. As regards that on which the Lord Ordinary proceeded, I need only say that I do not find it stated, or even adumbrated, on the record; that the defenders' counsel definitely informed us that they did not desire to make any amendment of their pleadings with a view to raising it; and that, as at present advised, I do not think I should be prepared to adopt it even if it had been properly pleaded.

LORD SALVESEN—I have the misfortune to differ from the rest of your Lordships as to the result in this case, and therefore it is right that I should state as shortly as I can the grounds upon which I think the pursuers here are entitled to succeed.

Your Lordships have already decided that a contract of sale was completed by the fall of the hammer, when Mr Robinson was

declared the purchaser of this particular steam engine. Accordingly the defenders could only succeed on one of two grounds.

The first of these grounds is that it was a condition of the contract, expressed or implied, that after the sale the Government would not interfere with Mr Robinson's removing the steam engine. The defender attempted to establish by his own evidence that at the meeting to which your Lordships have referred in the beginning of January an express undertaking or warranty to this effect was given. That rests entirely upon his evidence and is not supported to the smallest extent by the witness whom he adduced as corroborating him. It is contradicted by all the witnesses for the pursuer, and it is not even put to any of them in cross. Not one of them is asked, so far as my recollection of the proof goes, whether there was an undertaking that there should be no Government interference with the purchase of Mr Robinson if he made that purchase. Accordingly the case on express warranty—which I take to be the defenders' leading case here—in my judgment entirely fails. As regards the implied warranty I do not know on what it rests, and indeed Mr Christie was driven to the view that he must imply the condition from what passed in the way of verbal assurance, admittedly true at the time they were made at the meeting I have already referred to.

The only other ground of defence is that, there being a concluded contract of sale, the defenders are entitled to rescind it because Lieutenant Freeman, the Government representative, whose action was afterwards confirmed by the War Office, laid an impressment upon the engine which prevented the purchaser from obtaining delivery of it. The ground of rescission is that there was misrepresentation—innocent, no doubt it is said, but misrepresentation or concealment—of some facts which, if the truth had been disclosed to the purchaser, would have induced him to refrain from bidding at all.

Now it seems to me that in order for such a ground of rescission to succeed at all, it must be a misrepresentation of fact, not a statement of belief, and here I find nothing in the nature of a misrepresentation of fact. It is said that the situation had changed after the interviews at which the defender was told that the Government, so far as the pursuers knew, did not intend to interfere with the sale, that no permit was required for the sale of the engine, and that for the only goods included in the sale list for which permits were required permits had been granted. Every word of what was said by Mr Shirlaw, Mr Shankland, and Mr Reid (a clerk) at these interviews was absolutely true, so far as the facts were concerned. So far as belief was concerned, no doubt they entertained and expressed a belief as to what action the Government was likely to take, but it is not said that they did not honestly entertain this belief. I think they were well warranted in stating their view to the defender, who at the time when their statements were made was just as well able as the pursuers to judge as to whether the Government would interfere with the sale. He must be presumed to be just as familiar with the Regulations of the Defence of the Realm Act, which entitled the Government of the day at any time to requisition private property. Accordingly nothing that is stated at any of the interviews in question seems to me to raise a suggestion of bad faith or to have been otherwise than honest views entertained by these parties, as to whether or not the Government might interfere in the end. That was a matter upon which they were no better able to express an opinion than the defender.

In the meantime, however, it is said the situation had changed, and that it had changed when Lieutenant Freeman, a subordinate officer, intimated that he thought the War Office would probably require this engine among others. No doubt the pursuers, believing that Lieutenant Freeman had some warrant for what he had intimated, took a serious view of the situation, because there was no good preparing to expose things for sale when the sale of them might be stopped through the agency of a Government official. But they took means to ascertain whether the intimation was one which they were bound to respect. They went to Lieutenant Freeman's commanding officer and had an interview, at which he told them that so far as he was concerned they might disregard Lieutenant Freeman's intimation—in fact, that Lieutenant Freeman had no right whatever to give such an intimation as emanating from the Department. It was said, however, at that interview that the War Office might, of course, intervene, although Lieutenant-Colonel Gordon said that he would consider it to be most unfair that any Government Department should interfere after having waited so long in the full knowledge of the sale before taking any step.

But the matter does not rest there, because in the evening a telephone message was received, emanating from Colonel Gordon's department, which was to the effect—or was understood to be to the effect—that the War Office in London had been communicated with, and that they did not intend to prevent the sale of the machinery.

Now I can understand the view that if there had been an embargo lawfully threatened before the sale took place, that was a fact which, in view of the previous representations or assurances given, it might be necessary to disclose to intending purchasers. But so far from the situation having altered for the worse, it seems to me it had altered for the better, for not only had the pursuers been informed that Lieutenant Freeman's conduct was entirely unauthorised and had no support from his commanding officer, but that the War Office in London had no intention of interfering in the matter. Under these circumstances I think the pursuers had no duty through their auctioneer of making any intimation at the sale. No doubt it was stated as part of the telephone message that a representative of the military would attend the sale. That had no other significance than that it

showed that the military would at this sale, as I daresay at many other sales, take note where articles were going which they might in the future require, so that they might know in whose hands to lay hold of them. I do not think that that was a matter which required to be communicated to intending purchasers, even if these intending purchasers like the defenders had been assured that so far as the pursuers knew the military had no intention of interfering by laying an impressment upon any of the articles exposed for sale. As a ground of rescission I do not think a relevant case could have been averred, and in any event the facts proved are in my opinion inadequate to justify the rescission of the contract.

On these grounds, which are really based upon the facts as I read them, I come to the conclusion that the pursuers ought to succeed.

LORD GUTHRIE—I think the Lord Ordinary has arrived at the right result, and that the defenders are entitled to absolvitor.

I come to this conclusion on the ground of the defenders' essential error induced by the pursuers' and their agents' concealment of matters essential or at least material to the question of purchase by defenders. This ground in its essence, although the details are inaccurate, is set out in the record. I think it may fairly be held covered by plea 6, although that plea only founds in terms on representations and assurances and does not expressly refer to concealment. The point was not sharply and separately presented to us until near the end of defenders' senior counsel's speech, and it does not appear to have been brought before the Lord Ordinary as an independent ground of defence. It is not dependent on any facts which are seriously disputed, and it supersedes consideration of most of the difficult questions of fact and law which have occupied our attention during the last three days. As to the Lord Ordinary's sole ground of judgment, namely, breach of the obligation to furnish to the military authorities the names and addresses of the purchasers of the sixty articles in the sale catalogue, it depends on questions of fact and law not on record, and in any case I do not think the proved facts warrant the conclusion.

It is not necessary to affirm the general statement of failure of duty contained in the record so far as covering persons with whom the pursuers and their agents had had no previous relations comparable with their relations to the defenders. It is sufficient to affirm failure of duty, amounting to legal wrong inducing a contract, on the part of the auctioneers, who were the pursuers' agents from and up to the actual sale of the engine, and on the part of the pursuers' representative present at the sale.

As to the previous relation of the pursuers and defenders in regard to the engine in question, I negative nearly the whole case in fact and law made by the defenders on record, at the proof, and in argument. I think they have failed to prove (first) that any Government permission, written or verbal, was required either for the sale or delivery of the engine; (second) that at the date of sale there was any Government embargo either on the sale or delivery of the engine; (third) that the pursuers ever stated that they had received any such permission, formal or informal, either to sell or deliver; (fourth) that the defenders made it an express condition of purchase that there should be no interference by Government either with sale or delivery; (fifth) that the circumstances alone, or the circumstances taken along with the statements made, implied such a condition; or (sixth) as already mentioned, that there was any failure on the part of the pursuers and the auctioneers to give reasonable fulfilment of their obligation to the military authorities to give the names and addresses of purchasers. But taking the evidence as a whole I think it established—it is indeed not denied—that the defenders told the pursuers and their agents, the auctioneers, that they would not purchase at the sale or even attend it if the Government were to interfere with sale or delivery, and that the defenders were assured that so far as the pursuers and their agents then knew the military authorities were not going to take any concern with or interest in the sale.

Now the admitted fact is, that assuming the pursuers and their agents to have previously stated to Mr Robinson nothing except what was accurate, they knew from Colonel Gordon and Lieutenant Freeman before the sale, namely, on 15th and 16th January, that so far from the sale being an ordinary sale involving nothing but ordinary risks and contingencies, the Government had resolved to send, and they knew at the time of the sale that they had sent, a military representative with instructions to get the names and addresses of the purchasers of all the articles sold including the engine in question. Moreover, they ought to have seen that, whatever might be the views of his superior officer, this representative had made up his mind to secure the engine for the Government as soon as possible. In these circumstances I cannot but hold that the facts of the military representative's presence and of his instructions were material circumstances which the pursuers and their agents were bound in view of their previous statements and assurances to disclose to the defenders, and that, contrary, no doubt, to the pursuers' honest opinion, it was their legal duty to have known that these were circumstances which would be considered material by any prudent buyer, and, looking to what the defenders had admittedly said, would be considered vital by the defenders inducing them not to purchase or at least to reconsider their resolution to purchase. The result is that in the absence of any evidence that although Mr Robinson admits he saw a Government official walking about at the sale, he was aware that the official was there as a representative of the Government or by arrangement with the pursuers and the auctioneers and of his instructions to obtain the information necessary to enable the military autho-

rities to follow up and secure the articles, I must hold that the pursuers cannot sue for the price of the engine admittedly sold to the defenders, because the defenders are entitled to rescind the contract of sale on the ground of essential error induced, not by statements made by the pursuers, but by their concealment of material facts directly affecting the question of the defenders' purchase which they were bound to disclose, and which they failed to disclose to the defenders.

The Court adhered.

Counsel for the Pursuers (Reclaimers)—Constable, K.C.—W. T. Watson. Agents—Whigham & M'Leod, S.S.C.

Counsel for the Defenders (Respondents)—Christie, K.C.—D. M. Wilson. Agents—Fraser & Davidson, W.S.

Thursday, October 23.

SECOND DIVISION.

NEW ZEALAND AND AUSTRALIAN LAND COMPANY, LIMITED *v.* SCOTTISH UNION AND NATIONAL INSURANCE COMPANY.

Revenue—Income Tax—Company—Colonial Tax — Repayment — Preference Shareholders — Proper Deduction from Dividends—Right to Benefit by Repayment—Income Tax Act 1842 (5 *and* 6 *Vict. cap.* 35), *sec.* 54—*Finance Act* 1916 (6 *and* 7 *Geo. V, cap.* 24), *sec.* 43.

A company under whose articles of association the preference shareholders were entitled to a fixed dividend of 4 per cent. and no more, paid Colonial income tax at the rate of at least 1s. 6d. in the £1 on its profits earned in the Colonies. It subsequently obtained repayment under the Finance Act 1916, section 43, in consequence of having so paid Colonial income tax, of a certain proportion in the pound of the British income tax paid by it. *Held* that in paying the dividend on the preference shares the company was entitled to deduct the full amount of the British income tax, and was not bound to take into account the repayment it had received in respect of the Colonial income tax which it had paid.

Rover v. *South African Breweries*, [1918] 2 Ch. 233, decision of Astbury, J., *disapproved.*

The Income Tax Act 1842 (5 and 6 Vict. cap. 35), section 54, enacts—"That every such officer . . . of any . . . company . . . shall . . . prepare and deliver . . . a true and correct statement of the profits and gains to be charged on such . . . company . . ., computed according to the directions of this Act . . .; and such estimate shall be made on the amount of the annual profits and gains of such . . . company . . . before any dividend shall have been made thereof to any other persons . . . or companies having any share, right, or title in or to such profits or gains; and all such other persons . . . or companies shall allow out of such dividends a proportionate deduction in respect of the duty so charged. . . ."

The Finance Act 1916 (6 and 7 Geo. V, cap. 24), section 43, enacts—"If any person who has paid, by deduction or otherwise, United Kingdom income tax for the current income-tax year on any part of his income at a rate exceeding three shillings and sixpence proves to the satisfaction of the Special Commissioners that he has also paid any Colonial income tax in respect of the same part of his income, he shall be entitled to repayment of a part of the United Kingdom income tax paid by him equal to the difference between the amount so paid and the amount he would have paid if the tax had been charged at the rate of three shillings and sixpence, or if that difference exceeds the amount of tax on that part of his income at the rate of the Colonial income tax equal to that amount. In this section the expression 'United Kingdom income tax' means income tax charged under the Income Tax Acts; and the expression 'Colonial income tax' means income tax charged under any law in force in any British possession or any tax so charged which appears to the Special Commissioners to correspond to United Kingdom income tax."

The New Zealand and Australian Land Company, Limited, *first party*, and the Scottish Union and National Insurance Company, *second party*, brought a Special Case to determine the amount of income tax deductible by the first party from the dividend payable on preference shares held by the second party in the first party's undertaking.

The Case stated—"1. The first party is a company incorporated under the Companies Acts, and has its registered office in Scotland. It carries on business in the United Kingdom, and also carries on a large business as pasturalists and agriculturists in New Zealand and Australia, and owns a large amount of property in both Colonies. The share capital of the first party originally consisted of £2,500,000, divided into 2,500,000 shares of £1 each, consisting of 1,000,000 'A' preference shares and 1,500,000 ordinary shares. Its capital at the year ending 31st March 1917 was £2,500,000, divided into £1,000,000 'A' preference stock and £1,500,000 ordinary stock. In addition the first party had £677,400 of debenture stock and £1600 of debentures. No preference stock except the said 'A' preference stock has been issued. . . . 2. The second party holds £10,000 of the said 'A' preference stock in the capital of the first party. 3. The rights of the stockholders in the capital of the first party are fixed by its articles of association, which provide as follows, *videlicet*—'(10) Every holder of A preference shares or stock in the capital of the company shall be entitled to receive in each year a dividend upon such shares or stock, after the rate of four pounds per cent. per annum (and no more), out of the profits of each year before the