motive and the spirit in which these unfortunate proceedings plainly originated.

LORD KINLOCH—I am of opinion that this bill of exceptions should be disallowed. The question raised was whether the defender had gone on with diligence against the pursuer's person, after having, through his agent, agreed to give delay for payment of the debt. The Judge was clearly right in laying down that express authority to the agent formed entirely a question for the jury. In proceeding to say that "in law he had no implied authority to delay enforcing the diligence in the circumstances stated by the pursuer on record," I think the Judge must be held to have referred to those articles of the condescendence which, with the answers admitting the statements, were put in evidence by the pursuer, for these were the only parts of the record within the cognizance of the jury. In this view, I think the direction was entirely right, for the matter proved by these articles and their answers simply brought out that Mr Morrison was employed to raise and enforce diligence, which, without something else occurring, clearly implied no authority to grant delay. This undoubtedly did not conclude the case; for the authority might be implied from other circumstances. But these circumstances required to exist and be founded on. I cannot find them in the evidence; and the Judge being, I must presume, in the same predicament with myself, was not called on to give any additional direction on the subject. If the counsel for the pursuer conceived that such circumstances existed, it was his duty to bring them before the notice of the Judge, and to ask a special direction regarding them. In place of doing so, what the pursuer's counsel did, was to ask the Judge to send the whole case on implied authority to the jury for their exclusive determination—for such I consider to be the meaning of the request for a direction "that the question as to whether Morrison had implied authority to grant the delay was one on the evidence for the jury." This request, I think, was wholly without warrant; for implied authority was a mixed question of law and fact, in which the proper course was to lay down the law for the guidance of the jury, and leave them to apply this law to the facts as they should find them. I am of opinion that the Judge rightly refused to leave the whole case to the jury, as requested. And if this be so, the whole matter raised by the bill of exceptions is exhausted.

The Court disallowed the exceptions.

Agent for Pursuer—W. R. Skinner, S.S.C.
Agents for Defender—Philip Laing & Monro, W.S.

Tuesday, June 18.

DOBBIE *v.* DUNCANSON.

Sale—Fraud—Proof—Damages—Purchaser—Rental—Slump Sum.

Previous to the sale of a property, consisting of 67 subjects, the purchaser received from the seller a rental of £1201, 18s., in which three subjects were entered as "let on lease," and the rents specified, but the highest rent entered in the column for summation instead of the rent payable that year. Some time after the sale, the purchaser, in order to collect his rents, received a rental of £1159, 18s. as the rent actually payable that year. He nevertheless proceeded to complete his title to the property, made no offer to return it, and raised an action in which he claimed return of a sum proportioned to the difference between the two rentals, alleging that the sale had been effected by the fraud, concealment, and misrepresentation of the seller. Each party alleged that one Morrison, who had brought about the transaction, was the agent of the other; and several other points of fact were at issue between the parties. After argument on the relevancy, the Court thought it best "in the circumstances" to allow a proof before answer. *Held*, in fact, that Morrison was the agent of the purchaser, and that the property was of greater value than the price paid for it; and, in law, (1) that as no rental was mentioned in the deeds of sale, the sale was for a slump sum, and not by rental; (2) that the pursuer having qualified no damage, and made no offer of returning the property, was not entitled to claim damage on the allegation he would have offered a less price; (3) that the terms of the rental sufficiently warned the purchaser of the progression of the rentals; and (4) that it was the duty of a purchaser to make inquiries as to the property he was purchasing.

Actio quanti minoris—*Reparation.*

Opinion by Lord Kinloch that a defrauded purchaser is entitled to claim reparation on the principle of the *actio quanti minoris.*

Arrestment—Inhibition—Recal—Expenses—Interim Extract.

A pursuer having used arrestment and inhibition on the dependence of an action, the defender got them recalled by petition on caution, but the interlocutor made no reservation of expenses, and did not authorise interim extract. The petition process was extracted, and the defender proved successful on the merits. *Held* the defender was not entitled to ask in the principal action the expenses of having the arrestment and inhibition recalled; and that the Outer House interlocutor, having made no reservation of expenses, was final on the subject.

Observations on interim extract by the Lord President.

In October 1870 the pursuer purchased from the defender a tenement of shops and houses in Garscube Road, Glasgow, for the sum of £16,000. This sale, the pursuer alleged, was brought about through the agency of a Mr Morrison, acting for the defender in the transaction. The bargain was completed by missive offer, which bore to be written by Morrison for the pursuer, and by missive acceptance, written for the defender by his ordinary law agents. Neither in the missives nor in the disposition from the defender to the pursuer was there any mention of rental; but the pursuer alleged that the sale had taken place on a rental (A) of £1220, 18s., supplied by the defender to Morrison for him a few days previous to the sale. Shortly after the transaction was settled, the pursuer said he discovered that the rental was false in respect of over-statements of rent as regarded several of the subjects sold; and in respect that three shops were let on lease for a term of years, and that the rent payable at the end of the lease was entered on the said rental (A), instead of

the smaller rent payable in 1870-1. No explanation of these discrepancies had, he said, been given to him; and the intention of the defender had been fraudulently to deceive him by concealment and misrepresentation of the true rentals. He further said he had relied on this rental—on a valuation made by Mr Thomson, architect, Glasgow, in which the rental was stated to be £1201, 18s., and the value of the property to be £18,539; in a statement by Morrison that the rental would rise next year to £1235; and on various explanations in regard to the property which were false; and that these erroneous facts and figures were supplied by the defender to Morrison on purpose to deceive the purchaser. But for these mis-statements he would not have given £16,000 for the property; and he claimed a deduction from the £16,000 proportioned to the difference between the rental given him, viz., £1220, 18s., or the rental of £1201, 18s. mentioned in Thomson's valuation, and the actual rent payable for 1870 to 1871, viz., £1144, 18s. The rental of the present year was £1177, 18s. The pursuer made no offer to return the property; but after discovering the alleged errors, proceeded to complete his title to the property.

The defender denied that Morrison had acted for him, or that he had sold by rental. He alleged that the sale had taken place for a slump sum and not by rental; that rental A was not given till after the sale had taken place, and certainly never by him; that the only rental given by him was a rental (C) of £1201, 18s., and that the property was of much greater value than £16,000. The defender further alleged that he and his factor Davidson had gone over the various points of discrepancy between rental C and the real rent, and explained them to Morrison, as rental C had been prepared for the defender's own use, and not with a view to a sale of the property. Rental A had been prepared by the defender's factor, it was said, at Morrison's request, for information in regard to the probable increase in value of the property, and as a speculative estimate, and not as any statement of stipulated rents. Both rentals (A) and (C) expressly bore in regard to the properties entered at the maximum rent "let on lease," and gave the various progressions of rent.

The defender pleaded—"(1) The pursuer's statements are not relevant or sufficient in law to support the conclusions of the summons. (2) The pursuer being entitled to examine, and having examined the property before purchasing it, is barred from quarrelling the price. (3) In any event, the defender is entitled to *absolvitor*, in respect—(1) The sale took place for a slump sum, and not upon any rental, or at any rate upon a valuation made for the pursuer himself: (2) The subjects are of greater value than the price paid; (3) The pursuer having elected to abide by his purchase; and, after discovery of the alleged deficiency in value having deliberately proceeded to complete his title, and having retained possession of the property, is barred from making the present claim; and (4) The defender is not responsible for any misrepresentations the pursuer may have received from Mr Morrison, or for any act of defender's clerk *ultra vires* of his duty, and unauthorised by the defender. (4) The action being based on a plea of fraud, and no substantial averment thereof being set forth against the defender, he is entitled to *absolvitor*."

The Lord Ordinary (JERVISWOODE) pronounced the following interlocutor:—

"*Edinburgh, 2d November* 1871.—The Lord Ordinary having heard counsel and made avizandum, in terms of the preceding interlocutor of 19th October last, and considered the debate and whole process: Finds that the pursuer has not set forth on the record facts relevant to support the conclusions of the action: Therefore assoilzies the defender from the same, and decerns: Finds the pursuer liable in the expenses of process, of which allows an account to be lodged, and remits the same to the Auditor to tax and to report.

"*Note.*—The view on which, after anxious deliberation, the Lord Ordinary here proceeds, is one which is probably best explained by the terms of the interlocutor itself, and by the averments to which it bears reference.

"The sum of £996, for which the summons concludes, is expressly stated on the record to be the amount of damages which the pursuer has sustained through the fraudulent misrepresentation and concealment on the part of the defender, as specially alleged on the record. But this misrepresentation and concealment has, at the same time, direct relation to the transaction of sale and purchase of the property out of which this question has arisen; and consequently, if there be truth at all in the averments of the pursuer, these strike directly against the validity of the sale, and might probably entitle him to set aside the transaction, assuming that they are capable of being established in evidence. But the pursuer, for reasons, no doubt sufficient and satisfactory as respects his own interests, resolves to hold by the transaction in so far as it is favourable to himself, and to claim damages on a footing which, as the Lord Ordinary thinks, cannot be allowed, and which cannot be relevantly or competently stated by the pursuer while he is retaining and intends to retain the whole of the subjects of his purchase as his own. No one can estimate the value of these to the pursuer with such precision as he can. He must be held as being committed to the fact that the purchase was not disadvantageous; and if he were to succeed in his present demand, he would reap at once the full benefit of the transaction, and at the same time take from the defender the sum of £996, without the possibility of the latter having any opportunity of deriving benefit from the probable or possible rise in the value of the subjects. The Lord Ordinary is, however, of opinion that the transaction out of which this action has arisen must stand or fall in its entirety on its own merits, as one of sale and purchase; and that, as there is no attempt to set it aside as such, the present action cannot lie against the defender, and ought not to be sustained."

The pursuer reclaimed.

SHAND and LORIMER, for him, argued that where there has been fraud a purchaser can either rescind the contract, or maintain the contract and claim damages, and in such a case is not bound to offer to return the property. The only true rental is a rental (B) of £1159, 18s., supplied to the pursuer sometime after the sale, to enable him to collect the rent; and even it falls to be diminished by an overstatement of one rent to the extent of £15. The defender is liable for the misstatements by Morrison, who was his agent; and even if Morrison acted for both parties, or for the pursuer alone, he was fraudulently misled by the defender, who is

therefore responsible. The *actio quanti minoris* is recognised by the law of Scotland in cases of fraud, and has been given effect to in various cases. It was the defender's duty, in making up the rentals, to put in the summation column the actual rent paid that year, and not the higher rent payable at the end of the lease.

Authorities quoted—Stair, 1, 9, 14; *Graham* v. *Western Bank*, Feb. 2, 1864; *Wilson*, 13,330; *M'Lean*, 14,164; *Menzies*, 14,165; *Oliver* v. *Suttie*, Feb. 1, 1840; *Balmer* v. *Hogarth*, March 11, 1830; *Reddie* v. *Syme*, Feb. 10, 1831, and H.L., Aug. 11, 1832, 6 W. and S., 188: *Davidson* v. *Tulloch*, Feb. 20, 1860, 3 M'Q., 783.

Balfour and J. M. Lees replied—The remedy the pursuer asks is unknown to the law of Scotland, which does not recognise the existence of the *actio quanti minoris*. The only cases where a deduction has ever been allowed are not authoritative, and at any rate are where—(1) the purchaser has not received the full quantity, but only under deduction of a separable part, and sues on the warrandice on the ground of eviction *ex defectu juris*, or (2) where *res* have become irremediably *non integræ* before the defect is discovered, and restitution has become impossible. Here the purchaser got the full quantity he bought, and completed his title to the subjects in full knowledge of their alleged deficiency. In any event, both fraud and damage are required. But both rentals expressly state the progression of rents on the three subjects let on lease, and it was the purchaser's duty to inquire. Rental C is in other respects correct. There is therefore no ground for alleging fraud. But the sale was not by rental, but for a slump sum, which bars this remedy. And the defender never says he has suffered damage. The property is rising in value; and the seller looks to this, and does not sell by the rent of the year. If the rent were a decreasing one, or a grassum had been paid, it would be unjust to sell by the rent of the year. Besides, the property is of greater value than the price paid for it; and there has been no offer to return it.

Authorities quoted—Brown on Sale, sec. 415 and 463; *Watt* v. *Glen*, Feb. 6, 1829; *Chapman* v. *Couston*, March 10, 1871; Bankton, 1, 19, 2,; Stair, 1, 9, 4, and 14; *Coutts*, M., 13,328; *Lloyd*, 13,334; *Ransan* v. *Mitchell*, June 3, 1845: *Reddie* v. *Syme*, and *Davidson* v. *Tulloch*, *ut supra*.

The Court thought it best, in the circumstances of the case, to allow a proof before answer. Evidence was accordingly led before Lord Ardmillan.

At advising—

Lord Ardmillan pointed out that neither the missives nor the disposition made any reference to a rental, and there was no necessity the sale should be by rental. The value of the property was a matter of speculation; and both parties could ascertain it. He would not say whether the pursuer would be entitled to reparation in pecuniary damage if the sale had been effected fraudulently; but would assume the remedy was not excluded. The case for the pursuer on the record distinctly was, that Morrison was the defender's agent; and this was of importance, because, if so, the statements of Morrison were the statements of the defender. But it was clear Morrison was not the defender's agent, but was striking in for himself, and holding himself out as Dobbie's agent. Rental C had manifestly been the basis of the sale; and if so, and if the rising rents, amounting to £40, were deducted, there was no substantial discrepancy between rental C and rental B, and no approach to fraud or concealment on the defender's part. There was indeed some misunderstanding, but no reason to doubt the credibility of either pursuer or defender; and if Morrison was not to be believed, the £1220 rental could not be traced to Duncanson. Duncanson was most distinct that what he gave to Morrison was rental C; and he believed Duncanson rather than Morrison. Davidson, however, though quite honest, was not very satisfactory. But his account of the three rentals was quite satisfactory. Rental A was merely speculative—rather an estimate than a rental; and if rental C was above rental B, it was neither dishonest nor unexplained. It was therefore plain on the whole case that the pursuer had not established fraud.

Lord Deas said that this action was based on the ground that the pursuer would not have given the price he did had he known the rental. But there was no allusion to a rental in the deeds of sale: and therefore it was necessary to show there had been fraud. In a sale of property there were many things that must be looked into by the purchaser, and not taken on a verbal statement. No one would buy without inquiry. A valuator relied upon his own inquiries. Assuming, therefore, every word of Morrison's and Dobbie's to be true, the duty of the pursuer was to look into the purchase. The property turned out to be an excellent bargain; and the pursuer did not offer to give it up. There was therefore no question of law raised. If there had been, the question would have been very nice, What amount of fraud would entitle a purchaser to an *actio quanti minoris*?

Lord Kinloch adhered to the opinion he expressed in the case of *Amaan*, that if fraud is established, the purchaser has his option of the remedy he will adopt. But here the pursuer had entirely failed to establish fraud. It was doubtful whether Morrison had repeated to Dobbie Duncanson's explanations to him; but if he had not, Duncanson was not liable. If parties had agreed that the sale should be on so many years' purchase of the rent, and the statement of the rent had been fraudulent, there would have been a plain case of damage. But it was hopeless to say here there had been a bargain to sell by rental. It was a sale by a slump sum. The pursuer got all the information he could, and made up his mind; and there was no evidence that the defender would have taken less than £16,000. The alleged damage was not proved. But it was plain that there could be no damages awarded unless they had been incurred by the fraud of the defender.

Lord President said the first question was, whether rental A was given to the purchaser as the rental of the year, and was the basis of the purchase from the defender. This depended on Morrison's statement; and he preferred the statement of the defender. But, in reality, this was of no importance; for the pursuer admitted rental C was the basis of his purchase. And both rental A and rental C ought to have suggested doubts to the mind of the pursuer. They did not represent actual or permanent rentals of the property. It consisted of sixty-seven different subjects—the rents of which were constantly varying. And it was therefore absurd to depend on any rental as a perfectly accurate statement of the existing rent. In

both A and C it was obvious the rents varied in three cases. Was the purchaser therefore to assume that the highest rent was the present rent? As a man of business he was not entitled to do so. And that put an end to the charge of fraud. The documents were in fact more of the nature of estimates than rentals. But the pursuer did not rely on either one or other. He had a valuation of the property made, and he inspected the property himself. The case of fraud was therefore at an end.

His Lordship did not feel disposed to give an opinion as to the question of damages. But even if there had been fraud, he did not see how the pursuer would make out his damages. He estimated them by the difference between what he gave and what he would have given. But he had no absolute right to the property. He had to give a price that would please the seller; and the defender would not have taken less than £16,000.

The defender then applied for the expenses he had incurred in having inhibition and arrestments used by the pursuer recalled. It was essential to him to have them recalled; and they had therefore been recalled on caution by a petition in the Outer House. To get the record cleared of the inhibition the process had been extracted in the Outer House; and this was therefore the proper stage to apply for the expenses of recalling an arrestment that had been wrongously used.

The pursuer objected that the petition was a separate process in which expenses must be given, refused, or reserved.

Authorities referred to—*Manson* v. *Macara*, Dec. 7, 1839; *Clark* v. *Loos*, Jan. 20, 1855: *Steven* v. *M'Dowall's Trustees*, March 19, 1867, 3 Scot. Law Rep., 320; *Laing* v. *Muirhead*, Jan. 28, 1868; 1 and 2 Vict. c. 114, § 20; 13 and 14 Vict. c. 36, § 28; 31 and 32 Vict. c. 101, § 158.

The Court held that, as the Lord Ordinary's interlocutor on the petition did not reserve the question of expenses, the judgment is now final. The defender should have reclaimed to get it amended so as to reserve expenses. The proper form for the interlocutor would have been to reserve the question of expenses and authorise interim extract. The Lord President expressed himself doubtful of the safety of taking extract under 13 and 14 Vict. c. 36, § 28, unless the interlocutor expressly authorised interim extract.

Agent for Pursuer—D. J. Macbrair, S.S.C.
Agents for Defender—Ronald & Ritchie, S.S.C.

Wednesday, June 19.

BOAK *v.* BOAK'S TRUSTEES.

Factor—Process—Competency.

Circumstances in which, during the dependence of a cause, the Court refused a note presented by the defenders, praying them to appoint a person to take such supervision of the business which was the subject of litigation, as he (the person appointed) should consider necessary. Opinions as to the competency of this proceeding.

Mr Adam Beattie and Mr John Kerr, the trustees of Mr William Boak, tanner in Edinburgh, who died in 1855, continued to carry on the business of the deceased under the management of his eldest son, Mr Allan Boak. In 1871, the son, Mr Allan Boak, brought an action of declarator and implement against the trustees, to have it declared that they had sold to him, under certain conditions, the stock-in-trade, office furniture, book debts, and current bills of the tanning, currying, and japanning business, carried on by them in the West Port, Edinburgh; and also that, on the terms libelled, the defenders agreed with the pursuer to grant him a lease of the business premises, and machinery and utensils therein.

In consequence of this alleged agreement, Mr Allan Boak began to carry on the business as if he were not manager, but owner of the business, and the trustees did not take any active steps to prevent this, pending the decision of the case before the Lord Ordinary, but only gave intimation to Mr Allan Boak that they still considered him as manager only.

In the action, the Lord Ordinary (ORMIDALE) pronounced the following interlocutor:—

"*Edinburgh, 11th June* 1872.—The Lord Ordinary having heard counsel for the parties, and considered the argument and whole proceedings, including the proof, documentary and parole: Finds that the pursuer has failed to prove the sale and agreement averred and libelled by him; therefore assoilzies the defenders from the conclusions of the summons, and decerns: Finds the defenders entitled to expenses, allows them to lodge an account thereof, and remits it when lodged to the auditor to tax and report."

The pursuer reclaimed.

During the dependence of the cause in the Inner House, the defenders presented a note to the Lord President, setting forth the circumstances narrated above, and stating that, as the Lord Ordinary had decided in their favour, and as some time would probably elapse before the reclaiming note would be disposed of, they could no longer permit their business to be carried on under the uncontrolled management of Mr Boak; that they had accordingly authorised Mr Frederick Hayne Carter, C.A., to take such a supervision of the trust as he might think necessary, but that Mr Boak had intimated his resolution to oppose any such arrangement. They therefore craved his Lordship "to move the Court to ordain the pursuer Allan Boak to give the said Frederick Hayne Carter, as acting for them, access to the premises in West Port, and to the stock and business books therein, for the purpose of enabling him to inspect the same, and take such measures in regard thereto, and such supervision of the business, as he may consider necessary for the protection of the interests of the trust-estate, or to do otherwise as to the Court may seem proper in the circumstances."

SOLICITOR-GENERAL and KEIR for the pursuer.

MILLER and BURNET for the defenders.

At advising—

LORD PRESIDENT—I am not prepared to say that it is incompetent to make a motion in a depending process, to regulate the possession of the subjects of litigation, but we cannot possibly grant this motion, even if it is competent, as it is vague and indefinite.

As to the merits of the case, the parties presenting this application have no case at all. The dispute arose as to an alleged sale of the business by the trustees to Mr Allan Boak in 1870. Mr Boak alleged that an agreement to this effect had been completed, and that the business was henceforth his, and accordingly he carried on the