tained that in such a case the pursuers could have exacted compensation from the Railway Company, who had simply given a new and advantageous outlet for the mineral products of the district. I do not think it makes any difference that the branch railway now in question happens to pass through the pursuer's property and in close proximity to the *locus* of the private railway or way-leave on the pursuer's ground.

With these additional observations, I concur in the result at which both your Lordships have arrived.

The Court adhered.

Counsel for Pursuer — Kinnear — Pearson. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for Defenders—R. Johnstone—Mackintosh. Agents—Hope, Mann, & Kirk, W.S.

Tuesday, July 10.

SECOND DIVISION.

[Lord Young, Ordinary.

AITKEN AND OTHERS *v.* BAIRD AND OTHERS.

Landlord and Tenant—Lease—Capital and Interest.

In a lease for nineteen years of certain minerals it was agreed that the lessees should take over the pit and working plant at a valuation, "the amount of such valuation to be payable by the second parties by ten equal instalments, extending over a period of ten years, each of which instalments shall be payable at the term of Whitsunday yearly, and shall bear interest in case of failure in the punctual payment thereof, at the rate of five per centum per annum, on the amount which may remain due until payment." The lessees were given power to pay up the whole sum at any earlier period which might be convenient to them. The lease further declared, that though the lessees should have instant possession, the property should not pass until the whole price should be paid. The valuation was made, the lessees took possession, and for three years the parties settled the termly payments on the footing that interest was due on the price so far as not paid, and not merely on each instalment after the term of payment. *Held* (1) (*diss.* Lord Justice-Clerk) that interest was only due on each instalment in event of its not being punctually paid at the stipulated term, and that the construction of the contract could not be affected by the actings of parties under it; and (2) that in an action by the landlord for arrears of rent and instalments the lessees were entitled to get credit for the sums of interest paid by them in error.

These were two actions at the instance of Andrew Aitken and others, trustees of the deceased Robert Baird, against William Baird and John Wotherspoon as individuals, and as sole partners of the firm of Robert Baird & Co., coalmasters.

On 1st July 1876 the deceased Robert Baird had granted a lease to the defenders of the coal and other minerals in his lands of Limerigg and Wester Drumclair. The lease contained the following provisions in regard to the plant, machinery, &c.:—"And it is hereby stipulated and agreed that the said William Baird and John Wotherspoon shall take over all the pits, engines, and machinery, workmen's houses and other buildings connected with the colliery, railways, locomotives, waggons, and other plant, both fixed and moveable (except the weighing-machine and house, and also the dwelling-house presently occupied by John Buchanan, weigher there, which shall be retained by the first party, and the lessees shall be bound to have all their coal, shale, and others, carried over said weighs, and also to give such assistance as may be necessary in repairing said weighing-machine whenever required), belonging to the said Robert Baird, situated at or connected with said coal-workings, at a valuation to be put thereon by Alexander Simpson, mining engineer, Glasgow, whom failing by a skilled person to be mutually chosen for that purpose; the amount of such valuation to be payable by the second parties by ten equal instalments, extending over a period of ten years, each of which instalments shall be payable at the term of Whitsunday yearly, and shall bear interest in case of failure in the punctual payment thereof at the rate of five per centum per annum on the amount which may remain due until payment, but the lessees shall have power to pay up the whole sum at any earlier period when it may be convenient for them to do so: Declaring that while the second parties shall be entitled to the use and occupation of said pits, engines, machinery, houses, buildings, locomotives, waggons, and other plant, fixed and moveable, as before specified, the same shall not be transferred to them or become their property, but shall remain and continue to be the property of the first party until the whole price and interest thereof shall be paid, when the same shall become the absolute property of the second parties, but no sooner."

The defender entered into possession under the lease, and the plant, &c., were valued by Alexander Simpson, mining engineer, at £19,682, 16s. 3½d.

The defenders had paid three instalments of the price of the plant, &c., and had also paid interest on the balance of the whole price remaining unpaid at the payment of each instalment.

These actions were brought, *inter alia*, on account of the defenders having failed to pay the fourth instalment and the interest on the unpaid part of the price.

William Baird and Wotherspoon lodged separate defences, and in the first action neither of them raised any question in reference to the capital sum, upon which interest fell to be paid in terms of the lease.

In the second action Wotherspoon, *inter alia*, pleaded—"(3) The defenders are not liable in the sums of interest concluded for, and, in particular, for the interest claimed on the balance of the amount of the valuations."

On a proof Mr Simpson deponed that when he valued the plant, &c., he knew nothing about the lease, and that he valued it as a going concern

without any consideration as to when the money was to be paid.

The Lord Ordinary pronounced the following interlocutor:—"The Lord Ordinary finds that the defenders are not liable to the pursuers in the interest charged on the amount unpaid of the value of the pit-engines, machinery, &c. (so far as not in arrear), amounting, the said interest, as set forth in article 8 of the condescendence appended to the summons in the second action, to £1278, 6s. 8d. sterling: Assoilzies the defenders to that extent from the conclusions of the conjoined actions, and decerns."

The pursuers reclaimed, and thereafter were allowed to amend their record. In reference to the course of dealings between the parties they averred—"With respect to the payment of the instalments and interest on capital, the course of dealing always was that an account of the instalment due, with a detailed statement of the interest on the capital sum unpaid, was rendered to the defenders at the same time as the account for lordship was rendered in each year."

The defender Baird also amended his record. He, *inter alia*, averred—"Admitted that at or about the term of Whitsunday in 1872, 1873, and 1874, accounts were rendered on behalf of Robert Baird's trustees to the defenders Robert Baird & Company. Admitted that in each of these accounts the said defenders were charged with interest on the unpaid amount of the valuation of the said pits, engines, and other plant and subjects; and explained that the said accounts formed representations by the factor for the trustees that these sums of interest were due. The defender William Baird relied on these representations, and paid the sums demanded, in the belief that they would not have been demanded unless they were due."

Argued for pursuers—The use of money implies an obligation to pay interest where the credit given does not exclude this. The transaction here, as regards the plant, &c., was either a sale or a loan. The defenders have enjoyed the use of our property. The clause relating to interest on instalments is superfluous, or it might be a provision for interest on interest. No doubt, where payment takes place by instalments, interest is frequently discounted, but there is nothing to suggest that here. Then the defenders have interpreted the contract by paying interest, and they are bound by this course of dealing. The factor proceeded on conversations with Baird in making payment. Bell's Commentaries, i. 692–3; Erskine's Inst., iii. 3, 79–82; *Cuninghame* v. *Boswell*, May 29, 1868, 6 Macph. 890; *Darling* v. *Adamson*, 12 Sh. 598; *Garthland's Trustees* v. *M'Dowall*, May 26, 1820, F.C.; *Brown's Trustees* v. *Brown*, March 3, 1830, 4 Wils. and Sh. App. 28; *Edinburgh and Glasgow Union Canal Company* v. *Carmichael*, May 27, 1842, 1 Bell's App. 316 (Lord Brougham's opinion). Assuming that interest is due on the unpaid instalments, the defenders are not entitled to credit for the sums of interest which they allege they paid in error. There was no error of fact—*Wilson & M'Lellan* v. *Sinclair*, Dec. 7, 1830, 4 Wils. and Sh. App. 398. The case of *Dickson* v. *Halbert*, Feb. 17, 1854, 16 D. 586, was not a case of *condictio indebiti*, but one of discharge *sine causa*. The *dicta* in *Cooper* v. *Phibbs*, L. R. 2 H. L. 149, and *Beauchamp* v. *Winn*, L.R. 6 H.L. 223, relate to an action to rescind a contract.

Argued for defenders—This is a sale, not a loan. Interest is never due before the principal is payable. In a money loan repayable by instalments, or in cases of postponed payment by bill, interest is calculated on the principal. Here the obligations of parties are distinctly ascertained by written contract, and the course of dealing is immaterial. The case of *Carnegie* v. *Durham*, 20th Dec. 1676, Mor. 485, relied on by Erskine, related to tocher, and there was a "fitted account and subscribed ticket." This is a favourable case for *condictio indebiti*—Stair, i. 7–9. The principal contractor died before the first erroneous payment, and his trustees paid by their factor. There was mutual error, as in *Dickson* v. *Halbert*, and the sum repayable is easily liquidated. See also the observations of Pothier, and the translations from D'Aguesseau and Vinnius on Mistakes in Law; Evans' Pothier on Obligations, vol. ii. 369. The principle of *contemporanea expositio* was confined to ancient instruments. Greenleaf on Evidence, i. 347, 352; Taylor on Evidence, ii. 1044. Where a contract is reduced into writing, its terms must be taken without aid from parole evidence, which can be admitted only (1) to shew the position of parties when they contracted; (2) in order to construe ambiguous words; (3) to identify persons or things.

At advising—

Lord Ormidale—No question has been raised in regard to any of the findings of the Lord Ordinary in his interlocutor reclaimed against, except the first, by which the defenders are found not liable in payment of certain interest in the value of the pit-engines, machinery, and others referred to in the record; and the question of interest which has been so raised by the reclaimers, and is now to be determined, appears to me to be one of nicety and difficulty.

The present conjoined actions have arisen in consequence of disputes having occurred between the parties in reference to implement of the following stipulation in the lease, and the payments due by the defenders under that stipulation—[*His Lordship read the clause of the lease quoted above*]—It appears that three yearly instalments of the value of the plant have been paid by the pursuers to the defenders, and that interest was charged and paid on these instalments at the rate of five per cent., not from the stipulated date of their becoming due, but from the date when possession of the colliery and plant was taken. But the defenders decline to proceed with payment of the other instalments on this footing, and now maintain that they are liable only in interest on the yearly instalments from the respective dates at which they are payable, in terms of the stipulation in the lease. In order that the statements of the parties in relation to this matter of interest might appear distinctly, they were allowed to amend the record, which they have accordingly done. At the debate it was, on the one hand, contended on the part of the defenders that the interest as paid by them on the three first instalments was calculated and paid from the date of their taking possession of the plant, in place of from the respective dates at which they were payable according to the stipulation in the lease, through ignorance and mistake; while, on the other hand, it was contended for

the pursuers that there was no ignorance or mistake in the matter, and that according to the true construction of the stipulation in the lease the defenders were and are liable in payment of the interest exactly as it was made by them.

Two questions are thus raised for the determination of the Court—1st, What must be held to be the precise nature and extent of the defenders' liability in regard to interest on the instalments, or, in other words, what is the true construction of the stipulation in the lease in regard to that matter? and, 2dly, Supposing it to be held that the defenders' view of their liability according to the true construction of the lease is the sound one, are they, or are they not, entitled, on the ground of ignorance or mistake, or of the mutual mistake of both parties, to be restored against the erroneous payments which have been already made by them?

Now, in regard to the first of these questions, I can after full consideration entertain no serious doubt. As a general rule, it may be true, as was argued by the pursuers, that a party is, in the absence of any agreement to the contrary, liable in interest, or recompense in some form, for the use he has had of money or money's worth; and that, in accordance with this rule, he might have been liable in interest on the value of the plant in question from the date he received possession, and has had the use of it; but, in the circumstances of the present case, and having regard to the terms of the agreement between the parties on the subject, I am unable to come to any other conclusion than that the general rule is inapplicable, and that the defenders neither were nor are liable in interest on the instalments referred to except from the respective dates at which they became due and payable in terms of the stipulation to that effect in the lease. It must, I think, be assumed that the very object of the parties in expressly stipulating, as they did, that the instalments should be payable at the term of Whitsunday yearly, and that they should "bear interest in case of failure in the punctual payment thereof at the rate of five per cent. per annum," was to make it understood that no other interest was to be payable. I cannot think it admits of doubt that if the first instalment had been paid at Whitsunday 1872, being the first term of Whitsunday after the defenders obtained possession of the plant, the second instalment at the next Whitsunday, and so on till all the instalments were paid, that this would be punctual payment at the stipulated terms, and that no further or additional interest would be due. The only, or at anyrate the only plausible, ground, as it appears to me, on which the pursuers seemed to rest an argument in support of their contention that interest was due on the full value of the plant from the date when possession thereof was taken, besides additional interest on each instalment as it fell due, was the declaration at the end of the stipulations in the lease "that the lessees shall have power to pay up the whole sum at any earlier period when it may be convenient for them to do so." Although this does certainly appear at first sight to be a very singular declaration, and it may be doubtful what was its precise object, I find it impossible to hold that it was thereby intended to make the defenders liable in interest, not from the dates at which the instalments became payable, but from the date when the plant was taken possession of. I cannot hold that the previous perfectly clear and distinct stipulation to the contrary, as I must hold it to be, is to be rendered unmeaning and unintelligible for no other reason than that it subsequently contains an ambiguous, and, in some views that may be taken of it, an inconsistent, declaration. I would rather be disposed to think the true meaning and effect of the declaration to be, not to alter in any respect what I hold to be the plain and obvious meaning of the express stipulation as to interest, but to enable the defenders, if they pleased, to pay up at once the whole value of the plant, under deduction or discount of what would otherwise in that way be gained by the pursuers in consequence of such prepayment. But it is unnecessary to go that length, or to suggest a reason which is not expressed in the contract, because I find a reason is expressed by another declaration which immediately follows the power conferred on the tenants to pay up the whole value of the plant earlier than they would require if payment were made by yearly instalments, in these terms—"Declaring that while the second parties [the defenders] shall be entitled to the use and occupation of said pits, engines, machinery, houses, buildings, locomotives, waggons, and other plant fixed, and moveable, as before specified, the same shall not be transferred to them or become their property, but shall remain and continue to be the property of the first party [the pursuer] until the whole price and interest shall be paid, when the same shall become the absolute property of the second parties, but no sooner." The reason and object of what appears at first sight a strange and unaccountable power or privilege conferred on the tenants is thus explained—Till the whole price or value of the plant should be paid, the property, so far at least as title to the subjects of the lease was concerned, remained with the landlord, exposed to his debts and diligence of his creditors. It was therefore a matter of importance to the tenants to have the power of paying up the whole price at once, in place of by instalments extending over ten years, and thereby relieving themselves and their property from the risk to which they were exposed so long as such payment was not made.

Then, as to the second question, Whether, assuming that interest has to an extent beyond what was legally due been erroneously paid by the defenders to the pursuers on the first three instalments, are they entitled to repetition of such payments so far as they have been in excess, or to be otherwise restored against such excess?

It is certainly not in all circumstances that a claim for repetition of or restoration against an erroneous payment can be entertained; and it is all the more difficult to obtain such redress where the error into which the parties fell was more of the nature of one in law than of fact. It is certainly very difficult to hold that the defenders here were in ignorance of all the facts bearing on the matter. They could not have been ignorant of the stipulation in the lease to which they were parties, and by which their obligations regarding the plant, and especially their obligation as to payment of its value, principal and interest, was regulated. They may, however, have been under a mistake as to the true construction of the stipulation on the subject, and of their rights and duties under it; and the pursuers may also have

been under a similar error. Are the defenders then entitled in law or equity to the redress they now ask?

The decisions on the subject of *condictio indebiti* are not, I think, of a uniform character; but it is not necessary to examine them all, or to endeavour to reconcile them, for I am disposed to think that the principles laid down in the cases of *Cooper* v. *Phibbs*, L.R. 2 Eng. and Irish App. 149, and *Earl Beauchamp* v. *Winn*, as both were decided in the House of Lords, L.R. 6 Eng. and Irish App. 223, are sufficient to enable us satisfactorily to dispose of the present question. In the former of these cases it was stated by the Lord Chancellor (Westbury) that in the maxim *ignorantia juris haud excusat*, "*jus* is used in the sense of denoting general law—the ordinary law of the country. But when the word *jus* is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is matter of fact; it may be the result also of matter of law; but if the parties contract under a mutual mistake and misapprehension of their relative and respective rights, the result is that the agreement is liable to be set aside as having proceeded upon a common mistake." And, in the other case, of *Earl Beauchamp*, it was held (1) that when in making an agreement between two parties there has been a mutual mistake as to their rights, occasioning an injury to one of them, the rule of equity is in favour of interposing to grant relief; (2) that the court of equity will not, if such a ground for relief is clearly established, decline to grant relief merely because, on account of the circumstances which have intervened since the agreement was made, it may be difficult to restore the parties exactly to their original condition; and (3) that the rule *ignorantia juris neminem excusat* applies where the alleged ignorance is that of a well-known rule of law, but not where it is of a matter of law arising upon the doubtful construction of a grant.

These principles are, I think, in accordance with the doctrine stated by Professor Bell in his Principles (sec. 531) under the head "*Condictio indebiti*," and supported by the authorities to which he there refers.

Applying these principles to the present case, I am disposed to think that the defenders are entitled to the relief they ask for. There can be no question that both parties here—the pursuers as well as the defenders, acted under mutual mistake, for it was conceded in argument that there had been no intention by either party to deceive the other. The pursuers in asking payment of the interest in the manner and to the extent they did, and the defenders in paying the interest as so asked, were under a mistaken impression as to their respective rights and duties. And it is also undoubted that injury has resulted to the defenders. So far, therefore, the present case is within the principles which have been referred to. And there is just as little doubt that the defenders are also within these principles as they relate to the true meaning and effect of the maxim *ignorantia juris neminem excusat*. It was not ignorance of any general or well-known rule of law which had misled them. It was a mistaken view of the legal construction of the somewhat ambiguous stipulation in the contract of lease—a matter which is only now cleared up by the Court. And, as remarked by Lord Chelmsford in *Earl Beauchamp's* case, "although when a certain construction has been put by a court of law upon a deed it must be taken that the legal construction was clear, yet the ignorance before the decision of what was the true construction cannot be pressed to the extent of depriving a person of relief on the ground that he was bound himself to have known beforehand how the grant" (obligation) "must be construed." The ignorance or mistake is, indeed, all the more excusable on the part of the defenders in the present case, and their right to be restored against it is all the more equitable, in respect that it was in some degree induced by the conduct of the pursuers in sending them a state of debt made up on what must now be held, so far as the interest in question is concerned, an erroneous footing.

In these circumstances I am of opinion that the defenders are entitled to relief from the consequences of the error they fell into in regard to the interest on the three first instalments of the price of the plant in question. And, fortunately, there need be no difficulty in giving this relief, as the over-payments can be allowed for in the payments yet to be made.

Lord Gifford—In common with Lord Ormidale I have found this case one of serious difficulty, but I have arrived at the same opinion as that now expressed by Lord Ormidale, and substantially given effect to by the Lord Ordinary.

Previous to the year 1871 the late Robert Baird was proprietor of the lands of Limerigg and Wester Drumclair, and of the coal and minerals thereon. Up to Whitsunday 1871 Mr Robert Baird was himself in the personal occupation of the minerals, and worked them for his own behoof. On 1st July 1871, however, Mr Baird entered into a contract of lease in favour of his brother William Baird and John Wotherspoon, who had been his manager in the working of his mines, whereby he let to them, as tenants thereof, the whole coal and minerals for nineteen years from the term of Whitsunday 1871—the 1st of July 1871 being the date of the lease. The mineral lease, as is usual in such circumstances, embraces a great variety of stipulations regarding the working of the minerals, the plant, and machinery and other matters connected therewith, and, *inter alia*, it contains stipulations whereby the tenants became bound to take over the implements and machinery, workmen's houses, and other buildings and plant, at a valuation to be fixed by Mr Alexander Simpson, mining engineer, Glasgow. These stipulations are really subsidiary contracts between the first and second parties; they form part of the mineral lease, and the whole must therefore be taken into consideration for the purpose of determining its true construction and meaning. The provisions relating to the machinery, fixtures, plant, &c., form really a contract of sale of that machinery and plant by the lessor to the lessees, whereby they were sold to the tenants at a price to be fixed by the valuator, which price should be payable at the terms and in the manner stipulated and agreed upon in the lease; and the important question is, does this price as fixed bear interest, and if so, from what terms and to what extent? Now, the first observation I wish to make is that the mineral lease, dated 1st July 1871, is the sole and only contract between the lessor and lessees, neither of whom

have proposed to reduce it or to set it aside in whole or in part, or as not setting forth truly the agreement of the contracting parties. We are not asked to reform the deed (to use an English expression), to alter any of its clauses or provisions, or to vary its words in any way. We are only to read and consider the contract as it stands as embodying the sole contract between the parties, and we have merely to construe these terms and enforce them according to their present and true meaning and intent. I think it important to keep this strictly in view, but especially in reference to the proof which was led before answer, and with reference to certain receipts and documents which were founded on. To me it appears that a great part of the proof and documents have really no bearing at all upon the principal question at issue—I mean the question of the construction of the lease, and how far according to the terms of the lease interest is due on the amount of the valuation of the plant. I think this question can only be determined by construing the words of this lease, and by finding what is the true meaning of the contract which forms the written and sole agreement between the parties. I take, then, the words of the lease in reference to the sale of the plant and the payment of the price or amount of the valuation thereof, and I find that the contracting parties expressly stipulate and agree that the price of the plant as ascertained by the valuation of a man of skill shall be paid to the lessor, not instantly or when the lessees get possession thereof, but payment of the price shall be postponed, and shall be accepted of by the lessor in ten equal instalments extending over a period of ten years. The lease says so, and I do not think the words are capable of more than one construction. The words are—"The amount of said valuation to be payable by the second parties by ten equal instalments extending over a period of ten years." Now, if the deed had stopped here, I think these words by themselves would be conclusive against the claim which the landlords have presented for interest on the whole amount of the valuation from the date of the tenants' entry and of the lease. When a purchaser of goods or of any article or subject whatever at a specified or ascertained price is, by the express written terms of the bargain, allowed a certain credit or a certain time to pay the price, I think it follows that no interest is due, and that the purchaser shall have the advantage of retaining the price till the period of credit expires. It would be no advantage to a purchaser to get this credit if he had to pay interest; it might even be a disadvantage to pay five per cent. interest, because he might be able to borrow or obtain money at a less percentage. The rule that no interest is payable during the currency of the agreed-on credit unless expressly stipulated for, holds good most certainly in ordinary sales of goods and in the ordinary dealings between a merchant and his customer. Thus, in ordinary sales of merchandise, where twelve months' credit is sometimes given, or where the price is made payable, as often happens, by bill or bills at three or six months, or at other currency, no interest is due or can be charged till the credit expires, or until the bills for the price fall due, and if the bills are punctually paid when due no interest can be demanded from the purchaser, who has had the use of the article purchased from the very first. No doubt it may be said that credit for ten years or repayment by ten yearly instalments is a very unusual credit, and we must therefore look very narrowly into the contract to see whether that was really intended by the parties. This is quite a just observation, and accordingly I do look very narrowly into the deed, but I find that this unusual credit is really stipulated for in the very words of the contract. I make no difference, and can apply no different rule of interpretation between a credit for ten years or payment of the price by ten yearly instalments, and a credit for ten months where the price is made payable by ten monthly instalments. The principle is the same whatever be the duration or extent of the agreed-on credit. If nothing is said about interest, then no interest runs till the agreed-on period of credit expires. But the contract of lease is not overt on the matter of interest. It goes on expressly to deal with the question of interest on the price of the plant, that is, on the amount of the valuation thereof, and fixes what interest shall be due. The words are—"Each of which instalments" (that is, each of which ten equal instalments of the amount of the valuation), "shall be payable at the term of Whitsunday, and shall bear interest" (that is, each instalment shall bear interest), "in case of failure of the payment thereof, at the rate of five per cent. per annum." Now, when I find that it is provided that interest shall be paid on these instalments only in the event of their not being punctually paid at the stipulated annual terms, and nothing further is said about interest, the conclusion is irresistible that no further interest is due in case of their non-payment. Had the contracting parties intended that interest was to be due on the full price from the first, and apart altogether from the non-due-payment of instalment, I think that would have been distinctly stated in the lease. I cannot insert a provision for payment of interest, and make a bargain for the parties which they have not chosen to make for themselves.

The only answer to this was (and it was a very ingenious one, suggested at first, I think, by your Lordship in the chair), that the ten instalments were themselves to embrace, each one of them, a proportion of the interest, or such proportion of the price and of the interest, as to make the ten instalments equal in amount. Now, I think it is a sufficient answer to this view that the lease itself fixes what the ten equal instalments are to be. Each instalment is to be one-tenth of the "amount of the valuation," not of the amount of the valuation with anything added; and to add interest to each instalment is to do something not warranted by the deed. It is the "amount" of the valuation, and that amount alone, which is to be paid by ten equal instalments. Then it is a somewhat difficult calculation to combine interest and principal so as to make ten equal instalments of both. No doubt such a calculation might be made, but can we infer that such a calculation is to be made from the lease itself? I am quite unable to do so, even giving effect to considerations of equity. Ten equal instalments on the whole amount of the valuation are easily fixed. The valuation we have before us amounts to £19,000 and some odd hundreds of pounds, and each instalment is equivalent to a tenth

of that sum. If these instalments were to be increased by past-due interest, that would make the instalments unequal, and that would be contrary to the deed. And, really, if it was intended that the amount of valuation should bear interest from the beginning, it was easy to say so, and there was no reason whatever for an intricate calculation to make the instalments equal in amount. I do not think, nor does it appear, that the colliery proprietors ever made a calculation to bring out the ten equal instalments, each compounded partly of capital and partly of interest. Suppose the bargain had been that bills should be granted for the amount of the valuation, as in the case of a debt payable by instalments at one, two, three, or ten years' currency, or suppose a bond had been granted for the ten instalments binding the tenants, and by a cautioner binding himself, for payment of the amount of the valuation by ten equal instalments payable in ten years, could it have been held that, besides the amount in the bond or in the bills, interest was running all that ten years on the capital sum? That might have been —I am not sure that it was not—the original idea of the lessor. It seems it was the idea of his agent, for he acted on it, but it is not expressed in the lease, and I do not think we can give it effect. For I think this lease virtually embraces stipulations which are equivalent to a bond or bills for the ten equal instalments of the amount of the valuation of the plant, without any cautioner, which amount of valuation was payable at Whitsunday yearly, and extended over ten years. I cannot add anything to that. I cannot make a bargain for the parties which they have not chosen to make for themselves, and therefore I think that the fair interpretation of the deed is, that the ten equal instalments of the amount of the valuation are to be paid without interest. Still further, if the instalments were to include interest, as suggested in argument, then the stipulation for interest upon instalment must mean interest upon interest, and I do not think that is the case. A stipulation for compound interest, though it may be lawful, is never to be presumed, and must be very implicit indeed, and when there is only one stipulation for interest, and nothing said about compound interest, I cannot hold compound interest to be due. It was said that the actual payment of interest for three years might enable us to construe the meaning of the contract so as to read in the deed a different meaning from that which the deed taken by itself bears. I cannot possibly give such effect to the payment of interest for three years. No doubt, I must look to the position in which the parties stood when they entered into the contract. I must take into consideration the circumstances in which the parties stood at the date of the contract, which was 1st July 1871, and I think the actings of the parties after that date, even if it had been much stronger than it was, could not give a different meaning to the contract from that which it had at its date. But I do not think the payment of interest for three years alters the construction which I think should be put upon the lease itself, and therefore I hold that, according to the terms of the mineral lease itself, read in the light of the whole surrounding circumstances, the lessor is not entitled to any interest on the yearly instalments of the valuation of plant, &c., unless and until these yearly instalments fall into arrear, and then the interest clause of the deed will come into effect.

It was strongly urged that this interpretation of the contract of lease is inequitable and unjust, as it gives the tenants the use of the plant from their term of entry downwards, without paying anything for the use thereof, at least until the instalments fall due. But the first answer is, that if parties make a clear written agreement in certain terms, or in terms which have a certain legal effect, the Court cannot inquire into the equity of the bargain, and cannot estimate the relative value of the stipulations *hinc inde*. The written bargain must be carried out. But, apart from this, it appears to me that no want of equity is apparent. I cannot tell what compensatory effects the other clauses of the lease may produce. The rent or lordship may have been made higher just because the use of the plant was to be given without interest till the instalments fell due, or the other obligations on the lessees may have been made more onerous just because they got some advantage in a gratuitous or partially gratuitous use of the plant. Again, it appears that the plant in question was valued, not as upon a sale for removal, but as plant to be used in a going colliery, so that the amount of valuation was much greater, perhaps twice as great, as would have been realised at a breaking-up sale. May it not very well be, that in consideration of this enhanced price the payment of the instalments were deferred, and so to subject the lessees in payment of interest before the instalment fell due would or might very probably deprive the lessees of a benefit for which they may very probably have expressly stipulated. In every point of view, therefore, I feel myself bound to follow strictly the very words of the contract, without adding or inserting anything whatever.

The only remaining point is, whether the landlord's representatives are bound to repay or to give credit for the three sums of interest which the lessees (if my interpretation of the deed is correct) have erroneously paid? Now, on this point I agree entirely with Lord Ormidale. The moment the true meaning and effect of the contract of lease is fixed and ascertained, then everything erroneously paid in excess of what is truly and legally due must either be repaid or must be allowed credit for in the current accounting for rents and lordships. Everything is open; the instalments are only in course of being paid. The rents and lordships are accruing termly, and nothing has occurred to bar either of the parties from insisting that the accounting between them shall be adjusted, and that their rights shall be fixed and given effect to in terms of the contract of lease, as these terms shall now be judicially interpreted.

Lord Justice-Clerk—If I could come to the conclusion that the true meaning of this contract was that the defender was not bound to pay to the pursuer the value of the machinery, but only a part of it, and that the agreement to take the amount by instalments imported not only delay in payment but an abatement from the price, I should concur in the proposed judgment. But I think the contract bound the defender to pay the whole price, and that the stipulation that payment should be taken by instalments was

only an ease to the debtor (and it was a great one) in point of time.

It is unnecessary to say anything about rules of interpretation, for none are involved here excepting two of the most elementary—First, that the Court are entitled, in reading this contract, to be placed in the position of the parties to it, by ascertaining the surrounding circumstances; and, secondly, that the best exposition of doubtful expressions in a mercantile contract is the manner in which the persons who used them carried them into effect. But as I read the contract it contains no ambiguous words, nor any uncertain provisions requiring extraneous aid for their construction.

The real nature and substance of the contract may be very shortly stated. In this lease Robert Baird let the coal-field to the defenders for nineteen years, the tenants being bound to pay to the lessor a fixed rent or a lordship, and being bound to purchase the machinery and plant at a valuation to be fixed by a man of skill. But in order to enable the tenants to provide so large a sum the lessor agreed to postpone the payment of the present value, and to spread the amount over annual instalments—over ten yearly payments. The amount of the instalments is not fixed, but materials are to be furnished by the valuation to be made by the arbiter. As possession of the machinery was given immediately, and the tenant was to have the profit of it from the first, it followed that the price bore interest from the same date, unless there were a stipulation to the contrary, and, as a necessary consequence, that each of the ten annual instalments included interest as well as principal. The object being that the ten instalments should, when all paid, be equivalent to the present payment of the stipulated price, this could not be accomplished on any other footing. If I lend £1000, or sell a house for £1000, making payment or giving possession immediately, but stipulating that the price shall be paid by ten yearly instalments, that contract will not be fulfilled by the borrower or purchaser paying ten instalments of £100 each, for that would leave the creditor with little more than two-thirds of his debt. I do not go into calculations, but it is one of the most simple problems in a very simple and ordinary transaction. When a debt, certain in amount and instantly due, is stipulated to be paid by instalments, such is and must be the meaning of the contract.

It needs little arithmetic to show that the same numerical amount paid by annual instalments is of less value to the creditor than a present payment, and therefore that the sum which represents the value of the machinery when paid at once will not represent it when spread over ten yearly instalments. The simplest illustration of this, which seems to be self-evident, may be gathered from the familiar practice under Government loans for drainage and other improvements. The Government advance a capital sum, to be repaid by instalments in twenty-two years. That means that at the end of twenty-two years the Government will have received an amount equivalent to the value of the sum advanced as at the date of the loan. Now, this will not and cannot be done by splitting up the capital sum into twenty-two instalments, but, assuming that the loan is at three per cent., a sum equal to six and a-half per cent. on the capital is paid for twenty-two years, and these instalments, compounded of principal and interest, will, when paid, leave the Government as they would have been had the loan not been made.

Now, if that was the substance of the contract, let us examine the written instrument and see if it be susceptible of any other construction, and if it be not in all its parts entirely consistent with it.

First, there is the obligation to pay the value of the property sold. Whatever the nominal expression of the price may be, it is to represent the present value of the articles sold and delivered, and that value, whatever the period of payment may be, is to be made good to the seller, and therefore the primary obligation of the purchaser is to pay, in one way or other, the present value of the thing sold.

The sum so fixed is to be paid by ten annual instalments of equal amount. Therefore the instalments must be of such an amount as will, together, be equivalent to the present payment of the price. The contract does not specify the amount, and it could not, as the present value had not been ascertained; but it does say explicitly that the whole value of the machinery is to be paid in that way, and the value could only be made good to the creditor by including in the instalments the interest which a present payment would have given him.

But it would not follow as matter of necessity that interest would run on unpaid instalments compounded of capital and interest, because that would be to accumulate interest on interest. Therefore the contract quite consistently provides the "amount of such valuation to be payable by the second parties by ten equal instalments, extending over a period of ten years, each of which instalments shall be payable at the term of Whitsunday yearly, and shall bear interest in the case of failure in the punctual payment thereof, at the rate of five per centum per annum, on the amount which may remain due until payment." The provision is not only consistent with what precedes it, but shows that the writer of the deed had fully in view the rule that interest on interest will not be presumed unless made the subject of express stipulation. Then follows a clause which well illustrates the construction I have suggested. It is provided—"but the lessees shall have power to pay up the whole sum at any earlier period," &c. Now, if the lessees had volunteered to pay up the price before the first instalment became due, what would they have had to pay? Clearly the whole amount of the valuation. They are to pay "the whole sum" and nothing less. But the "whole sum" was to be the sum found due by the arbiter; and this could never have been inserted as a privilege to the tenant except on the footing that the landlord was to draw at least as much, if the instalments ran on to the end of the ten years. The clause seems to be quite conclusive against the notion that the tenant was to retain the whole accruing interest if he did not elect to pay up, and only to be allowed as a privilege to pay the whole amount. But this is made still clearer by the succeeding words of the agreement—"Declaring that while the second parties shall be entitled to the use and occupation of said pits, engines, machinery, houses, buildings, locomotives, waggons, and other plant, fixed and

moveable, as before specified, the same shall not be transferred to them or become their property, but shall remain and continue to be the property of the first party until the whole price and interest thereof shall be paid, when the same shall become the absolute property of the second parties, but no sooner." Nothing can be more explicit. The object of this clause was plainly to create in the landlord a certain security over the plant, although delivered, while the instalments were current and unpaid. The effect of it may be doubtful. It may be questioned whether the landlord could in any way have asserted this right while the instalments were current, or maintained his security against the creditors of the tenant. But, be this as it may, the concluding words seem to leave no doubt remaining. The property is only to pass when the whole price—that is, the value of the plant—"and interest thereon shall be paid." That was the condition on which alone the tenant was to become absolute owner, and the condition also on which the delay was given.

In all this there is really nothing which requires construction. Granted that the present value was to be made good to the seller, the words of the contract seem to admit of no other signification.

But let us see what followed on the contract, for, as I have said, the manner in which the provisions of it were carried out is the best interpreter of what the parties meant by it. The first thing which was done was that the arbiter valued the machinery, as for a present payment, at £19,000. This would have been presumed, but the matter is put beyond doubt by his own evidence. He swears he knew nothing about the period of payment, but simply fixed its present value as for a going concern. It was quite competent, indeed essential, to clear this up by evidence, and the fact admits of no doubt. It follows that a present payment of £19,000 was the capital on which interest was to be calculated, and the data were thus furnished for determining the amount of the annual instalments.

This being so, the contract was acted on for three years entirely on the footing I have described. The accounts were rendered annually for the instalments as they fell due, including the interest, and they were duly paid. Whether the mode of charging the instalments was altogether artistic is another matter, but no question has been raised on that head. Then the payments fell in arrears, and an action was raised to recover them, and even in the defences to that action no plea was taken that the interest had been surrendered. It was not until the supplementary action was raised that at last it was suggested by the defenders' advisers, what never had occurred to the man who made the contract, that by the terms of the written instrument the interest had been foregone. That is the plea which your Lordships propose to sustain. I am of opinion that it is unfounded, for the following reasons:—

First, There are no words in the instrument which admit of such a construction, unless the provision that the price was to be paid by instalments necessarily implies it. I have endeavoured to show that it means the reverse.

Secondly, The view that the purchaser was not to pay the price, but only a composition on it, is wholly inconsistent with the distinct obligation to pay the value of the machinery.

Third, The provisions in regard to the option by the purchaser to pay up the price, and the condition on which he was to acquire the property, exclude absolutelythe plea contended for. The words are quite precise, and can mean nothing else but a payment of the full price and the whole interest due. To interpolate into this provision words which are not true, and which were, as I think, never intended to be true, I should hold to be entirely inadmissible.

Fourth, It is clear that the tenant, who knew what his contract was, never supposed that it gave him a gift of the interest, because he paid it without objection for three years.

Lastly, The defender did not venture to appear as a witness in the proof, and assert that he was under any error in making these payments; from which I conclude that he was conscious he was not. The only error he could have alleged was an erroneous reading of the agreement, and if he had alleged that he would have proved conclusively that he read the contract as his brother did.

As to the question of repetition, if the considerations I have mentioned do not avail, as they will not avail, to establish the nature of the contract, I am of opinion that there is no proper case of *condictio indebiti*—a payment in error—here. If the interest is not due, there is only an overpayment to account, which may be adjusted on the subsequent instalments. If, indeed, the instalments had been paid up, with or without interest, I should have held it incompetent for either party to have re-opened the accounting on any such ground, seeing that both must have been aware of the true nature of their contract. But while they are current it is a matter of accounting merely, and although overpayments might not have been recovered back had the account been concluded, it is not, I think, incompetent to hold them as payments in account while there are future payments still to become due. The true effect to be given to these payments is to hold them as conclusive, as I think they are, of what the contract truly was. But if they have not this effect, I cannot see that the pursuer can refuse to give credit for them.

The Court pronounced this interlocutor:—

"The Lords having resumed consideration of the cause, and heard counsel on the record as amended and closed of new, and on the proof and whole process, Adhere to the interlocutor complained of, so far as it finds that the defenders are not liable to the pursuers in the interest charged on the amount unpaid of the valuation of the pit-engines, machinery, and plant, as far as the instalments stipulated for in the lease were not in arrear and past due, and to this extent refuse the reclaiming note: *Quoad ultra* recal the said interlocutor: Further, find that in fixing the amount of rents and lordships now due by the defenders to the pursuers, the defenders are entitled to credit for the three sums of interest paid by them on the unpaid amount of said valuation, the instalments of which were not in arrear, but which sums of interest were erroneously paid in 1872, 1873, and 1874, and that as at the dates at which

the said three sums of interest were paid respectively; and with this finding remit the cause to the Lord Ordinary to proceed therein as may be just, reserving all questions of expenses; and decern: Grant power to the Lord Ordinary to deal with the whole questions of expenses, both in the Outer and Inner House, and to decern therefor."

Counsel for Pursuers — Asher — M'Kechnie. Agents—D. & W. Shiress, S.S.C.

Counsel for Defender — Kinnear. Agent — George Burn, W.S.

Wednesday, July 11.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

GIBSON'S TRUSTEES *v.* FRASER.

Court of Session Act 1868 (31 *and* 32 *Vict. c.* 100, *sec.* 29).

Amendments proposed to be made under this section must be for the purpose of determining the question between the parties that is raised by the summons and condescendence.

Observed (*per* Lord President) that the time at which the proposal to amend is made is a very important consideration.

This was an action by the trustees of the late Patrick Gibson, a farmer near Brechin, against Robert Fraser, who was to become tenant of the farm which Gibson had held, at Martinmas 1876. The summons concluded for declarator that an agreement, consisting of eight different heads, had been entered into between the pursuer and defender, whereby it was agreed that the defender should take over certain crops and implements at a valuation, and should accept the houses and fences as in the condition in which the outgoing enant was bound to leave them. The summons set forth the whole alleged agreement, and further concluded for decree ordaining the defender to implement it or to pay damages.

In the condescendence it was averred that a draft of the agreement had been written out, and that the defender had agreed to sign it when extended.

The pursuer pleaded—"The defender having entered into the agreement libelled with the pursuers, and having refused to implement the same, the pursuers are entitled to decree as concluded for, with expenses."

After a proof the Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 13th February* 1877.—The Lord Ordinary having considered the cause, dismisses the action, and decerns: Finds the defender entitled to expenses, &c.

"*Note.*—The Lord Ordinary regrets that he has been obliged to pronounce this decision. But from the form of the action he does not think that he can do otherwise. No proposal was made to amend the summons.

"The only purpose of the action is to declare that the pursuers and defender entered into an agreement consisting of eight different heads. It is contained in an informal writing prepared by Mr Shiell, as the agent of the pursuers, and sent to the defender on 18th August 1876. It was not signed by the defender, but the pursuers alleged that *rei interventus* followed.

"It is plain from the evidence that before the writing was drawn up no such agreement as that which it expresses was ever entered into between the parties. Certain obligations existed on the pursuers and defender as the outgoing and incoming tenants. But these were ascertained by the lease, and, with perhaps a small exception relating to the time when the turnips were to be removed, it had never been proposed to make them the subject of any agreement. Indeed, at the time when the writing was sent to the defender it is not contended by the pursuers that anything had been agreed on, except that the defender was to take over a number of farm articles, and that in consideration of his obtaining immediate access to the steading he should take over the houses and fences as being in the condition in which the pursuers were bound to leave them. The defender does not deny that he agreed to take the farm articles, but he maintains that he never undertook to accept the houses and fences.

"After the writing was communicated to the defender, a meeting took place on 22d August. The pursuers say that the defender approved of it, and agreed to sign it, and indeed that it would have been signed then and there but that it was only in scroll. The defender says that he refused to sign it in consequence of his objection to the clause relative to the houses and fences, but he does not seem to have stated much, if any, objection to the other clauses. It is certain, however, that when it was sent to him on the 23d of August for his signature he refused to sign it and returned it.

"The Lord Ordinary is of opinion that the pursuers have not established that the agreement libelled was concluded between them and the defender. It was intended to be reduced to writing, and the defender refused to sign it. Even assuming that the defender agreed to it, there was *locus pœnitentiæ* until it was signed; and in regard to the question whether the agreement as a whole was ever concluded, the Lord Ordinary is of opinion that nothing followed between the 22d and 24th of August to prevent the defender from resiling. On the 24th of August the defender definitely refused to sign, and his refusal was never withdrawn.

"The real question between the parties was whether the defender agreed to take over the buildings and fences as in good order. On this question there is a painful conflict of evidence. But the Lord Ordinary forbears to express any opinion upon it, as owing to the form of the action he cannot decide it. He has thought it proper to dismiss the action and not to assoilzie."

The pursuer reclaimed, and proposed to amend his record to the effect of abandoning his attempt to set up the written agreement, relying instead upon evidence as to a verbal agreement and *rei interventus*, which had reference to the taking over of the farm buildings.

The defender resisted this motion, on the ground that this was really a different ground of action, and that the pursuer was bound to have taken up