she had granted a conveyance in favour of Guthrie had failed, and Guthrie had no authority to make use of the conveyance for any other purpose, but held it as a mere custodier for the pursuer. If he had used it to borrow money on the faith of his apparent right in the pursuer's property the question might have been different. But the defender's money had been put into his hands before the conveyance was granted, in reliance upon his honesty, and upon his promise to invest it in a different security. In these circumstances it appears to me that the pursuer is entitled to set aside the bond granted by Guthrie to the defender in so far as it bears to affect her property.

"The principle by which the case must be decided is laid down by Lord Cairns in the case of *Cundy* v. *Lindsay*, 3 App. Ca. 459, where he says that when it is necessary 'to determine as between two parties, both of whom are perfectly innocent, upon which of the two the consequences of a fraud practised upon both of them must fall,' the Court in discharging that duty 'can do no more than apply rigorously the settled and well known rules of law. Now, upon the settled and well known rules of law with regard to heritable property the defender's bond is invalid and inept to affect the pursuer's land. For although the bond itself has been recorded in the Register of Sasines the disposition in favour of Guthrie, the granter of the bond, was not recorded, and since Mr Guthrie was not himself infeft in the lands his precept was ineffectual to infeft the defender. At present therefore the defender has no real right in the lands, and she can of course have no personal right under her bond, except against the granter and persons whom he was entitled to bind. But it is certain that he had no authority to bind the pursuer. It is said that the defender's right may still be made real; and it is true that, if it were good as a personal right against the pursuer, there would be no formal difficulty in completing the title by following the procedure prescribed for that purpose in the Titles Act of 1865. But it is obvious that the defender cannot complete her right in this way unless the pursuer is under obligation to make the right effectual. And the pursuer is under no such obligation. There is no contract between the parties.

"It is said that the pursuer must bear the loss, because she put into Mr Guthrie's hands the instrument which enabled him to perpetrate the fraud. But the conveyance to Guthrie was not used as an instrument for obtaining money from the defender. Her money was already lost, and the fraud which was practised by the execution of the bond in her favour was a fraud upon the pursuer. The defender therefore gave no value for the bond, and cannot retain the advantage which her agent attempted to procure for her by a fraud. In this respect the case differs from that of *Rose* v. *Spavens*, June 15, 1880, 7 R. 925, on which the defender's counsel relied. In that case the pursuer had executed a bond and disposition in security, which he placed in the hands of his agent for the purpose of raising money. The agent, to conceal a fraud which he had practised upon a second client, induced a third to discharge a bond over certain property, and to accept the pursuer's bond in its place. The discharge was given in exchange for the bond; there was no question that the bond was in itself valid and effectual, and the agent had authority from his client to borrow money and give the bond in return. In the present case the agent had no authority to execute the bond under reduction; the defender's money was not given in exchange for the bond, and the bond as it stands is ineffectual.

"There may be some apparent difficulty from the form of the action, because it is said that if the bond were ineffectual a reduction would not have been required. But the reduction may be useful to clear the record although it is unnecessary to disencumber the land. If the summons had concluded for declarator that the bond is invalid and ineffectual the defender would have had no answer. But the form of action the pursuer has chosen is nevertheless quite competent and apposite."

Counsel for the Pursuer—D.-F. Balfour Q.C.—Strachan—Craigie. Agent — James Russell, S.S.C.

Counsel for the Defender—Gloag—W. Campbell. Agent—P. Morison, S.S.C.

Saturday, November 9.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

PATON *v.* MACPHERSON AND OTHERS.

Sale—Sale to Highest Offerer—Conditions—Contract—Title to Sue—Relevancy.

The trustee on a sequestrated estate offered for sale a share of a policy of insurance which had vested in him, and on which a premium was payable, on these conditions—"2. The premium due to be paid by the purchaser; 3, the highest offerer to be the purchaser." The higher offerer of two competitors obtained an assignation of the share of the policy, which was duly intimated, but he refused to pay the premium due, averring that by the terms of an arrangement prior to the sale the premium was to be paid by the trustee himself.

The second offerer brought an action of reduction of the offer, and acceptance and assignation and intimation thereof, against the purchaser, on the ground that the pursuer was truly the higher offerer, and in terms of the conditions of sale he was purchaser of the share.

Held that even if from any dispute the contract between the defender and the trustee came to an end, that circumstance would not of itself rear up any contract between the trustee and

the pursuer, and as the pursuer was not the higher offerer there was no contract between him and the trustee. The action was *dismissed* as irrelevant.

Alexander Paton, manufacturer, Dalry, in return for an advance assigned a certain policy of insurance to the extent of one-half to Henry Shaw Macpherson, and to the extent of one-fourth to William Alexander Smith. In terms of a verbal arrangement between the parties the premiums were paid by Macpherson to the insurance company, and Paton and Smith on each occasion either provided him beforehand with their respective proportions of the premium or thereafter repaid same to him.

Smith became bankrupt, and his estates were sequestrated in 1888, and John Gourlay was appointed trustee. Gourlay resolved to realise the one-fourth of the policy assigned to Smith before payment of next premium, which was payable on 1st December 1888. Both Paton and Macpherson were desirous of purchasing the share, and accordingly Gourlay wrote to them both on 6th December 1888. The letter to Paton was as follows—"Dear Sir,—As another premium is now due, I must bring the matter of the life policy to a close, and as Macpherson seems desirous to have it, and you also wish it, I have decided to intimate, as I now do, that I will receive sealed offers for my interest in said policy as trustee on Mr Smith's estate on or before Tuesday the 11th inst., at 12 o'clock noon, at which hour I will open the sealed offers and accept the highest offer if it is above £690, and payable in cash. Offerers may be present if they so desire." The letter of the same date to Macpherson was *mutatis mutandis* in identical terms. Macpherson intimated to Gourlay on the 7th December that he had paid the whole premium due on 1st December 1888, and that the share thereof applicable to the share of the policy vested in him as trustee foresaid was £53, 3s. 4d., of which he requested payment.

On the 13th December Paton and Mr Macpherson junior, as representing his father, went to Gourlay's office, and the offers were opened. Prior to opening the offers Gourlay stated that in order to avoid any mistakes he would, before opening the offers, write down the conditions upon which he was selling the policy. He accordingly wrote down, signed, and showed to the pursuer and Mr Macpherson junior the following "conditions of sale":—"2nd. The premium due 1st December to be paid by the purchaser. 3rd. The highest offerer to be the purchaser." It appeared that Paton offered £751, 11s. 7d., and Macpherson £763, 6s. 8d. The latter was accordingly declared to be the purchaser, and Gourlay wrote to him on the following day accepting the offer.

An assignation by Gourlay in favour of Macpherson was thereafter prepared, the price stated therein being the sum of £763, 6s. 8d. Macpherson in exchange granted a cheque for the sum of £704, 5s. 9d. only, being the sum contained in his offer less, *inter alia*, the sum of £53, 3s. 4d., being the proportion of the total premium paid by Macpherson effeiring to the share of the policy. He stated that his offer was made upon the footing of the proportion of the premium being held as part payment of the price offered. Gourlay refused to accept the cheque granted by Macpherson as a settlement of the transaction, and called upon him to pay the difference between the sum in the cheque and that in the offer. Macpherson, however, refused to do so, and he retained the assignation which was intimated to the Life Association.

In these circumstances Paton raised an action against Macpherson and Gourlay to reduce the said offer and acceptance, and the said assignation and intimation thereof, on the ground that he was truly the higher offerer, and that in terms of the conditions of sale he was the purchaser, and was entitled to the share of the policy. He averred that at various meetings previous to the sale Gourlay had informed Macpherson and the pursuer that the buyer of the share must pay the premium then due upon it, and that the offers must be made upon that footing. He stated that Macpherson refused to give up the assignation, and maintained that he was entitled to the share of the policy at the price for which he granted the cheque. Gourlay had not taken action in the matter, and thus the present action had been rendered necessary.

The defender Macpherson denied that the defender Gourlay ever informed him that the purchaser of his interest in the said policy would have to pay the premium then due upon it, or that the offers were to be made on that footing. He intimated to Gourlay on 7th December that he had paid the whole premium due on 1st December, and that the share thereof applicable to the share of the policy vested in him as trustee was £53, 3s. 4d., of which he requested payment, and Gourlay admitted that he was responsible therefor. He explained that he paid the premium due on 1st December 1888 in terms of the agreement which had been acted on with reference to all the premiums since the parties had acquired the policy down to and including the premium due at 1st June 1888. The share of the premium due at 1st June 1888 applicable to the share of the said policy vested in the defender Gourlay, as trustee, was repaid to him by Gourlay. He further explained that the defender Gourlay had taken no action for the recovery of the sum of £53, 3s. 4d., alleged to be underpaid at settlement of the transaction. In the event of its being found that he was entitled thereto, or that the sale proceeded upon the footing that said sum fell to be paid by Macpherson in addition to the full purchase of £763, 6s. 8d., he was willing at once to make payment to Gourlay of the sum of £53, 3s. 4d. He averred that the pursuer had no interest in the arrangements for settlement entered into between Macpherson and Gourlay.

The defender Gourlay explained that he wrote the letter of 14th December to Macpherson accepting his offer on the footing of the conditions of sale, and in the belief

that under Macpherson's offer the purchaser was to pay the proportion of premium due on 1st December. If that had not been his belief, he would never have accepted the offer as it would have been much less than the amount of the pursuer's offer for the share in the policy, and he would rather have held the policy till the six months covered by the premium had nearly expired. . . . On his understanding of the transaction the defender Macpherson's offer was the higher; but if Macpherson made his offer on a different basis there was really no contract between the parties, and he and Smith were still the owners of the share in the policy. He did not object to the conclusions of the summons for the reduction of the offer by the defender Macpherson, acceptance thereof, assignation and intimation thereof, nor to the conclusion for declarator that the assignation was never validly delivered to Macpherson, but he declined to deliver to the pursuer a valid assignation of said share in the policy on payment only of £751, 11s. 7d., and maintained that the whole transaction was void on account of essential error.

The pursuer pleaded—"(2) The pursuer's offer having been truly higher than that of the defender Henry Shaw Macpherson, he was purchaser of Mr Gourlay's share of and interest in the said policy, and is entitled thereto."

The defender Macpherson pleaded—"(1) No title and no interest to sue. (2) No relevant case."

The defender Gourlay pleaded—"(1) In respect that the transaction of sale libelled is void on the ground of essential error, decree ought to be pronounced only in terms of the reductive conclusions of the summons. (2) In respect that the pursuer was not the highest offerer for the share of the policy in question, he is not entitled to decree of declarator, and for delivery as libelled."

On 6th July 1889 the Lord Ordinary (M'LAREN) allowed the parties a proof of their averments.

"*Opinion.*—The conclusion I have come to upon this interesting case is, that I am not in a position to give a definite decision until there had been an inquiry into the averments to this effect, that any doubt regarding the conditions of the sale was removed in consequence of Gourlay, the exposer, having made verbal explanations to both parties to the same effect as the three conditions which he wrote down on the day of the sale. If these conditions were verbally explained to both parties to be included in the written offer, then it appears to me not to be material that Macpherson was not personally present at the exposure, because he could not, at any time thereafter, represent these as new conditions, when they were nothing more than what had been previously understood and agreed to. I have a strong impression that, whatever may be the result of the inquiry, the equity of the case is in favour of the pursuer, because I think the defender is here in a dilemma. Either he never made a real offer for the property meeting the conditions of the sale, in which case the pursuer being the only offerer, would be entitled to be preferred, or, on the other hand, if the defender, knowing the terms on which alone his offer could be received, put in an offer for the policy, which he interpreted as meaning the sum mentioned under deduction of the premium already paid, then that was an offer of a smaller sum than the pursuer offered, and in that view also the offer of the pursuer was preferable. In the first alternative of the dilemma the pursuer succeeds because he is the only offerer; in the second alternative, the pursuer succeeds because he is the higher offerer of the two. Still it is a thing of questionable advantage, the giving of a legal decision which may be the subject of review on alternative views of the facts. I rather think that, in the ordinary course of judicial procedure, it is the function of the Judge to ascertain the facts, and to give a decision based if possible upon the evidence in fact. There is no great object to be gained in this case by avoiding a proof, as it will be of the simplest kind, and need not involve an expensive preparatory inquiry. While I am not quite clear that the case might not be disposed of without a proof, my feeling is that I ought not to do so, as I think that, according to the practice founded on decisions of the Inner House in all cases of doubt as to the course of procedure, a preference is given to making the first order one of inquiry into the facts. That order will unavoidably delay this case a little, because the proof cannot take place until October."

The defender Macpherson reclaimed.

In the Inner House the discussion was confined to the question of relevancy.

Argued for the reclaimer—The pursuer's averments were irrelevant. The reclaimer stood on the "conditions of sale" which regulated the contract between him and the trustee; he disputed all verbal communings which could not control the agreement. Any misunderstanding between him and the trustee arising after the contract was completed fell to be settled between them, and was not a matter in which the pursuer had any interest. The reclaimer was, in any way in which the transaction might be viewed, the higher offerer, for if the defender was not bound to pay the premium on this policy, neither was the pursuer. No dispute between the defender and the trustee, even if it terminated the agreement, could rear up any contract between him and the pursuer, or give any ground for an action between the pursuer and defender—*Shiell* v. *Guthrie's Trustees*, June 26, 1874, 1 R. 1083.

Argued for the respondent—What was offered for sale was the policy with the burden of the premium for the year. If the defender was to be allowed to deduct the amount which he claimed from the sum which he promised to pay, the effect would be to make his offer considerably below that of the pursuer. The question between the parties was, what were the true conditions of sale? This could only be cleared up by a proof, after which the question would still remain, which was the higher offer. The

pursuer had a substantial interest in the present question, as if the contract between the trustee and the defender terminated, his offer still subsisted, and he would be entitled to the policy—*Anderson* v. *Wilson*, November 13, 1856, 19 D. 39; *The Scottish Amicable Association* v. *The Northern Assurance Company*, December 11, 1883, 11 R. 287.

At advising—

LORD PRESIDENT—In this case the Lord Ordinary has allowed the parties a proof of their averments, but the reclaimer Macpherson objects to this course, and desires to discuss the relevancy of the pursuer's case. Now, there can be no doubt that the reclaimer is quite entitled to adopt this course, and if he can succeed in showing that the action is irrelevant he is entitled to have it dismissed.

The case on record is that Gourlay, as Smith's trustee, was vested in one-fourth share of a policy of insurance for £10,000, and as a premium became payable on 1st December 1888 he was desirous of realising the share before the date for the payment of the premium arrived. He accordingly wrote to the pursuer and to the defender in substantially the same terms telling them that he understood that they both wished to buy this policy, and that he would receive sealed offers for his interest therein up to the 11th of December, when he would open the sealed offers and accept the highest, provided it was above £690.

Two offers were lodged, one by the pursuer for £751, 11s. 7d., and the other by the defender for £763, 6s. 8d. The pursuer then goes on to aver that prior to the lodging of the offers, at various meetings, Gourlay informed both the defender and himself that the purchaser of the said share of the policy must pay the premium then due upon it, and that the offers were to be made upon that footing. He also alleges that the reason why Gourlay made this condition was because subsequent to his letter asking the parties to lodge sealed offers the defender had intimated to him that he had paid the whole premium on 1st December, and he claimed repayment from Gourlay of £53, 3s. 4d., which was the proportion of the premium effeiring to his share of the policy.

On the 13th December both the pursuer and defender lodged sealed offers with Mr Gourlay. The pursuer was present when the offers were opened, while the defender was represented by his son. Before opening the letters Mr Gourlay wrote down, signed, and showed to the pursuer and the defender's son the following conditions of sale—[*His Lordship here read the conditions quoted above*]—and both parties assented to these conditions. The offers were then opened, and the defender Macpherson's being preferred, he was declared to be the purchaser.

Now, so far the record discloses this fact, that in a competition initiated by Gourlay for his interest in this policy of insurance two offers were lodged, one higher than the other, and that the higher offer was preferred. But the pursuer goes on to say that Macpherson, after the contract was completed, took up the ground that he was entitled to deduct from the purchase price the share of the premium which he had already paid. If this contention be good, then the purchaser was not to be liable for the premium due on the policy, and this would hold either, in the case of the pursuer or of the defender.

Whether the purchaser can or can not make good this contention against Gourlay is a question which we are not called upon in the present case to determine. The contract remains as it was, but even if it were otherwise, I cannot see how it would help the pursuer's case, because even if from any cause the contract between the defender and Gourlay came to an end that circumstance would not of itself rear up a contract between Gourlay and the pursuer. He was not the higher offerer, and that being so, the record makes it clear that there was no contract between Gourlay and him, and accordingly that the pursuer has no ground of action either against the defender or anyone else arising out of this transaction. It seems to me therefore that the present action is irrelevant, and that we should recal the Lord Ordinary's interlocutor and dismiss the action.

LORD SHAND—The basis of the present action is, that of the two offers which were lodged with Gourlay for his interest in the policy of insurance, that of the pursuer was truly the higher of the two, and this contention is distinctly brought out in the pursuer's pleas-in-law. But it is clear that anything which occurred after the sealed offers were opened cannot in any way affect the contract or the rights of parties, nor can it affect the question whether Macpherson was or was not the purchaser of this policy of insurance.

The pursuer has made it quite clear that at the date when these offers were lodged he and the defender were *in pari casu* as to what had taken place between them and the trustee. Each had received a letter from the trustee in substantially the same terms, they had been present at the explanations offered, and had heard the conditions of sale of the policy read over by him, and accordingly at the date of their respective offers they were on practically the same footing. The offer of the defender was preferred, and it is not very easy to understand why his offer should now be considered the lower of the two. It is said that it is so to be viewed in consequence of something which occurred subsequent to the opening of the sealed offers. But nothing which then took place can in any way constitute a contract between the present pursuer and Gourlay.

It is alleged that the defender claimed a right when tendering his cheque in payment of the price of this policy to deduct the amount of the premium which he had paid. Whether he was entitled so to do is a question between him and Gourlay, but it cannot be said that because he so acted the contract between the parties is at an end. The matter is one between the de-

fender and Gourlay, and is not now before us. In these circumstances I think that the defender's second plea of "no relevant case" must be sustained.

The general rule that the Court will not interfere with the discretion of a Lord Ordinary in allowing parties a proof of their averments before proceeding to deal with the questions of law between them is a salutary one, and it ought not lightly to be interfered with, but in the circumstances of the present case I am disposed to concur with your Lordship in sustaining the defender's second plea-in-law, and in dismissing the action as irrelevant.

LORD ADAM—The defender here wishes the action disposed of on the question of relevancy, while the pursuer asks for a proof. Even if, however, the truth of all the pursuer's averments be assumed they do not come to much—[*His Lordship narrated the circumstances of the case to the time of lodging the sealed offers*]. When the offers were opened one was found to be higher than the other, the sale was concluded, and the higher offerer became the purchaser. Now, here the pursuer's case ends. He was not the higher offerer, but the conditions under which either the pursuer or the defender became the purchaser were identically the same.

The mere circumstance that the purchaser has raised a question with the trustee as to his liability to pay the premium cannot constitute any contract between the pursuer and the trustee; besides, such a condition would equally have applied to the pursuer if he had been the successful offerer.

The Court recalled the Lord Ordinary's interlocutor, sustained the defender's second plea-in-law, and dismissed the action.

Counsel for the Pursuer—Low—Guthrie. Agents—Millar, Robson, & Innes, S.S.C.

Counsel for the Defender Macpherson—The Lord Advocate—Shaw. Agents—J. W. & J. Mackenzie, W.S.

Counsel for the Defender Gourlay—Ure. Agents—Webster, Will, & Ritchie, S.S.C.

Thursday, November 7.

SECOND DIVISION.

[Dean of Guild, Edinburgh.

MACGREGOR *v.* SOMERVILLE.

Burgh — Dean of Guild — Jurisdiction—Alteration of Structure — Edinburgh Municipal and Police Act 1879 (42 *and* 43 *Vict. c.* 132).

The Edinburgh Municipal and Police Act 1879, sec. 159, provides—"Every person who proposes to . . . alter the structure of any existing house or building . . . shall lodge with the Clerk of the Dean of Guild Court a petition for warrant so to do, and such petition shall set forth a description of the intended . . . alteration, and shall be accompanied by a plan of the site, showing the immediately conterminous properties, and also the position and width of any street, court, foot-pavement, or footpath from which the property has access or upon which it abuts, and also plans, sections, and such detailed drawings as are necessary to show the mode of structure and arrangement of the intended alteration, and the lines of the intended drainage thereof, and the levels thereof relatively to the street, court, foot-pavement, or footpath, and to the sewer or drain with which the soil-pipes and drains of the property to be built or altered are intended to be connected." Section 160 "provides that the Burgh Engineer shall report to the Court whether in his opinion the plans sufficiently provide for ventilation and other sanitary objects, and the Dean of Guild Court may decline to grant warrant for . . . . the alteration of the structure of any existing house or building until satisfied that the plans provide suitably for such ventilation and other sanitary objects." Section 162 provides "that every person who shall proceed to alter the structure of any existing house or building without a warrant of the Dean of Guild Court . . . shall be liable to a penalty."

The proprietor of a main-door house in Edinburgh, consisting of a street flat and basement flat, without warrant from the Dean of Guild Court, altered his property so as to fit it for the occupancy of six tenants. The street flat was made to contain 2 two-roomed houses and 1 one-roomed house. Three new sinks were introduced, for 2 of which the back wall was slapped. A new partition was erected, and a water-closet was provided in the centre of the house for the common use of the three new houses. The basement flat was made to contain 1 three-roomed and 2 one-roomed houses. Three sinks were provided, a new partition was added, and the old water-closet was left as common to the three houses.

The Dean of Guild, on the petition of the Procurator-Fiscal of Court, interdicted the proceedings until a warrant of Court should be obtained, and found that the arrangements proposed were of such an unsanitary character that a petition for warrant to make them must have been refused.

The Court, on appeal, *held* that the operations did not amount to an alteration of the structure of the house, and therefore did not require the warrant of the Dean of Guild.

Opinion (*per* Lord Justice-Clerk) that the interests of the public in regard to sanitation were not confided to the Dean of Guild, and that the effect of the Edinburgh Municipal and Police Act did not enlarge his jurisdiction in such matters, but only provided that the proper sanitary authorities might interfere if work which was being executed under the authority of the Dean