the parties in going before the Commissioners will present "a clean sheet" as regards the period after 1869. The Commissioners will have the consideration on the one hand that the North British Company are the owners entitled in the first instance to the possession and use and working of their own line and the trains upon it, but, upon the other hand, that the North Eastern Railway Company have obtained running powers which they will be entitled to exercise. There is this difference, of course, between the year 1869 and the present, that there is a much larger traffic to be dealt with now than would have to be taken into consideration then, and this circumstance and the public necessities and convenience may require some arrangements of a kind different from what they would have been if the question had arisen for determination then. Perhaps with the light which the parties have, I hope, received from what has fallen from your Lordships to-day, they may find that their wiser course is still to continue some mutual arrangement between themselves, but failing that the Commissioners will take up the question with reference to the legal position of the pursuers and defenders which your Lordships have now defined.

On the other question—I mean with regard to the use of the railway carriages—I agree entirely in thinking that the Court was right in dismissing that conclusion of the summons because all parties were not called.

Each party in this case has made demands so much in excess of their legal rights, that I agree that in dismissing the action on the grounds which have been already so fully stated, it should be dismissed, awarding costs to neither party.

LORD DAVEY—I agree entirely in the order which has been proposed by my noble and learned friend on the Woolsack, and in the reasons which have already been given by your Lordships in support of that order. It is quite unnecessary to repeat them. I will only say that I think both parties in this litigation have put their claims far too high, and in fact that the claims put forward in some of the pleas-of-law both of the pursuers and the defenders are, in my opinion, extravagant.

Ordered that the interlocutors appealed from be reversed, and that the cause be remitted to the Court of Session to dismiss the action, and to find neither party entitled to the costs in this House nor to the expenses of process in the Courts below.

Counsel for the Appellants—The Dean of Faculty (Asher, Q.C.)—Solicitor-General for Scotland (Dickson, Q.C.)—Grierson. Agents—Loch & Company, for John Watson, S.S.C.

Counsel for the Respondents—The Lord Advocate (Graham Murray, Q.C.)—Cripps, Q.C.—C. J. Guthrie—A. O. M. Mackenzie. Agents—Williamson, Hill, & Company, for Cowan & Dalmahoy, W.S.

COURT OF SESSION.

Wednesday, December 2.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

THIN & SINCLAIR *v.* ARROL & SONS AND OTHERS.

Reparation—Measure of Damages—Fraud—Concealment and Misrepresentation.

A, induced by representations made by B, a creditor of C for a large amount, advanced £6000 without security to C, a grower of esparto grass in Algeria. He subsequently made further advances to C, amounting in all to £4500, against C's bills of lading. C having failed to repay these advances, A raised an action of damages against B, concluding for payment of £10,500, on the ground of B's fraudulent concealment and misrepresentation with regard to C's indebtedness to himself.

After a proof, *held* (*aff.* judgment of Lord Kyllachy) that B was entitled to absolvitor—*per* Lord President, Lord Adam, and Lord Kinnear, on the ground that the evidence failed to establish the alleged misrepresentations; and *per* Lord M'Laren—on the ground that the pursuer had improperly included in his demand restitution of the £4500 advanced subsequently to the alleged misrepresentations, for which the defenders could in no case be liable.

On 22nd March 1894 Thin & Sinclair, merchants, Liverpool, raised an action against Archibald Arrol & Sons, brewers, and Thomas Kennedy & Son, Algerian merchants and esparto brokers, Glasgow, concluding for payment of £10,500.

The pursuers averred—"(Cond. 1) For some years prior to November 1889 the defenders—at least the defenders Arrol & Sons—had been in the habit of making large advances to Mr T. A. Barber, Oran. Mr Barber's principal business was in esparto grass, which he shipped to the United Kingdom. His agents in Glasgow were Messrs T. Kennedy & Son, one of the partners of which firm was married to a daughter of the late Mr Archibald Arrol, the senior partner of the firm of Messrs Arrol, and the business was in fact financed by Arrol & Sons. (Cond. 2) Mr Arrol died some time prior to November 1889, and the defenders became anxious to cease financing Barber, and to secure payment of the debt due to them. The debt due by Barber to the defenders amounted at Mr Arrol's death to not less than £10,000, and the defenders were unable to obtain payment of this sum from Barber. It was therefore in the autumn of 1889 arranged between the defenders and Barber that the latter should approach the pursuers with the view of inducing them to make cash advances to him with reference to his esparto business, and so enabling the business to be carried on, and the defenders to get their debt satisfactorily paid off. Accordingly Barber, in

the beginning of November 1889, called upon the pursuers in Liverpool, and asked them to finance him to the extent of £5000 or £6000. He explained that he was indebted to the defenders, and stated that they were willing to agree to allow the amount of their debt to stand over for a period of years, so far as it was not covered by the then stock of esparto grass held by Barber, and represented by a stock list which he showed to the pursuers. The pursuers being disposed to entertain Barber's proposal, wrote him the following letter:—

'Thomas A. Barber, Esq.,

'Oran. 8th Nov. 1889.

'Dear Sir,—We now beg to put in writing the terms on which we are willing to enter into business relations with you. It shall be agreed that the present stock of grass held by you at Oran and elsewhere, as represented by the stock list in the hands of Messrs T. Kennedy & Son of Glasgow, and dated 31st October 1889, shall be sold through Messrs Thomas Kennedy & Son, and the proceeds of the sales credited to your account with Messrs Thomas Kennedy & Son and Messrs A. Arrol & Sons. An agreement in writing must be given us by these firms undertaking that if the proceeds of the sales of the stock do not produce sufficient to pay off your indebtedness to them they will wait for a minimum period of seven years for the balance. Further, that Messrs Arrol give us an undertaking by a legal document drawn up in Glasgow to the satisfaction of our solicitors, and containing the foregoing agreement, that they will not for a minimum period of seven years foreclose the mortgage which they hold on your property in Oran and/or Tlelat so long as the agreement lasts, or in any way dispose of it unless they have the purchaser bound to fulfil the same obligations, and agree and undertake not to hold any grass that may be purchased by you with our money against any of your obligations to them. We are willing to give you an open credit for £5000 to £6000, and any bills you may draw on us or our bankers in addition to this amount must be against bill of lading. We would prefer that you draw one-half the bills on us, and one-half on our bankers. In consideration of this it is agreed that we charge a commission of 2 % (two per cent.) on the amount you draw on us or our bankers. Regarding the sale of the grass, it is agreed upon that Messrs Kennedy & Son act for you in Scotland under whatever agreement you may come to with them; and it is agreed and understood that we sell your grass for this district, and charge you one per cent. for so doing, and we are to have option of selling to any other district except Scotland. Full particulars must be sent to us from Oran weekly regarding your purchases, and a weekly list of the stock in hand and up country. Messrs Kennedy & Son are to advise us regularly of any sales they make. Any shipments of grass made by you to the United Kingdom must be made to us. Marine and fire insurance to be effected by us. Telegrams, porterage and travelling expenses, and all monies out of pocket on your account, to be charged to your account. We not to be responsible for any payments for sales made, except for sales made by ourselves. It is further agreed by you that none of the money we advance to you shall be used for any other purpose whatever except for the purchase of grass; but any other business which you may propose to us from time to time shall receive our best consideration. Kindly acknowledge the receipt of this in writing, and agreeing to its contents. THIN & SINCLAIR." (Cond. 3) Barber went to Glasgow and saw the defenders on the 9th November. The defenders agreed to the terms of the pursuers' letter in all respects, and authorised Barber to write saying this, which he did on the 9th November. The defenders, it is believed and averred, saw the letter he wrote at the time. (Cond. 4) In compliance with the conditions laid down by the pursuers, the defenders sent them an undertaking, dated 19th November 1889, in the following terms:—"Messrs Thin & Sinclair, Liverpool. With reference to your letter of the 8th instant to Mr Thomas A. Barber, Oran, we, Messrs Archibald Arrol & Sons, merchants, Glasgow, and Thomas Kennedy & Son, merchants, Glasgow, agree—*First*, That for the amount that shall continue to be owing by Mr Barber to us, Messrs Archibald Arrol & Sons and Thomas Kennedy & Son, of his existing debt or debts to us or either (whether on open account or on the mortgage or mortgages held by us, Archibald Arrol & Sons), after crediting the proceeds of the stock of grass in Oran and elsewhere, as represented by the stock lists referred to in your letter, we, or either of us, shall not take legal steps against Mr Barber within seven years from this date to enforce payment by him of the balance, but you shall be bound to agree to Mr Barber himself selling the farm or vineyard included in one of his mortgages to us, Archibald Arrol & Sons. *Second*, That during the subsistence of the agreement or arrangement between you and Mr Barber, but not exceeding a period of seven years, we shall not, without your previous consent in writing, sell or foreclose the mortgage or mortgages held by us, Messrs Archibald Arrol & Sons, over any of the property, whether in Oran and/or Tlelat or La Senia contained in our mortgages. *Third*, That we shall not hold any grass which may be purchased by Mr Barber with your money against any of Mr Barber's obligations. *Fourth*, This agreement is subject to the arrangement embodied in your letter to Mr Barber being acted on, and shall only be binding on us during the subsistence of that arrangement, and the agreement to be binding upon the parties for the time being comprising our said firms. ARCHD. ARROL & SONS. THOS. KENNEDY & SON." (Cond. 5) By the said letters the defenders, *inter alia*, agreed to allow the balance of Barber's debt to them to stand over for a period of seven years, and represented to the pursuers that the defenders would wait for payment of said balance for that period, that the pursuers might rely on them doing

so, and might enter into the proposed arrangement for financing Barber, and make cash advances to him as proposed, on the footing that the defenders would let their said claim stand over for seven years. On the faith of the undertaking and representations so given and made by the defenders, the pursuers agreed to finance Barber as proposed, and proceeded to make advances to him, with the result that the latter is at this date largely in their debt. It has turned out that Barber is not able to discharge this debt, and the pursuers believe and aver that by their transactions with him on the faith of said undertaking and representations of the defenders, the pursuers are losers to the amount of about £10,500, conform to statement herewith produced. (Cond. 6) It has recently come to the pursuers' knowledge that in breach of the good faith and terms of the bargain between them, Barber and the defenders, at the very time when, as the pursuers understood, the defenders were agreeing to wait for seven years for the said balance of their debt, the latter were taking legal steps to enforce payment of said balance within the said period. In particular, on the said 9th November 1889 Barber was constrained by the defenders to enter into an agreement with them, which is set forth in letters by him to them of date 9th November 1889, whereby (*a*) Barber's obligations to the defenders were considerably increased; (*b*) he came under legal obligation to pay the whole balance of said debt within seven years; (*c*) Kennedy & Son were relieved of their obligations in connection with their transactions with Barber by the latter; (*d*) provision was made for payment of part of the defenders' indebtedness through Barber taking over debts unconnected with the stock in the stock list, and paying the amount thereof at an early date; (*e*) Barber was taken bound to pay off his whole debt to the defenders at the rate of £4000 per annum, beginning the first payment on 31st January 1890; (*f*) he was further taken bound to grant bills to the defenders for £10,000 sterling; (*g*) he was taken bound to pay rent for stores at Tlelat and Oran then occupied by him, and which were mortgaged by him to the defenders, at the rate of not less than £1200 per annum. The defenders fraudulently concealed said agreement of 9th November 1889 between them and Barber from the pursuers lest the pursuers should refuse to carry out the foresaid arrangement for financing Barber. If the pursuers had been informed or become aware of the said agreement, they would have declined to have any transactions with Barber. The whole object of the pursuers requiring the defenders to wait for their debt, viz., to secure that Barber should be free to carry on his business without pressure from the defenders, was defeated by said agreement. Following upon said agreement between the defenders and Barber, the defenders—at least the defenders Arrol & Sons—with the full knowledge and approval of the other defenders, in breach of their undertaking to the pursuers, and of the good faith of the contract, took bills from Barber for said £10,000, and at once pressed him for payment of money. Moreover, the defenders, in fraud and in breach of their said undertaking to the pursuers, continued from time to time to harass Barber for payment of the balance due by him to the defenders. The result was, that from the outset Barber was seriously embarrassed for funds; they frequently cabled him to pay sums; they passed drafts on him; they treated the agreement with him as legally binding, and enforceable at any time; and they refused to renew bills. By these means, since November 1889, the defenders had forced payment from Barber of about £10,000 to account of their debt over and above the proceeds of said stock. In consequence of the pressure brought by the defenders to bear on Barber as aforesaid, he was obliged to use the funds supplied to him by the pursuers in making remittances to the defenders to account of the balance due to them. In consequence of the defenders' said actings, Barber's business seriously suffered, and the pursuers' position as his financiers was most prejudicially affected. Their claim against Barber for advances made to him, amounting, as above stated, to upwards of £10,000, has in consequence become irrecoverable from him, whereas but for the defenders' actings in breach of their agreement the pursuers would have been kept safe, and would have recovered full payment from Barber. (Cond. 7) It has further recently come to the pursuers' knowledge that Barber, with the knowledge and approval of the defenders, fraudulently understated the amount of his indebtedness to the defenders, and so induced the pursuers to give him credit. He represented the amount at £12,000 to £14,000, while it very largely exceeded that sum. The pursuers' advances to Barber considerably exceeded, as the defenders well know, the sum they had come under obligation to give him. If the pursuers had been informed or become aware of the true amount of Barber's indebtedness to the defenders, they would never have entered into the said agreement to finance him. (Cond. 8) So soon as the pursuers learned of the agreement of 9th November 1889, and of the actings of the defenders, they communicated with them, and required them to relieve them of the loss they had sustained, but the defenders have declined to do so, and this action is rendered necessary."

The pursuers pleaded—"(1) The pursuers having been induced to finance the said T. A. Barber, and having made advances to him as condescended on, in consequence of the fraudulent concealment and misrepresentations of the defenders as to material facts, are entitled to recover the amount of the loss thereby sustained by them. (2) The defenders having acted in bad faith and in contravention and breach of the undertaking condescended on, to the loss, injury, and damage of the pursuers, the defenders are liable to the pursuers in reparation. (3) The pursuers having suffered loss and damage to the amount sued for in consequence of the defenders' breach of under-

taking, decree should be granted as craved with expenses."

The defenders pleaded—"(1) The pursuers' averments are irrelevant, and insufficient to support the conclusions of the summons. (2) The pursuers' averments being unfounded in fact, the defenders ought to be assoilzied. (3) The defenders not having acted in breach of the conditions contained in their said letter, ought to be assoilzied."

A proof before answer was allowed by the Lord Ordinary (WELLWOOD), whose decision was affirmed by the First Division.

The import of the proof, so far as necessary to an understanding of the case, may be gathered from the opinion of the Lord Ordinary and of the Lord President.

On 5th May 1896 the Lord Ordinary (KYLLACHY) assoilzied the defenders.

Opinion.—"The pursuers in this case are merchants in Liverpool, who from 1889 until recently financed upon certain terms the business of a certain Mr Barber, who is or was a shipper of esparto from Oran, in Algeria, to the United Kingdom. The result of the business has it appears been unsatisfactory, the pursuers being—including interest and commission—over £10,000 in advance, and Barber's ability to pay being apparently doubtful. The object of the action is to recover from the defenders, who are merchants in Glasgow, damages equivalent to the amount thus lost or likely to be so, and the ground of the demand is twofold—(1) That the defenders, who had up to November 1889 been Barber's correspondents, and were at that time his creditors to a large amount, made or were parties to the making of misrepresentations as to the amount of Barber's indebtedness, by which misrepresentations the pursuers were induced to undertake Barber's business; (2) that the defenders having, in connection with what I may call the transfer of Barber's agency to the pursuers, come under certain obligations with respect to the non-enforcement of the debt due to them, violated those obligations by entering into a certain private agreement with Barber, and acting under that agreement in a certain manner.

"To take first the case of alleged misrepresentation. It appears that in November 1889 the defenders had desired to be relieved of making further advances to Barber, and the latter had applied to the pursuers to take their place. At that time the pecuniary position as between the defenders and Barber was shortly this. He was due them in all about £35,000, made up thus—(1) £9250 of ordinary trade bills drawn between him and the defender Kennedy; £10,000 accommodation bills drawn between the defenders Arrol & Kennedy for Barber's accommodation; (3) £16,000 odds, being balance of cash advance account due by Barber to Arrol. As against this total indebtedness there had been bought and was about to be shipped to Messrs Kennedy for sale on their account, and that of Messrs Arrol, esparto valued at the time at £14,579. There was also a mortgage or mortgages for £12,000 held by Messrs Arrol over certain stores at Oran and a certain vineyard in Algeria, both belonging to Barber, and on which it is said he had expended about £27,000. There were also some other assets belonging to Barber, including debts due up country, wine crop of vineyard, &c., which assets were expected shortly to be realised.

"In these circumstances the case made by the pursuers upon record is this—That 'Barber, with the knowledge and approval of the defenders, fraudulently understated the amount of his indebtedness to the defenders, and so induced the pursuers to give him credit. He represented the amount as £12,000 to £14,000, while it very largely exceeded that sum.' There is here, it will be observed, no word of direct representation by the defenders. The representation is said to have been made by Barber. Further, it is not, I think, disputed—at least it is not capable of dispute—that the indebtedness of £12,000 to £14,000 meant, and must have meant, indebtedness after deducting the value of the stocks in hand. It is common ground that the gross indebtedness was known, and known all along, very largely to exceed that sum.

"Now, I may say at once that I think there are strong grounds for believing that Barber did, in his communications with the pursuers, understate the amount of his indebtedness to the defenders. He was not himself examined, and the statements in his letters on which the pursuers found are not in themselves evidence of the facts stated. But the pursuer Mr Thin was examined, and I see no reason to doubt his statement that Barber represented to him in Liverpool that, after crediting the estimated value (£14,579) of the stocks of esparto which he (Barber) had in hand, his indebtedness to the defenders did not exceed £12,000, thus making his total indebtedness (which, as I have already explained, was really about £35,000) not more than about £26,000. In other words, Mr Thin depones that Barber understated his total indebtedness, as we now know it, by about £10,000, and Barber's letters to the defenders are at least evidence to the effect that he contemporaneously told the defenders that he had made this understatement, having, as he said, overlooked altogether the £10,000 bills drawn between Arrol & Kennedy for his (Barber's) accommodation. This being so, I should be disposed to hold that as against Barber the alleged misrepresentation was sufficiently proved; and if nothing further had taken place I should have been further disposed to hold that the defenders, learning of this misrepresentation, and not promptly repudiating it, exposed themselves to the charge (to whatever effect in point of law) of knowing and approving of Barber's action.

"The fact, however, is that more did take place. The pursuers did not rest satisfied with Barber's statements, but, as it now appears, put themselves into direct communication with the defenders. Their confidential clerk Mr Jones was sent to Glasgow to obtain direct information, *inter alia*, as to Barber's indebtedness; and the

result in the end was, that after a good deal of negotiation a certain agreement between the pursuers and the defenders was adjusted and executed. That is the agreement to which I have already referred, and which is printed in the record. It is dated 19th November 1889, and expressed certain concessions which the defenders agreed to make with a view to relieving Barber from immediate pressure in connection with the defenders' claims against him.

"In these circumstances it is obvious that the representations made at an earlier stage by Barber cease to be of importance, at all events as affording any substantive ground of action as against the defenders. Whether true or false, they were not, as it now appears, the representations on which the pursuers ultimately relied. And accordingly the case now made by the pursuers is not the case made on record, but a different case, viz., that the defenders Messrs Arrol & Kennedy made directly misrepresentations to the pursuers—misrepresentations involving not the suppression of the £10,000 bills (which it is now admitted that they disclosed), but the suppression of a larger item, viz., the £16,000 of Arrol's cash advances. What the pursuers now say is that when Mr Jones went down to Glasgow, he was told about the bills—both the bills for £10,000 and those for £9250—but was told of nothing else; and that the gross indebtedness was thus represented to him as being only £19,250, and the indebtedness after crediting the £14,579 of stocks as being only £4670. In other words, the pursuers' case now is, that having been first told by Barber that the indebtedness (not covered by stocks) was from £12,000 to £14,000, they were subsequently told by the defender that it was only £4670, and that accepting that latter statement without remark or further inquiry, they proceeded to negotiate the agreement from the results of which they now seek relief.

"Now, it must be admitted that this is a view of the facts which at the outset involves serious difficulties. It is not intelligible, to begin with, that the pursuers getting from Barber and the defenders information so different should not have been startled by the difference. It is still less intelligible that if they believed or came to believe that Barber's indebtedness to the defenders (that is to say, his indebtedness uncovered by stocks) was only £4670, they should have stated on record, and Mr Thin should have repeated in evidence, that their belief throughout was that the amount was £12,000 to £14,000. On the other hand, looking at the matter from the defenders' standpoint, it is not intelligible why they (the defenders) should have sought to reduce the indebtedness below what they knew to be Barber's figure; or why, if they wished to support his deception, they should have proceeded to do so by disclosing the £10,000 bills which he had suppressed, and suppressing the £16,000 cash account which so far as they knew he had disclosed. All this, it must be acknowledged, is difficult, and the difficulty is not solved by the suggestion—made, I think, rather late in the day—that the £12,000 to £14,000 was reached by deducting from the total indebtedness only the stocks of dry grass actually at Oran and ready for shipment, these stocks being, as it appears, valued at £8354. In the first place, the discrepancy is by this process only reduced—not removed. But in the next place it is, I think, quite impossible to read the pursuer Mr Thin's evidence as coming to anything else than that Barber represented the indebtedness as being about £12,000 after the whole stocks (valued in the slip at £14,579) had been realised and credited. He was undoubtedly examined on that footing, and I understood him so to affirm; and nothing else, I may observe further, is consistent with Barber's statement in his letters to the defenders (a statement on which the pursuers found) that the extent of his (Barber's) suppression was £10,000, viz., the amount of the accommodation bills. That Barber, in his communications with the pursuers put the gross indebtedness at about £26,000, and the net indebtedness at about £12,000, is not, I think, reasonably disputable. What the pursuers have to explain, as I have already said, is how they should have subsequently received and accepted without remark a statement by which the gross indebtedness was reduced to £19,250. and the net indebtedness to £4670.

"The issue, however, now is, whether the defenders being appealed to as to the amount of Barber's indebtedness, did fraudulently represent the total amount as £19,250, made up of the two sets of bills—concealing altogether the existence of the £16,000 due to the Messrs Arrol on cash account. That they did so is affirmed by the witness Jones, the pursuers' clerk, and he is said to be corroborated (1) by the memorandum which there seems to be no doubt that he made at the time, and (2) by the absence in the defenders' letters to Barber of any definite repudiation of his (Barber's) concealment of the £10,000 bills, or any definite statement that the cash account for £16,000 had been brought under Jones' notice. On the other hand, there is the emphatic testimony of the two Messrs Arrol and Mr Kennedy, that at their meeting with Mr Jones at Glasgow the £16,000 was expressly mentioned; that the passbook showing its amount was exhibited; and that the whole negotiation between them and Jones proceeded on the assumption that the deficiency (that is to say, the deficiency not covered by stock and for which seven years' delay in enforcement was asked) amounted not to £4670 but to about £20,000. What I have to decide is, which of those two accounts of what passed at Glasgow is to be believed.

"I have come to the conclusion that upon the issue of fact thus raised I must find for the defenders. There are undoubtedly difficulties on both sides. But I am convinced that more passed between the defenders and Jones than Jones recorded or now remembers; and also that more passed between Jones and the pursuer Thin than either of them now remem-

bers. It is, I admit, quite probable that neither of them realised that the total indebtedness was £35,000. On the other hand, I cannot believe that either of them thought that it only amounted to £19,250. If I were to conjecture, I think it probable that there was some confusion about the mortgage debt. Mr Jones may have supposed that the £16,000 debt was a separate mortgage debt connected with Barber's properties, and, so supposing, may have paid no particular attention to its amount. Mr Thin again, knowing its existence and amount, may have assumed that it was inclusive, and not exclusive, of the £10,000 bills. And so the misunderstanding may have arisen. All this, however, is only conjecture. What I am unable to hold proved is that the £16,000 debt was, as the pursuers say, wholly suppressed. On that matter I do not see my way to reject the testimony of the Messrs Arrol and Mr Kennedy. There are points in their conduct which may be open to animadversion. I do not, I confess, understand why they should have received without protest Barber's scarcely-veiled suggestion that they should suppress the £10,000 accommodation bills. Still the fact is certain that they did not suppress them; and on the only question with which we are here concerned, the question, viz., whether they suppressed the £16,000 cash advance, it appears to me that in addition to the considerations of probability to which I have already referred, there are several corroborations of their story to be gathered from the pursuers' letters and Mr Thin's evidence.

"In the first place, I do not think that either Mr Thin or his counsel succeeded in explaining away the passage in his letter to Barbour of 23rd June 1892, in which he speaks of a sum of '£16,000' as owing to Messrs Arrol on mortgage.

"In the second place, in connection with that letter there must be read the passages in the same correspondence (and other passages) in which the £19,250, so often mentioned, is always described as 'due on open account' in contradistinction, as it appears to me, to the sum due or supposed to be 'due on mortgage.'

"In the third place, and lastly, I am not able to reconcile the pursuers' case as now presented with the attitude in the correspondence which immediately preceded the raising of the action. Beyond all doubt the pursuers knew, not later than October 1893, all that they know now. In particular, they had by that time fully before them the existence of the cash account due to the Messrs Arrol over and above the £10,000 of bills. (See letters of 11th and 12th October 1893). But knowing then at latest of the cash account in question, the fact is incontestable that they made no complaint and no suggestion that its existence had been concealed from them in 1889. On the contrary, while they do complain of concealment, their complaint relates exclusively to the concealment of the agreement between Barber and the defenders of 7th November 1889. Moreover, even when the action came into Court, there was, as I have already pointed out, nothing in their summons or in their record to indicate that they were in possession, or thought that they were in possession, of a ground of action such as they now urge.

"On the whole, while I do not doubt that the pursuers were more or less deceived, or sought to be deceived, by Barber, they have failed to satisfy me that they have any similar ground of complaint against the defenders.

"If I am right in this, it is unnecessary to consider the further questions which would arise if it were proved that the defenders fraudulently misrepresented the amount of Barber's indebtedness. I may say, however, that I did not, as I thought, have a sufficient answer to the defenders' argument, to the effect that the terms of the agreement of 19th November between the pursuers and the defenders, and the course of the negotiations which preceded it, are inconsistent with their suggestion that the supposed smallness of Barber's indebtedness to the defenders was the inducing cause of the pursuers' acceptance of Barber's agency. Neither did I hear from the pursuers what I thought a sufficient argument for the proposition on which their claim of damage is rested, viz., that the measure of the damage due to them (supposing their case otherwise to be established) is the whole loss which they have sustained upon their four years' transactions with Barber. I do not say more at present than that that seems to me a difficult proposition.

"It remains, however, to consider the pursuers' second ground of action, viz., the defenders' alleged breach of contract—first, by entering into their agreement with Barber of 9th November 1889; and second, by pressing the latter for payment under that agreement. This matter has bulked largely in the proof and argument, but, in the view I take, I may deal with it shortly. The agreement of 19th November 1889 between the pursuers and the defenders, said to have been broken by the defenders, involved, as I read it, three points—(1) That the defenders should not for seven years take *legal steps* to enforce payment of the balance due by Barber after realisation of all existing stocks; (2) that during the same period the defenders should not sell or foreclose their mortgage or mortgages; (3) that they should not hold any grass purchased with the pursuers' money (that is to say, any grass so purchased and sent to them for sale) as against any of Barber's obligations. Now, I can find no evidence that the defenders did any of the things that were thus forbidden. They took no action or diligence against Barber. They did not sell or foreclose, or attempt to sell or foreclose their mortgages. They did not retain or attempt to retain as against Barber's obligations any grass which came into their possession. And this being so, I am of opinion that, taking the terms of the agreement as the measure of the defenders' obligation, no breach of contract has been committed.

"What the pursuers appear to assume is, that because the defenders agreed to take no legal steps for seven years, they were

debarred from accepting from Barber an undertaking to pay them off at the rate of £4000 a-year, and were not at liberty to press Barber from time to time for fulfilment of that undertaking, or indeed for any payment at all. I am not, I confess, able to discover in the agreement of 19th November any warrant for that assumption. It may have been understood (it is admitted to have been so understood although the agreement does not express it) that no payment should be made to the defenders out of the price of grass purchased with the pursuers' money except in so far as such price represented profits. But it was, as I read the evidence, quite contemplated in November 1889 that between the profits of his vineyard and the profits of his esparto business (including the rents of his stores) Barber would or might be in a position to pay £4000 a-year to the defenders without trenching on the pursuers' money. And in point of fact it has not, in my opinion, been proved that the defenders have since 1889 either asked or received any payments from Barber which they had reason to know were made out of the pursuers' money. They received in all to account of their indebtedness £3171 of principal and £3469 of interest, &c., the last payment of principal being made in June 1892, and the last payment of interest in June 1893, and there is certainly no proof (indeed, it is admitted that upon the materials available the point is incapable of proof) that Barber did not, between his vineyard, his stores, and his business, earn profits at least equal to those payments. In any case, the defenders say that they so believed, and give their grounds for so believing, and I am unable to say that those grounds are displaced by the proof. Some confusion was, I think, introduced into the proof by the pursuers' failure to realise that a good deal of the correspondence between the defenders and Barber, on which they (the pursuers) found, had reference not to repayment of the defenders' original indebtedness, but to repayment of two sums of £500 and £1000 advanced by the defenders in November 1889 and March 1892 after the date of the agreement of 19th November 1839. Altogether, even if I felt called upon to go beyond the terms of the written agreement, and to follow the parties into the ethical questions into which the proof in this part of the case largely diverged, I doubt whether I should, upon the materials before me, see my way to a different conclusion than that which I have reached in point of law."

The pursuers reclaimed, and argued—The ground of action was that Mr Thin was induced to enter into this transaction with Barber by fraudulent misrepresentation on the part of Arrol & Sons. The amount to which the pursuers were entitled was consequently the sum due by Barber to the pursuers when the account between them was closed, viz., £10,500.

Argued for the defenders—As regards the question of damages, £6000 being the sum advanced by the pursuers to Barber on the strength of the alleged misrepresentation, was the very utmost which the pursuers could claim.

On the facts both parties submitted an elaborate argument protracted for several days, which need not here be recapitulated.

At advising—

LORD PRESIDENT—This case has been very fully and carefully argued, the speeches of counsel having occupied five days. The Lord Ordinary has closely analysed the mass of material before him, and has explained his views in considerable detail. As I am satisfied of the soundness of his Lordship's conclusions, I shall summarise rather than fully develop the grounds of my adherence.

The pursuers in argument presented their case as resting on two grounds—(1) Fraudulent misrepresentation made by the defenders in regard to the amount of the indebtedness of Barber at the date of the agreement between him and the defenders, and (2) the "secret agreement." On either of those subjects the pursuers' case has most formidable difficulties to encounter, having regard to his averments on record, the proved facts, and the remedy sought.

1. The first ground being fraud, one naturally expects a specific averment of certain statements made by persons named on specified occasions, or equally specific averments of concealment, and that those induced the transaction resulting in loss. Now, the case on record is that the false statement was made by Barber, and it was that his indebtedness to the defenders was from £12,000 to £14,000. The charge against the defenders was that Barber made this false statement with their knowledge and approval. When the action was before this Division on the previous reclaiming-note, the defenders maintained that the charge of complicity in Barber's fraud was not relevantly laid—that knowledge and approval were not enough. As the case had to go to proof on other matters, the Court did not feel called on to determine this point. But it never was suggested that the pursuers' case truly was that, Barber having made misrepresentations about the figures, the defenders exposed those misrepresentations, and therefore prevented the pursuers from being induced by his misrepresentations, and then proceeded to make separate and independent misrepresentations of their own which induced the transactions. Yet such is the case now made by the pursuers. I have very great doubt, the issue being one of fraud, whether the parties, having joined issue on the question, did Barber in Liverpool make certain statements to Thin, with the knowledge and approval of the defenders, the pursuers are entitled to judgment in their favour, on the ground that Arrol & Kennedy in Glasgow made certain different statements to Jones. Nothing which I know of the facts suggests any reason why the pursuers should have alleged on record misstatements by which they now admit they were not misled, and should have been silent about what they now represent to have been the moving cause of their entering the transaction.

Assuming, however, that the case on which our judgment is asked may be held to be on record, I agree with the Lord Ordinary that that case fails. This is largely a question of credibility. Of the witnesses examined, the preponderance in number is with the defenders, and their witnesses affirm that they saw and heard Jones informed of the £16,000 debt, one of them having himself been the informant. The Lord Ordinary believed those witnesses, against whom was to be weighed the testimony of Jones. Now, Jones, when invited by the pursuers' counsel to say, as his last word, the degree of definiteness with which he would warrant his statement that the £16,000 was not mentioned, gave the disappointing reply, "Well, I have no recollection of it."

The Lord Ordinary in giving his verdict on this question of fact, has not omitted to consider the very singular complications arising from the defenders' knowledge of Barbour's misstatements, and from sundry passages in their own letters. After giving very close attention to this problem I have come to the conclusion that if the sworn testimony of the witnesses and the letters be read as a whole, the letters do not invalidate the testimony. Again, if regard be had to the letters written by and received by the pursuers, I think they support the view that the pursuers were aware that Barber was largely indebted to the Arrols on open account, and even knew the amount.

I may add that the very singular mistake on the part of the pursuers as to what really was done in 1889, to which I am immediately to call attention in relation to the second branch of the case, makes me the more ready to believe that the pursuers are simply wrong in their account of what they knew in 1889. It is several years ago, and even gentlemen of perfect integrity, through whose minds very many other business transactions have passed in the meantime, may mix up their present contention with actual memory.

2. The pursuers' case about what was called in the debate "the secret agreement," stands in a very curious position, and rests, as I think, on a total misconception of what was done, and in this instance done in writing, in 1889.

In 1889, as everybody now admits, the reason why Barber required to go to the pursuers at all was that the Arrols, who had been financing him, declined to finance him any longer. That he was indebted to the Arrols at that date was matter of course; and the pursuers were told that the death of one of the partners of Messrs Arrol was the reason why they declined to give Barber more money, and wanted him to get someone else to do so. It is plain, on these facts, that the Arrols simply assumed the position of creditors for what Barber owed them on the account. In order to keep their debtor going they were willing to make some concessions, which might induce the new financier to come forward. They did so; and in the letter of 19th November 1889 they set down in black and white the specific concessions they made. It is as plain as anything can be that those concessions did not preclude the Arrols from asking and taking from Barber, during the seven years, as much money as they could get out of him by other means than those which were waived for that stipulated period.

Yet on record the pursuers have set out that the bargain was that the Arrols should allow the balance to stand over for seven years; and on record the "secret agreement" is impugned because it is a violation of this bargain. When the "secret agreement" is compared, not with this imaginary bargain, but with the letter which set out the bargain, it is seen that the one in no way infringes the rights conceded by the other. So long as they kept within their concessions to the pursuers, the Arrols were at perfect liberty to make any arrangements with Barber which they saw fit. Examining the arrangement actually made, I think Mr Balfour's observation was just, that the most of it is in favour of the debtor and subserved the purpose common to the pursuers and defenders alike, of fostering Barber's business and keeping him afloat. On the question more directly before us, I am of opinion that the "secret agreement" was not a violation of the written undertaking of the Arrols to the pursuers; and that the steps actually taken by the defenders under that agreement were not in violation of their undertaking to the pursuers. There need have been no mystery about the agreement, and had it been shown to the pursuers at the time, they would, as best I can judge, have quite approved of it. Their annoyance at its existence would seem to be due to the ill result of their adventure, and the erroneous impression of their own rights as against Mr Arrol which misrecollection of the facts has induced them to put on record.

I indicated at the outset that a difficulty common to both grounds of action attends the remedy sought. The pursuers' counsel admitted that they have not proved damage in the sense of actual loss resulting on their account with Barber. They maintained that their true right, they having been deceived, was to have the defenders to relieve them of that account. It is, I think, impossible to sustain this contention. The pursuers cannot, and the Court cannot, create between the defenders and Barber contractual relations which do not exist. Accordingly, against a third party, a bystander—although it may be an interested bystander—by whose fraud a contract has been induced, the remedy must necessarily be damages—to wit, the loss directly or naturally resulting from his fraud. As the pursuers' case fails upon the facts, it is not perhaps necessary further to prosecute this subject.

I am for adhering to the Lord Ordinary's interlocutor.

LORD ADAM concurred.

LORD M'LAREN—I have considered this case with the care which its importance and the extended character of the oral and

documentary evidence demand, but for reasons which will appear my opinion may be very shortly stated.

I shall consider first the question of damages. The hypothesis is that the defenders, by fraudulent representations, or by concealment amounting to a partial and untrue representation as to the credit and solvency of Barber, induced the pursuers to enter into an agreement whereby the pursuers undertook to make Barber an immediate advance, without security, of a sum not exceeding £6000, and also to make further advances in the ordinary course of business against bills of lading. The pursuers advanced the full sum of £6000, and during a course of business extending from the year 1889 to 1894 they accepted Barber's drafts against bills of lading. The result was an ultimate loss, as appearing in their ledger account, of £10,500. This sum is claimed from the defenders as damages, on the ground, as I understood the argument, that the pursuers are entitled as against the defenders to be restored to the position they occupied before the agreement was made.

In my opinion, the principle of restitution is incapable of being applied to a claim of this nature, and no authority for such an extension of the principle was or could be cited. My view may be illustrated in this way. The purpose for which the defenders were consulted was to assist the pursuers in coming to a decision whether they would be safe in making an advance of £6000 to Barber without security. Now, if the defenders had guaranteed Barber to that amount, £6000 would be the limit of their responsibility however large the ultimate deficit might be in the trading account which followed on this advance. But the argument is that because the defenders did not guarantee Barber but only made untrue representations as to the state of his account with them, they are to be liable in the whole ultimate loss arising on a course of trading extending over a term of years. There are two answers to this view, the one theoretical and the other practical. In the first place, it involves the paradox that the liability resulting from a representation should be greater than the liability consequent on a guarantee; secondly, the sum which a banker or a mercantile agent advances without security may be held to be advanced in reliance on representations as to the credit and solvency of the debtor; but what he advances upon ordinary mercantile security, such as bills of lading, must in ordinary circumstances be taken to be advanced upon his own judgment as to the state of trade and the sufficiency of the security. Especially is this the case where the advances extend over a period of years during which the conditions of the case are necessarily altered, so that the alleged representations cannot justly be held to have any application to the circumstances of the debtor at the times when the successive advances are made.

What I have said may be applied with a slight variation to the case made against the defenders in respect of their having entered into an agreement with Barber to pay them so much a year to account of his debt. If it could be established that the defenders had received payments from Barber which were not taken out of profits, I think the pursuers would have a good claim to have these sums restored to the debtor's estate, on the ground that the defenders had agreed not to take payment out of grass purchased with the pursuers' money. But it was admitted at the bar that the proof did not contain materials for proving that such payments were made out of stock. I understood the Dean of Faculty to disclaim any argument founded on the immediate advance of the £6000, and leading to an alternative claim of special damage of that amount. I was anxious that this view should be left open for our consideration, because my difficulties as to the question of damage would not affect a claim thus limited. But no such claim has been made or argued, and I shall give no opinion regarding it.

In what I have said I have not answered the question of fact, whether the defenders, while professing to make a full disclosure of Barber's indebtedness to them, concealed the existence of debt amounting to about £16,000.

Now, with my view of the duty of a judge, I never would give an opinion that a party was guilty of fraud in an action in which such a finding could not be followed out to an effective conclusion. As I am unable to accept the theory of estimation of damages which the pursuers have put before us, and no other claim is open to our consideration, I prefer not to express an opinion on the issues of fraudulent concealment.

I concur in the judgment proposed, assoilzieing the defenders, on the ground that on the facts as stated the pursuers are not entitled to the remedy of restitution, and that no other relief is claimed.

LORD KINNEAR—I agree with your Lordship in the chair and with the Lord Ordinary.

The Court adhered.

Counsel for the Pursuers—D.-F. Asher, Q.C.—Sol.-Gen. Dickson, Q.C.—J. Wilson. Agents—J. & J. Ross, W.S.

Counsel for the Defenders—Balfour, Q.C. —Ure—Napier. Agents—J. W. & J. Mackenzie, W.S.

Tuesday, December 8.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

THE ASSETS COMPANY, LIMITED *v.* OGILVIE.

Process — Declarator — Competency of Declarator not Concluded for.

In an action of declarator where the Court were of opinion that the pursuer was not entitled to decree to the ful