Anderson Vs. Lambie

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Court : House of Lords

Decided On : Jan-25-1954

Judge : Lord Morton of Henryton, Lord Macdermott, Lord Reid

Appeal No. : No.

Appellant : Anderson

Respondent : Lambie

Judgement :

LORD MORTON OF HENRYTON.-This appeal arises out of an action by the appellant against the respondents in the Court of Session, claiming reduction of a disposition of certain land by the appellant in favour of the respondents. The Lord Ordinary (Lord Mackintosh) decided in favour of the appellant and reduced the disposition, but the First Division of the Court of Session reversed his decision and dismissed the action. Hence this appeal.

The events leading up to the action are as follows.

Prior to 15th December 1948 the appellant owned two adjoining properties in the parish of Shotts and county of Lanark. One was a farm called Blairmuckhill in the occupation of Messrs Hugh Miller and Sons, as tenants. It was 197 acres in extent, and the rent was 120 a year. The other was a colliery, some 34 acres in extent, in the occupation of the National Coal Board, who paid a rent of 51, 12s. to the appellant.

By probative missives dated 15th, 16th and 17th December 1948, and passing between Messrs Moncrieff, Warren, Paterson and Co., as solicitors for the appellant, and Messrs Waddell, M'Intosh and Peddie, as solicitors for the first respondent, the appellant agreed to sell and the first respondent agreed to buy at the price of 1000 "the farm of Blairmuckhill … at present occupied by Hugh Miller and Sons," the "assessed rental of the farm" being stated as 120. The construction of these documents is not open to doubt. The acreage of the property sold is not stated, but its area is defined by the reference to the occupation of the Millers. The rent stated is the rent paid for the farm, and there is no reference to the colliery. In view of the contentions of counsel for the respondents, to be mentioned later, it may be convenient to say at once that the Lord Ordinary, who heard the evidence of the appellant and the respondents and of other witnesses, held that the parties had a common intention to effect a sale of the farm only and not of the farm plus the 34 acres occupied by the National Coal Board. He did not believe the evidence given by the first respondent to the contrary effect. To quote the words of the Lord Ordinary:

"I find it impossible to believe that Mr Lambie, having seen for himself in September 1948 that the area adjoining the farm on the south, whether originally part of the farm or not, was in fact being occupied by some party or parties for colliery purposes, would not at least have mentioned the fact of such occupation to Mr Peddie if he had thought that this area would be included in what he was buying, and that he would have allowed Mr Peddie to accept on his behalf an offer stated in the terms used in the missive letter of 15th December 1948 without even telling him that the whole of what he (Mr Lambie) was regarding as Blairmuckhill farm was not then in the occupation of the Millers but was being used by some other party or parties for colliery purposes. In point of fact Mr Lambie made no mention at all of the colliery-occupied area to Mr Peddie before authorising him to accept the offer made in the missive letter of 15th December 1948, and Mr Peddie remained unaware of the existence of any such area on or adjoining the farm until months after the missives had been executed and the disposition following upon them had been granted. I further cannot believe that Mr Lambie, rustic and not lawyer or business man as he claimed in his evidence to be, would have bought a farm a part of which he had seen to be in colliery occupation without having

inquiries made regarding the terms and conditions of that occupation and how he would stand with regard to it if and when he became proprietor of the subjects."

The parties being thus agreed on the sale of the farm and nothing but the farm, a disposition was drafted by the solicitors of the first respondent and approved by the solicitors of the appellant. At the request of the first respondent, his wife, the second respondent, was joined with him as a disponee. Unfortunately, when the disposition was drawn and approved, each firm was under the mistaken impression that the farm occupied by the Millers was co-extensive with the property described in a disposition of 1902, which was one of the appellant's title deeds. Accordingly they took the description of the property from the deed of 1902 and inserted it in the disposition. It is now clear that that description, which was very long and obscure, covered both the farm occupied by the Millers and the adjoining colliery. The appellant and the respondents signed the disposition in January 1949, naturally relying upon their solicitors for the accuracy of the parcels and without becoming aware of the error. The disposition was then recorded in the General Register of Sasines.

When the error was discovered, the appellant's solicitors wrote to the first respondent's solicitors pointing it out and suggesting that the first respondent should "co-operate with us in having the matter put right-at, of course, our expense." The first respondent, through his solicitors, refused this suggestion. Thus the appellant was compelled either to bring the present action or to lose his colliery. He decided on the former course, with the result already stated. I should perhaps add that the Lord Ordinary thought that the first respondent "had come to believe" that he had intended to buy the colliery as well as the farm, before he gave evidence at the trial in 1952. I think this is a charitable finding, and I do not get the same impression from reading the evidence of the first respondent. However, the fact, if it be a fact, that the first respondent had come to believe this before 1952 cannot, in my view, make any difference to the result of this appeal.

Counsel for the respondents sought to attack the decision of the Lord Ordinary and uphold the decision of the First Division on two grounds. First, he submitted that, even if the findings of fact by the Lord Ordinary were correct, the law of

Scotland, differing in this respect from the law of England, gave no relief in a case in which these facts were proved. Secondly, he sought to go behind the missives, and to show, upon the oral evidence, that it was the missives, and not the disposition, which failed to carry out the intention of the parties. It will be convenient, first, to consider the second of these contentions.

I feel some doubt whether it is open to the respondents to go behind the plain terms of the missives, in the absence of any claim to reduce these documents. In Gloag on Contract (2nd ed.) the learned author observes (at p. 365):

"Assuming, then, a written contract, admitted or proved to be authentic, couched in intelligible terms, and not alleged to be reducible, if one of the parties proposes to lead extrinsic evidence as to their real intention, how far is that evidence admissible? The general rule undoubtedly is that where parties have reduced the terms of their agreement to writing, the obligations they have undertaken must be ascertained from the terms of that writing without the aid of any extrinsic evidence. Parole evidence that their real intention was other than that so expressed is inadmissible, either when offered as explanatory of the writing, or with the object of proving that the obligations there undertaken were not those by which they intended to be bound."

It is unnecessary, however, for me to express any opinion on this question. We have allowed counsel for the respondents to read all the relevant evidence. It is plain that the appellant never intended to sell the colliery, and I am in complete agreement with the view of the Lord Ordinary that the first respondent intended to buy, and knew that he was agreeing to buy, the farm occupied by the Millers and nothing else. I should have hesitated long before differing from the view of the trial Judge upon an issue such as this; but if I had to arrive at a conclusion on the transcript alone, without the assistance of the Lord Ordinary's views, I should arrive at the same conclusion as he did. There are many circumstances which, as it seems to me, make it quite impossible to accept the evidence of the first respondent on this point.

I now come to the first contention of counsel for the respondents. If the findings of fact by the Lord Ordinary are to be accepted, and they were not doubted by the

First Division, the present case is one in which there was a concluded agreement between the parties for the sale and purchase of a farm containing 197 acres, by a mistake common to the solicitors of both parties the disposition has conveyed to the purchaser the farm and another piece of land 34 acres in extent, and the purchaser insists on retaining all that has been conveyed to him. I should have been greatly surprised to find that in such a case the law of Scotland afforded no remedy. To such a case one may surely apply the words of Lord Dunedin in Krupp v. Menzies (at p. 908):

"There are cases in which it would be truly a disgrace to any system of jurisprudence if there was no way available of rectifying what would otherwise be a gross injustice."

The cases cited in argument, and especially the cases of Waddell v. Waddell, Glasgow Feuing and Building Co. v. Watson's Trustees and Krupp v. Menzies, convince me that the law of Scotland does afford a remedy in the present case, although it would appear that the form of that remedy is not rectification of the disposition so as to make it correspond with the true intent of the parties, but reduction of the disposition. That is, indeed, the only relief sought by the appellant. If it is granted, the result will be, as it seems to me, that the missives stand, and the parties are bound to carry out their obligations thereunder, in so far as they are not already performed.

For these reasons I would reject the arguments advanced on behalf of the respondents and allow the appeal. I have refrained from any detailed discussion of the decided cases and of the reasoning of the Lord President, with which Lord Carmont and Lord Russell agreed, not from any lack of respect for the First Division, but because this task is about to be performed by others more familiar than I with the history and development of the law of Scotland on this subject.

Having regard to all the circumstances of the case, I am of opinion that the respondents should pay to the appellant three-quarters of his costs of the appeal to this House and of the proceedings in the Outer House, and the sum of five guineas in respect of his expenses in the Inner House.

My noble and learned friend **LORD MACDERMOTT** is unable to be present to-day, but he has read my opinion and also the opinions about to be delivered by my noble and learned friends Lord Reid and Lord Keith of Avonholm. He has asked me to state that he agrees that the appeal should be allowed, for the reasons stated in these three opinions.

LORD REID.-The appellant is pursuer in an action brought by him against the respondents. The conclusion of the summons is for reduction of a disposition by him in favour of the respondents dated 22nd and 26th January and recorded in the General Register of Sasines applicable to the county of Lanark on 2nd February 1949. The appellant's first plea in law is "The said disposition dated January 1949, having conveyed to the defenders, through essential error on the part of both the pursuer's agents and the defenders' agents, more than the land agreed to be conveyed by said missives, should be reduced, and decree should be granted as concluded for." The defenders pleaded that the pursuer's averments were irrelevant, and "4. The said disposition dated January 1949 not having been executed through error, or in any event through error rendering it reducible, the defenders are entitled to absolvitor." The Lord Ordinary, Lord Mackintosh, allowed a proof before answer and after proof pronounced an interlocutor reducing the disposition. On a reclaiming motion the First Division (the Lord President, Lord Carmont and Lord Russell) by interlocutor of 16th December 1952 recalled the Lord Ordinary's interlocutor and dismissed the action. This appeal is brought against that interlocutor.

I shall state the facts as briefly as I can, but it is, I think, necessary to set out in some detail those which are important. I shall refer to Mr Lambie alone as the respondent. Both he and his wife were made defenders because the disposition is to him and his wife and the survivor of them. But it is common ground that there is no need to consider separately the position of Mrs Lambie.

In 1948 the appellant owned lands in the parish of Shotts and the county of Lanark known as the lands and estate of Blairmuckhill. These lands extended to about 231 acres, of which the greater part, extending to about 197 acres, was known as the farm of Blairmuckhill and was occupied by Messrs Miller and Sons as tenants

under an agricultural lease. The remainder, extending to about 34 acres, was used for colliery purposes and had on it various colliery buildings, railway sidings and bings. The colliery had been carried on by the appellant's firm prior to nationalisation, and in 1948 this area of 34 acres was occupied by the National Coal Board. The farm was separated from the colliery ground by a fence.

The whole of the lands and estate of Blairmuckhill were held under a disposition of 1902. The description of the lands in that disposition was very long and uninformative. The lands were described as "parts of the twenty-six shilling and eightpenny land of old extent of Blairmuckhill" and otherwise were only identified as having been possessed by persons long since forgotten or bounded by other lands apparently now unidentifiable. The disposition conveyed minerals, but there is no reference in it to any colliery and there is no evidence as to when the colliery was started.

For some considerable time before September 1948 the appellant had been trying to sell the farm. He advertised in various newspapers the farm and lands of Blairmuckhill extending to 197 acres or thereby, stating that the present rental was 120. He had apparently made no attempt to sell the land occupied by the colliery.

Towards the end of September 1948 the respondent, accompanied by his wife, called at the appellant's office in Glasgow. There is some conflict of evidence about what occurred but it seems clear that the respondent made an offer of 1000 and that after some bargaining the appellant agreed to that price and referred the respondent to his solicitors. There was no mention of any particulars of the subjects to be sold, which appear simply to have been referred to as Blairmuckhill or the farm or lands of Blairmuckhill. The respondent and his wife then went to the solicitors' office and spoke to a partner of the firm, Mr Forbes. The appellant had telephoned to say that the respondent was coming and approving the offer of 1000. There is, again, some conflict about what was said, but, again, no particulars were mentioned except a reference to the subjects being occupied by Messrs Miller and Sons. Mr Forbes thought that the respondent had seen the advertisement, and, as Messrs Miller and Sons were making some difficulty about giving up possession, Mr Forbes said that nothing definite could be done until after

the Martinmas term and he asked the respondent to come back after 29th November. There appears to have been another meeting at which still no particulars were discussed, and ultimately, on 15th December 1948, Mr Forbes wrote to the respondent's solicitors a letter in the following terms:-

"45 West George Street,

Glasgow, C.2,

15th December 1948.

Dear Sirs,

On behalf of our client Mr J. A. Anderson, we hereby offer to sell to your client Mr Samuel Lambie, Drumclair Farm, Limerigg, Slamannan, the farm of Blairmuckhill, near Harthill, in the Parish of Shotts and County of Lanark, at present occupied by Hugh Miller and Sons, and that at the price of One thousand pounds and on the following terms and conditions, namely:-

1. The term of entry will be as at 1st December 1948 and actual occupancy will be given as soon as the present tenants vacate the farm in terms of a decree of removing which will be obtained in the action raised against them which calls on Friday 17th curt.

2. The price will be payable as at the term of entry, and interest on the price will run at the rate of 3 1/2 per cent per annum from said term until payment and that notwithstanding consignation of the price in bank.

3. In exchange for the price your client will receive a marketable title with searches showing the records to be clear of any incumbrances on his title.

4. There is no feu-duty payable and the assessed rental of the farm is 120, the stipend applicable thereto 16, 8s. 8d. and the land tax 1, 10s. 6d.

5. Our client will keep your client free of all claims of whatever nature competent to the present tenants against the landlord on the termination of their tenancy other than their claim for grass seeds and unexhausted manures and the compensation

payable for equipment, andc. (if any) which the landlord is bound to take over by statute, which claim and compensation shall be met by the purchaser.

6. The stipend, land tax, rates and taxes payable in respect of the property for the current year will be apportioned as at the term of entry.

Yours faithfully,

Adopted as holograph,

Moncrieff Warren Paterson and Co."

On 16th December the respondent called at his solicitors' office in Edinburgh and saw Mr Peddie, a partner of the firm. Mr Peddie read over the offer to the respondent, who instructed him to accept it, subject to a small condition, which is immaterial, and thereupon Mr Peddie wrote a reply in the following terms:-

"21 Melville Street,

Edinburgh, 3,

16th Decr. 1948.

Dear Sirs,

Mr Samuel Lambie,

Blairmuckhill Farm.

We are obliged for your letter of yesterday offering on behalf of your client Mr J. A. Anderson to sell to Mr Lambie the above farm at the price and on the terms and conditions stated in your letter.

We hereby on behalf of Mr Lambie have pleasure in accepting your offer on the terms and conditions stated subject as arranged on the telephone with Mr Forbes to-day to the addition that your client will assign to ours any claims competent to him under the Town and Country Planning (Scotland) Act, 1947, and hold the bargain as closed.

We will be glad to receive the title deeds at your convenience.

We

are, Yours faithfully,

Adopted

as holograph,

Waddell

M'Intosh and Peddie."

The condition was accepted by the appellant's solicitors in a letter of 17th December, as follows:-

"45

West George Street,

Glasgow, C.2,

17th December 1948.

Dear Sirs,

Mr J. A. Anderson,

Blairmuckhill Farm,

Mr

Samuel Lambie.

We are in receipt of your letter of yesterday's date and now confirm the sale to your client subject to the conditions therein mentioned.

Yours truly,

Adopted as holograph,

Moncrieff

Warren Paterson and Co."

These three letters constituted the missives.

On 24th December the appellant's solicitors sent the titles to the respondent's solicitors in order that they might prepare a draft disposition. Mr Forbes knew that the appellant owned both the farm and the colliery ground but apparently he did not realise or did not recollect that the titles covered both and he merely gave general instructions to his conveyancing clerk, Mr Wood. Mr Wood knew nothing about the colliery and, as I have said, the titles did not show either the nature or the extent of the land held under them. There was a plan annexed to the disposition of 1902 and also a small sketch plan of later date put up with the titles. Both showed correctly the whole land comprised in the disposition but there was nothing on either plan to indicate that part of the land had been separated from the farm and was occupied by a colliery. So it is not surprising that, in the absence of any warning or special instructions from Mr Forbes, Mr Wood assumed that the only land held by the appellant under these titles was the farm and therefore simply forwarded the titles and plans without comment. The respondent's solicitors also knew nothing about the colliery, and, not having been told that any part of the subjects held under the titles was to be excluded from the conveyance, they

prepared a draft into which they simply copied the whole description of the subjects of the disposition of 1902. When revising this draft, the appellant's solicitors still did not observe that it conveyed more than the farm, and the disposition was signed in January and recorded on 2nd February 1949.

There is no doubt that the appellant never intended to convey more than the farm, and his solicitors did not realise that more than the farm was in fact being conveyed, but the case made for the appellant is based on essential error on the part of both parties and the respondent denies that there was any error on his part or at least any such error as would entitle the appellant to a remedy. It is, therefore, necessary to examine the respondent's evidence in the light of the whole facts.

The respondent was a miner and he continued to work in the pits until 1949, but for a considerable time he had also been farming, with the assistance of his two sons. Latterly, he had owned a small farm some five miles from Blairmuckhill, and in July 1948 he sold that farm. According to his evidence he had made no particular effort to find another farm and he did not know that Blairmuckhill was for sale until one day in September 1948 he overheard a conversation of two men in Lanark. They were talking about various farms and they mentioned Blairmuckhill and said that it was for sale, that it was a big rough-looking place and that the owner was unable to sell it and had never had an offer for it. The respondent then went home and talked the matter over with his wife, and two days later they went to look at Blairmuckhill, knowing nothing more about it, if the respondent is correct, than what he had overheard in Lanark. The respondent first met the tenant of a neighbouring farm and then called on Mr Miller, the tenant of Blairmuckhill, but he got no information either from the neighbour or from Mr Miller. The respondent and his wife then walked a short distance along the road and across a field and crossed the fence into the colliery ground. They then had tea in the colliery canteen and he called at the colliery office, where, as he said, he "asked the clerk to give me Mr Anderson's address." It may perhaps be inferred from the form of this answer that he already knew that Mr Anderson owned the farm but he said nothing to indicate that at this stage he had any idea that there was any connexion between the farm and the colliery beyond the fact that both were owned by Mr

Anderson and, if he had formed any impression at this stage about any other connexion between the two, it is somewhat surprising that he did not say so. I may add that I find nothing in the evidence to show that his visit to the ground would suggest to him any connexion between the two. Accordingly, on the respondent's own evidence, he must have gone to Mr Anderson's office knowing nothing more about the place than what he had seen on his visit.

The respondent is a man of very modest means and 1000 must have meant a great deal to him. Yet he says he offered that sum for a place without knowing its extent or the rent which the tenants were paying, without having made any inspection of the buildings or the fences, and without having looked at more than a small part of the land. If the respondent knew as little as he says he did when he went to see first the appellant and then Mr Forbes, I find it incredible that he would refrain from making any inquiries and confine himself to making an offer. The Lord Ordinary says that he cannot credit Mr Lambie's evidence on these matters, and I agree with him.

When the respondent called at Mr Peddie's office on 16th December, the appellant's offer was read over to him by Mr Peddie. That offer only mentions the farm of Blairmuckhill but it states the rent. If the respondent knew no more than he says he did, I find it difficult to believe that he would not have said something to Mr Peddie about the particulars which the letter disclosed, and, if he thought that his offer to Mr Anderson had covered the colliery ground, he would surely have said something about this when he heard the letter read to him, for the letter plainly only referred to the farm. But he said nothing.

The appellant called as a witness at the proof Robert Miller, the tenant of Blairmuckhill farm, who said that the respondent's son had called at the farm long before the day when the respondent called and that he showed the son the boundaries and in particular the boundary between the farm and the colliery. The respondent said in evidence that he had no knowledge of his son having inspected the farm and that his son had never mentioned the matter to him. But the son was not called as a witness. Of course, the fact that a witness is not called does not prove anything, but it makes it difficult for the respondent to attack Mr Miller's

credibility, and I see no reason why Mr Miller's evidence should not be accepted. Certainly, the Lord Ordinary made no adverse comment on it. The respondent and his son were living and working together: it is proved that the son had inspected the farm before his father's visit, and I cannot believe that the son never discussed his visit with his father. It appears to me that the only conclusion one can draw is that the respondent knew a great deal more about the place than he is willing to admit when he made his offer, and I have no doubt that when he made this offer he intended it to apply to the farm and to the farm alone,

On 22nd December Messrs Miller held a displenishing sale at the farm, and the next day Mr Miller made some remark to the respondent to the effect that he was getting 2 an acre for some land occupied by the colliery. In fact an acre or two of the land which had been occupied as part of the farm had been resumed by the landlord and added to the colliery ground and it was in respect of this land that the tenant was receiving 2 per acre. So far as the evidence shows, this is the first occasion on which the respondent heard anything about a connexion between the two, and he seems to have built up on this remark an idea that the whole of the colliery ground was really part of the farm. I would refer to a short passage in the cross-examination of the respondent about the letter of 15th December:-

"(Q.)That will be the letter Mr Peddie read to you? (A.) Yes. (Q.) Did he read the whole letter to you? (A.) The whole letter. (Q.) You authorised him to accept the offer in that letter? (A.) Yes. (Q.) Just look again at what is offered there, the farm of Blairmuckhill at present occupied by Hugh Miller and Sons? (A.) Yes. (Q.) That is what you told Mr Peddie to buy? (A.) Yes. (Q.) There is no mention in that of the colliery land? (A.) But there was a mention by Mr Miller that when he paid Mr Anderson 120 he received 2 per acre for the colliery ground. He paid 120 ground rent to Mr Anderson and received 2 per acre back for the colliery ground. (Q.) Where did you gather that idea from? (A.) Mr Hugh Miller, and Robert Miller was there at his side. That was the day after the sale."

When giving evidence-in-chief about his first visit to the appellant the respondent was asked:

"(Q.) Did you at that stage think that if you purchased the farm and lands of Blairmuckhill you would have acquired the lands on which were the colliery buildings?"

He gave the evasive answer "I thought I would be acquiring all the land at Blairmuckhill." In argument his counsel attached importance to a remark of Mr Anderson during this conversation at the first meeting in September 1948. Just before this passage in his evidence the respondent had quoted Mr Anderson as saying that Blairmuckhill had been an asset to him but that since the National Coal Board had taken over it had become a liability. Mr Anderson appears to have been explaining why he was selling the farm. If the respondent had at that time inferred from this that Mr Anderson was offering to sell to him both the farm and the colliery ground, he would surely have given some clearer indication of this in his evidence.

The respondent moved into the house at Blairmuckhill with his family early in 1949 and he was ill there for a time thereafter. Nothing appears to have arisen with regard to the colliery land until about March, when there was some trouble about the fences between the colliery land and the farm, and then the respondent took the matter up with the National Coal Board. Not getting satisfaction from them he brought his solicitors into the matter on the basis that he was the owner of the colliery and they corresponded first with the Coal Board and then with the appellant's solicitors. Mr Peddie thought that the respondent did then understand that he was the proprietor, and Mr Peddie wrote these letters on that basis. In the course of correspondence which followed, the appellant's solicitors explained the mistake which they had made and offered at their expense to give the respondent a new title to the subjects which had really been sold to him, but the respondent stood his ground and ultimately the present action was raised. The Lord Ordinary says that he does not think that the respondent was deliberately trying to mislead the Court when giving evidence. He says:

"I formed the impression that by the time when he came to give his evidence in the witness-box Mr Lambie did genuinely believe that even before the missives were signed he had known that the colliery-occupied area was included in the subjects of sale. I think, however, that the genesis of this belief in Mr Lambie's mind was a

chance remark which Mr Hugh Miller had made to him on the day after the displenishing sale which had been held on 22nd December 1948, to the effect that he (Miller) was getting 2 an acre for the colliery land."

I entirely accept this view of Mr Lambie's evidence, but the crucial point is that any belief which Mr Lambie had that the subjects which he bought included the colliery ground was a belief which only began to grow after the missives had been signed. So I think that it is clearly proved that at the date of the missives the appellant intended to sell, and the respondent intended to buy, the farm and the farm alone, and each had made that intention clear to the other.

In my judgment, if two parties both intend their contract to deal with one thing and by mistake the contract or conveyance is so written out that it deals with another, then as a general rule the written document cannot stand if either party attacks it. That appears to me to be supported both by authority and by principle. Several cases were cited in argument but, with the exception of two, I do not think that any is directly in point in this case, and I shall not examine them in detail, because I have had an opportunity of reading the speech which my noble and learned friend Lord Keith of Avonholm is about to deliver and I agree with what he says about them. The two cases which I propose to examine are Krupp v. Menzies and Glasgow Feuing and Building Co. v. Watson's Trustees .

I wish to make it clear at the outset that I regard cases of this kind as essentially different from cases where the question at issue is the meaning of words in the deed; where the words are those which the parties agreed to put in but the Court attaches to those words a meaning other than that which the parties or one of them intended. In that case the parties are held to their words; it is for the Court to construe the document and determine the meaning of those words; and neither party can attack the deed on the ground of error. But in the present case the error only arose after the parties had reached agreement.

In Krupp v. Menzies the pursuer had been appointed manageress of a hotel: she had a written contract which contained a provision entitling her to one-fifth of the profits, and she brought an action to recover that amount. The owners averred in defence that the parties had in fact agreed that she should have 5 per cent of the

profits, that the clerk who was instructed to draw up the contract had been told to copy another contract in which the manager was entitled to one-tenth but to halve the share of profits in that contract, and that the clerk had by mistake written one-fifth in the pursuer's contract as being a half of one-tenth. It was argued for the pursuer that it was incompetent to contradict the unambiguous provision of a formal written deed by parole evidence of the intention of the parties, but proof before answer was allowed. The Lord President (Lord Dunedin) said (at p. 908):

"There are cases in which it would be truly a disgrace to any system of jurisprudence if there was no way available of rectifying what would otherwise be a gross injustice … This case seems to me to have nothing to do with the avoidance or reformation of the contract."

Lord M'Laren said (at p. 908):

"It must be kept in view that it is a condition of the pursuer's case that neither party was under error as to the terms of the contract intended."

No question of reducing the deed arose in that case, because the pursuer's service had terminated before the action was raised.

In Glasgow Feuing and Building Co. v. Watson's Trustees Watson had agreed to feu two lots of land to the company's authors, and the missives made it clear that Watson was bound to make the roads on the first lot but the feuars were bound to make the roads on the second lot. But the feu-contract, which included both lots, bound Watson to make the roads "intersecting the said pieces of ground above disponed in so far as delineated and tinged brown on said plan," and on the plan the roads on both lots were tinged brown. Watson's agents had given inadequate or wrong instructions to the surveyors who prepared the plan and who did not know the terms of the missives, and the surveyors, without any fault on their part, coloured all the roads. This mistake was not noticed when the feu-contract was signed and was only discovered some years later, after the lands feued had been purchased by the company. Watson's trustees raised an action for partial reduction of the feu-contract, and the Lord Ordinary, Lord Fraser, would apparently have granted decree if the directors of the company had been aware of the error

when they bought the land, but, as they bought without knowledge of this, he held that they were entitled to rely on the record. The Second Division granted decree of reduction in so far as it declared that Watson should form or imported an obligation on him to form any roads on the second lot of land. Lord Young gave the only opinion. He held, for reasons into which I need not enter, that the company were not entitled to rely on the record. On the issue material to the present case, he said (at p. 618):

"The mistake is thus of the nature of a clerical error, and indeed a plan colourist's error in ‘tingeing’ a road is perhaps of even a more mechanical character. It is not the case of both or either of two parties contracting under the influence of error, for here the parties were under none. It is the case of the instrument which was intended to express their contract, as to which they were quite agreed, failing through the blunder which I have mentioned to express it accurately. I agree with the Lord Ordinary that on satisfactory evidence of such a mistake this Court would not hesitate, as between the original parties, to rectify it. Neither of them would be permitted to take advantage of such a mistake either by cancelling the contract altogether should he have repented of it, or by taking an unconscionable benefit to the prejudice of the other."

He then proceeded to make some not very precise, and I think not very accurate, statements about "equity" and "equities."

There are two matters arising from these cases which it may be convenient to deal with at this point. In the first place, in both these cases, some importance is attached to the error being of the nature of a clerical error. The phrase "clerical error" is generally used to mean a slip of the pen, where the writer means to write one thing but by mistake writes another. But I cannot see how it can matter whether the error was the error of the person who drafted or copied the deed or the error of the person who instructed him. In the Glasgow Feuing Co. case Lord Young referred to a "plan colourist's error." This was a slip on his part, because he had just accepted the Lord Ordinary's statements of the facts, and the Lord Ordinary made it clear that the error was the error of the law agent in not giving proper instructions to the surveyor. I cannot believe that if Lord Young had realised

this it would have made the slightest difference to the result. And in Krupp v. Menzies Lord M'Laren attached some importance to the error being a clerical or an arithmetical error: but the same error might have resulted in that case from the law agent having had two old contracts by him and having given the wrong one to the clerk to copy, and surely the case would have been decided in the same way if that and not the clerk's miscalculation had been the source of the error.

The real distinction is between cases in which it is apparent from the deed itself that there has been an error and cases where error can only be proved by going behind the deed. If the error is apparent, it can be corrected by construing the deed: for example, in Glen's Trustees v. Lancashire and Yorkshire Accident Insurance Co., a clause in an insurance policy was meaningless as it stood, but, reading the document as a whole, the First Division held that the word "not" had evidently been inserted by mistake and therefore held as a matter of construction that the clause should be read as if the word "not" was deleted. Such an error can often, but not always, be properly called a clerical error and there is no need to reduce the document in whole or in part to correct it. Erskine says with regard to cases of that kind (III, iii, 87):

"Where a clause in a contract obliges one of the parties to a fact which appears impossible, and where the alteration of a single word or two will bring it to a meaning which was obviously the intention of the contractors, our Supreme Court have presumed that the mistake proceeded from the inaccuracy of the writer, and have therefore exercised their pretorian power of correcting the clause accordingly."

Erskine's statement that the Court have presumed that such mistake proceeded from the inaccuracy of the writer may perhaps have led to rather loose use of the phrase "clerical error" in some cases.

With cases of apparent error I would include cases where the error becomes apparent on leading such extrinsic evidence as is ordinarily permissible for the purpose of construing a document or identifying persons or things: an example was cited to your Lordships. In Earl of Errol v. Mouat the Earl disponed to Mouat the teinds of the barony of Balquholly, comprehending the teinds of a number of

specified "rooms" or pieces of land, one of the rooms mentioned being the lands of Bomelly. On its being shown that the lands of Bomelly had never been part of the barony it became apparent that there was an error in the disposition: it purported to carry the teinds of the barony, but, if it carried the teinds of Bomelly, it carried more than the teinds of the barony. The Lords sustained an argument that "the word ‘comprehending’ is only exegetic and demonstrative; which demonstration being clearly erroneous, contrary to the meaning of the bargain, it cannot prejudice the disponer."

But in the present case and cases like Krupp v. Menzies and the Glasgow Feuing Co.case no error is disclosed either by the terms of the deed or by any extrinsic evidence which would be competent for the purpose of construing the deed, and therefore the error cannot be corrected by construing the deed. So long as the deed stands, the error cannot be corrected. In such cases the error may sometimes be a clerical error and sometimes an error caused in some other way, but that distinction will not by itself determine whether or not there is a remedy.

That brings me to the second matter which arises from the Glasgow Feuing Co. case-the nature of the remedy available. In that case the decree was for partial reduction of the feu-contract. Partial reduction of a deed may perhaps be competent where it is proposed to reduce a part of the deed which is clearly severable from the rest, but it is quite clear that it is beyond the power of a Court to make a new bargain for the parties, and, if partial reduction would have that result, it would plainly be incompetent; and I think that it is equally clear that a Scots Court has no power to rectify a disposition or other deed in the sense of altering its terms so as to make them conform to some earlier contract or to the real intention of the parties. In Steuart's Trustees v. Hart Lord President Inglis said (at p. 200):

"It is not in the power of any Court to alter the contract of parties, or the terms of a conveyance in implement of a contract of sale."

I am not aware that this has ever been questioned, so it can only be in rare cases that partial reduction of a deed is competent. But, whether or not that particular form of decree was appropriate in the Glasgow Feuing Co.case, that case is, I think, good authority for there being a remedy where, owing to error, a deed

contains something which the parties never agreed to. In that case the error was in a recorded disposition of land, but it was not in the dispositive clause. That is a very important difference. In that case a third party had acquired the land, but reduction was allowed on the ground that the faith of the records did not protect the clause which contained the error. In the present case the error is in the dispositive clause, to which, above all, the principle of the faith of the records applies, and I agree with the Lord President that that principle is a cardinal and distinctive feature of Scots law. But its primary object is to enable third parties to acquire rights in safety and I do not see why giving a remedy in the present case should shake this principle in any way: I do not understand how the rights of any third party could be affected if this disposition is reduced. Then the Lord President says:

"There is much to be said for the view that reduction in respect of ‘error in expression’ should never be available in regard to a deed which has once been duly placed on the records."

But I see no reason why there should be any distinction between reduction in respect of error and reduction in respect of, say, fraud, and I do not think that it could be maintained that the faith of the records must prevent reduction on any ground even where there is no question of prejudice to any third party. If, then, reduction is competent on the ground of error in the dispositive clause of a disposition, what is the nature of the error which must be proved by the appellant if he is to succeed in this case?

Counsel for the appellant submitted as his main argument that it was enough for him to show that owing to a mistake the disposition was framed in such terms that it included subjects not included in the missives, and that it was not competent to go behind the missives to see what the parties did or said or really agreed to. In effect, the remedy which he sought was rectification of the disposition so as to make it conform to the missives. He did not argue that it is competent for a Scots Court to rectify a deed in the sense of granting a decree for deletion of part of the deed and substitution of something else, but he did argue that the same result can and should be achieved in Scotland by granting a decree for the reduction of the

whole deed coupled with a condition that the pursuer should grant a new disposition to conform to the missives. This argument appears to have been accepted by the Lord Ordinary, who said:

"In my view the contract constituted by the missives is conclusive and final evidence that what the pursuer agreed to sell and the first defender agreed to buy was the farm of Blairmuckhill which was occupied by the Millers at the date of the missives whatever the area and extent of that farm might be shown to be by such extrinsic evidence as was necessary to identify it on the ground."

Although I agree with the Lord Ordinary in the result at which he arrived, I agree with the Lord President that this ground of judgment cannot be supported. It makes the missives the ruling document and the disposition merely a means of giving effect to the contract contained in the missives. In my judgment, that has never been the law of Scotland. The disposition has always been held to be the ruling document. A conveyance in implement of a contract of sale is not just a piece of machinery for giving effect to the contract. It has been said again and again that a disposition supersedes the earlier contract: for example, in Edinburgh United Breweries v. Molleson Lord Watson said (at p. 16):

"By the ordinary rule of law, the moment a conveyance is accepted as in implement of the obligations of a contract, the original contract is at an end, and the conveyance constitutes the only contract between the parties."

Young v. M'Kellar, an unusual case, might appear to be an exception, but otherwise the rule stands undisputed. As Lord Watson said in Lee v. Alexander (at p. 96):

"According to the law of Scotland the execution of a formal conveyance, even when it expressly bears to be in implement of a previous contract, supersedes that contract in toto, and the conveyance thenceforth becomes the sole measure of the rights and liabilities of the contracting parties."

But, when it is sought to reduce a deed, it is necessary to go behind the deed and discover the real facts. The fact that the parties agreed to the missives is important

evidence but it is not the only competent evidence. The question is not what the missives mean: if that were the question, the ordinary rule would apply that the meaning of a document must be found from its terms. The question is whether the real facts are such that the disposition must be reduced, and the existence of the missives does not alter the nature of the inquiry. There is a heavy onus on a party who seeks to reduce a probative deed, but, in my opinion, the appellant has proved his case beyond reasonable doubt and he is entitled to succeed.

The appellant has properly undertaken that on the reduction of the existing disposition he will grant a new disposition of the farm. He is bound to do that. The missives are superseded so long, but only so long, as the disposition exists. There is no attempt to reduce the missives, and, when the disposition is reduced, the missives will remain an enforceable contract for the sale of the farm.

On the question of costs, your Lordships are confronted with a difficult situation. In the Inner House (though not in the Outer House) the respondent was an assisted person. One must presume, therefore, that he is a person of such modest means that he could not properly be expected to bear the full expenses of litigating in the Court of Session. Under the legal aid scheme in its present form there is no provision for legal aid in this House, even for a respondent who has been successful as an assisted person in the Court of Session or the Court of Appeal. In the present case we are deciding against such a respondent, and, if the usual order as to costs were made, he would be ordered to pay the whole costs of the appellant in this House. Costs in this House may far exceed expenses in the Court of Session, yet the scheme operates to relieve such a litigant from part at least of the lesser liability in the Court of Session and does nothing to protect him against a greater liability in this House which he can in no way avoid. Even if he failed to appear and the appeal were heard ex parte, he would normally be ordered to pay the costs of the successful appellant; and in this important and difficult case it would have deprived us of much assistance if the respondent had failed to appear by counsel. I can quite understand that it may be good policy to refuse assistance to one who seeks to appeal to this House, but it may be that the position of a respondent who had been an assisted person was not specially considered when the present scheme was made. Of course a respondent who is sufficiently poor

can be allowed to appear in this House in forma pauperis, but it would seem probable that this was not open to the present respondent. So, in a case like the present, both that privilege and the protection of legal aid must be refused to a respondent in this House who has had protection in the Court below and has been brought here against his will. I realise that, if we do not make the usual order in favour of the appellant in this case, we would be discriminating against him for no fault of his, but it seems to me that the facts which I have stated ought not to be entirely neglected, and I think that the situation might properly be met by ordering the respondent to pay only a part of the appellant's costs in this House.

I agree with my noble and learned friend Lord Morton of Henryton as to expenses in the Court of Session, and I also agree that the respondent should be required to pay three-quarters of the appellant's costs in this House.

LORD KEITH OF AVONHOLM.-The circumstances out of which this action arose are fully narrated by my noble and learned friend Lord Reid, and I content myself with a short summary of the salient points.

Prior to 15th December 1948 the appellant was proprietor of the lands and estate of Blairmuckhill in the parish of Shotts and county of Lanark, and had been so since 18th March 1946. These lands and estate had been let to the extent of 197 acres as a farm to tenants described as Hugh Miller and Sons and to the extent of 34.42 acres to a firm of coalmasters called A. and G. Anderson. The 34.42 acres were let and occupied for the purpose of working Blairmuckhill colliery and had in fact passed into the occupation of the National Coal Board by force of statute since 1st January 1947. By missives of sale dated 15th, 16th and 17th December 1948 the appellant agreed to sell to the male respondent and he agreed to buy the farm of Blairmuckhill "at present occupied by Hugh Miller and Sons" at the price of 1000, subject to certain conditions which are not relied on as material to the decision of this appeal. At this date no part of the colliery land extending to 34.42 acres was occupied by Hugh Miller and Sons. Following on these missives a disposition of lands was executed on 22nd and 26th January, and recorded in the Register of Sasines on 2nd February, 1949. The lands described in and conveyed by this disposition include not only the farm lands of 197 acres but also the colliery

land of 34.42 acres.

The appellant seeks to reduce this disposition on the ground of essential error common to both the seller's agents and the buyer's agents. His case, as averred on record, is that the buyer's agents in preparing the draft disposition followed a description in an earlier disposition of 1902 which included the whole lands of Blairmuckhill and this they did in error, not understanding that the description included not only the farm lands but also the colliery lands. When the draft disposition was sent to the seller's agents for revisal, it was owing to error on their part returned as revised without its having been appreciated and pointed out to the buyer's agents that the lands disponed were not the farm of Blairmuckhill as occupied by Hugh Miller and Sons but included other land which was never at any time occupied by Hugh Miller and Sons.

There arises at the outset a question of relevancy, whether, if common error there be in the drawing of the disposition, that is sufficient to entitle the appellant to have the disposition set aside. The view of the Lord President is that this is a conveyancing blunder affecting the extent of the heritable subjects conveyed, which is a matter peculiarly within the province of the dispositive clause of a feudal conveyance. On a review of the authorities he apparently reached the conclusion that the remedy sought was without precedent and contrary to all the conceptions and principles of feudal conveyancing. With his opinion Lord Carmont and Lord Russell concurred, and the action was dismissed.

It would appear to be true from an examination of the authorities that there is no precedent which discloses a case of common mistake affecting the subjects conveyed by the dispositive clause of a feudal conveyance. But I have not been able to bring myself to the view that common mistake in such a connexion can or should have different results from what it has when it operates to affect any material term or clause of a contract or conveyance. The remedy sought does not seem to involve any peculiar application of equitable principles but to depend on the application of ordinary principles of contract law, so far as these are consistent with the principles of feudal conveyancing. I discard at once those authorities which go to construction only. Among these are two decisions of this House-Inglis

v. Buttery and Lee v. Alexander . The former of these was concerned with the meaning of a written commercial contract, and the latter with the meaning of a recorded conveyance. They affirm the well-established principle that in construing such a document it is not permissible (apart from certain recognised exceptions) to look at previous communings or writings of the parties. In a question of construction this principle has its proper place. But in a question of setting aside a contract on grounds known to the law, where the intention and conduct of the parties may be material, it can have no application. The case of Inglis v. Buttery, however, contains a passage by Lord Hatherley (at p. 96) on reforming a contract to which I shall refer later, and in Lee v. Alexander, in a passage quoted by the learned Lord President in the Court below, Lord Watson states what is now firmly established, that according to the law of Scotland the execution of a formal conveyance, even when it expressly bears to be in implement of a previous contract, supersedes that contract in toto, and the conveyance henceforth becomes the sole measure of the rights and liabilities of the contracting parties. This proposition was reaffirmed by Lord Watson in Edinburgh United Breweries v. Molleson. In its place the proposition is unexceptionable, but it leaves open the question of how far a conveyance, like any contract, is open to challenge for common error or mistake. The authority of Erskine, III, iii, 87, and the cases of Erroll v. Mouat and North British Insurance Co. v. Tunnock and Fraser, when rightly read, relate to errors identifiable on the face of a deed and deal, I consider, with questions of construction.

There are, however, cases in a different category where some mistake of a unilateral, or of a mutual, character has been made in a formal deed which is not apparent on the face of the deed, and where the Court has not hesitated to find a remedy. In Waddell v. Waddell a father alleged that a bond and disposition in security which he had intended to take in his own name as creditor had by a mistake of his law agent been taken in the name of his son. The son resisted the action. The Court allowed an issue of whether the money had been lent by the father and whether the bond and disposition in security was through error or inadvertence taken in name of the son instead of in name of the father. On the father's averments the case was one of unilateral mistake, and Lord President M'Neill treated it as a case of "substantial error" and Lord Curriehill as "error in

substantialibus." The error was a material one, for it resulted in the son's appearing as creditor in the bond and disponee of the security subjects under the dispositive clause of the disposition in security. The son could legitimately have appeared in the bond in either of three capacities, as donee of his father, as ex facie the creditor and absolute disponee but in reality holding as trustee for his father, or as the true creditor in the bond having himself provided the amount of the loan. The last alternative was the case in fact pleaded by the son which was in effect sent to a jury, though in argument he endeavoured to limit the proof to writ or oath on the view of trust title, an argument which was rejected by the Court. The case is a clear authority for the view that the Court were prepared to go behind the transaction appearing on the face of the deed on the averment of unilateral error (which the grantor of the deed did not dispute and the correction of which he had no interest to oppose) and to give relief if the averment were substantiated. Questions arose as to the precise form of relief and the Court felt some difficulties in this matter, but the stage had not been reached for deciding that matter and I entertain no doubt that a competent form of remedy could have been found. Glasgow Feuing and Building Co. v. Watson's Trustees was a case of a mistake on a plan attached to a feu-contract which resulted in the superior's being taken bound to made roads to a greater extent than the parties had intended, as was clearly shown from the original missives of sale. The mistake was not discovered until the lands had passed to a third party, the Glasgow Feuing Company, and had been in their possession for some years. The mistake arose through certain roads shown on the plan being wrongly coloured brown, and Lord Young, who gave the judgment of the Court, treated the error as a clerical error. Of the original parties to the contract Lord Young said (at p. 618):

"Neither of them would be permitted to take advantage of such a mistake either by cancelling the contract altogether should he have repented of it, or by taking an unconscionable benefit to the prejudice of the other."

The Glasgow Feuing Company, he held, had no countervailing equities entitling them to more favourable consideration. They knew nothing about the obligation when they acquired the lands. They had paid nothing for it. The obligation, or its discharge, was not one which it was the peculiar purpose of the Register of

Sasines to record. They were accordingly no more entitled than the original parties to take advantage of the mistake and stand on the letter of the obligation. The ratio of the judgment Lord Young expresses thus (at p. 621):

"If through the blunder of a copying clerk or of a plan colourist (I give them only as instances) an instrument fails to express what the parties to it intended-the mistake will be rectified unless there be good reason to the contrary."

This, in my opinion, is a correct statement of principle. The rectification in that case took the form of a reduction of the obligation complained of, which, as it could be regarded as a severable part of the feu-contract and not properly within the feudal clauses of the deed, was in the circumstances a competent remedy. Krupp v. Menzies was concerned with an agreement which, ex facie of the agreement, entitled the manageress of an hotel to one-fifth of the annual net profits of the hotel in addition to a fixed salary. It appeared that what had been intended was that the manageress should get 5 per cent of the net profits but that, in copying a similar agreement which provided for one-tenth of the net profits being paid and being instructed to halve the rate of profits there appearing, a clerk had in error calculated one-half of one-tenth as a fifth, instead of a twentieth. The manageress was said to have been receiving 5 per cent of the profits for some years before the error was discovered, when she sued for the balance over the past years. The Court allowed proof of the mistake. Lord President Dunedin said (at p. 908):

"The only question is whether proof is admissible that a document which in ordinary circumstances would be held to express the intentions of the parties does not in fact do so."

Lord M'Laren also indicated the ratio of the judgment when he said (at p. 908):

"It must be kept in view that it is a condition of the pursuer's case that neither party was under error as to the terms of the contract intended. That being so, we are not at all in the region of rescinding or reforming a written contract where one of the parties has been led into error by the fault or negligence of the other party."

I should, however, delete from this passage the words "or reforming." I am not clear what Lord M'Laren had in his mind but I am not prepared to accept it that by the law of Scotland any Court has power to make a new contract for the parties. This is made very clear in two cases to which we were referred-Steuart's Trustees v. Hart and Pender-Small v. Kinloch's Trustees . The former was a case of essential error on the part of one party known to and taken advantage of by the other. In that case the First Division reversed the judgment of the Lord Ordinary, who had reformed a conveyance to give effect to the seller's intention. The Court gave decree of reduction on condition of the seller's making restitution in integrum. The Judges stated clearly and, in my opinion, rightly that it was not competent to reform the contract. The case, however, contains passages relevant to the present appeal in supplementary opinions by Lord President Inglis and Lord Deas as to the distinction between adducing parole evidence to prove essential error and parole evidence to prove the terms of the contract. In Pender-Small's case lands were sold under burden of a bond of annuity which had been in existence for nearly forty years. The bond provided for an annual payment of 50 in favour of the Free Church of Scotland so long as there was a church of that denomination in Glenisla parish. The capitalised value of this annuity was computed as part of the purchase price. For reasons into which I need not enter the annuity ceased to be payable through failure of the condition and was never in fact paid by the purchaser under the disposition. The pursuer then attempted to recover the capitalised value of the annuity as part of the purchase price. The First Division, reversing the Lord Ordinary, held that this was to reform the contract for the parties and dismissed the action. It is material to note that the pursuer averred and pled that there was mutual and essential error in the circumstances of the case. While the Judges seem to have taken the view that the facts did not disclose a case of common error, they all held that, on any view, the remedy was to reduce the contract as a whole, or not at all, the consideration for the conveyance not being capable of severance into two separate contracts. The tentative view expressed by Lord Hatherley in Inglis v. Buttery is in conformity with these decisions so far as the law of Scotland is concerned. I find it unnecessary to express any opinion as to whether there is any difference between the law of Scotland and the law of England in this respect.

I have examined these authorities somewhat narrowly to see whether there is any recognised principle of law or conveyancing practice that would prevent a Court affording relief in a case of common essential error affecting the identity of the subjects disponed by a formal conveyance. I can find none. The errors in some of the cases may be described as clerical errors, or errors calculi. But they were errors that went to very material parts of the conveyance or contract, to the identity of the creditor in a bond, to the obligations undertaken by a superior in the making of roads, to the remuneration of an employee under a commercial contract. In my opinion, no distinction can be made in principle between clerical errors not apparent on the face of the deed and conveyancing blunders, if either result in a conveyance or contract being expressed as regards essentials in different terms from what the parties really intended and had agreed between them. In either case there has been essential error due to a common mistake. In either case the same relief should be available, on ordinary principles of law, subject to the interests of third parties and any equities affecting the parties themselves. I conclude accordingly that the pursuer and appellant has presented a relevant case.

Before parting with the authorities I would refer to Scottish Union Insurance Co. v. Marquess of Queensberry .This, though relied on by the appellant, does not appear to me to be a case of common error. The transaction there illustrated may be unfamiliar to-day but in those days was well recognised and is lucidly explained by Lord Cottenham at page 198 of the report. It was in form the purchase by an insurance company of an annuity from an heir of entail who wished to raise money and had no landed security to offer apart from his life interest in the entailed lands. To secure themselves against loss the insurance company took from the heir an assignation of a large number of insurance policies on his life. The company undertook in the event of the heir redeeming the annuity payments to retransfer to him the policies of insurance. The heir died without redeeming the annuity payments and the question arose whether the company was entitled to retain the insurance moneys entirely for themselves or must account to the heir's representatives for the excess remaining after satisfying themselves of the sum originally advanced to the heir and any other charges incurred by them in respect of the transaction. I cannot find from anything said or done that any mistake was made in the documents giving effect to the transaction, though Lord Mackenzie in

the Court of Session ventured a conjecture that there had been an oversight by the parties. If by that he meant that the parties had not provided for the situation which had arisen, the observation was irrelevant, and, as I have said, there is nothing to suggest that he was referring to any proved or admitted common mistake. The transaction, however, was stamped from the beginning as a transaction of loan and the policies as a security. It was on this consideration, in my view, and not on any doctrine of common error that this House held that the company had to account for the proceeds of the policies. The decision has no application to the circumstances of the present case.

As to whether in the present case there was common error, I am unable to agree with the Lord Ordinary that the matter is concluded by the terms of the missives. They are important adminicles of evidence but not, in my opinion, conclusive. On record the defenders state:

"The defenders and their agents at all material times understood that they were purchasing the whole area of ground described in the disposition sought to be reduced, the boundaries of which were shown on the said separate plan and the plan annexed to the disposition dated 6th and 9th December 1902, and that no area was excepted from the sale."

This the defenders are entitled to prove and in doing so they are not setting up a sale of heritage by parole but standing on the terms of the conveyance and meeting averments of the appellant that there was common error.

In the matter of proof the onus is on the appellant. He has to overcome the terms of the conveyance, and the onus is not a light one. It is, in my opinion, rightly expressed by Lord Chelmsford in Fowler v. Fowler, at p. 265, as requiring a standard of proof that will leave no fair and reasonable doubt upon the mind. The line of approach taken by the Lord Ordinary enabled him to avoid making a critical examination of the evidence as to the understanding and intention of the defender Lambie when he entered into the negotiations leading up to the missives of sale. The statement by the Lord Ordinary that he thinks that from the end of 1948 (which was before the date of the conveyance) Mr Lambie did genuinely think that the colliery ground was included in what he had bought under the missives makes

it even more necessary to examine narrowly the grounds for a different belief existing at the date of the missives. As I read the Lord Ordinary's judgment, he does not regard Lambie as a dishonest witness but as a witness who honestly held a certain belief from the end of 1948 till the date of the proof. His view is that Lambie is merely mistaken as to what he thought at an earlier date. All these considerations make it, in my opinion, necessary to take all the evidence as it appears on the printed page on the footing that the Lord Ordinary saw no reason to treat Lambie throughout as other than an honest witness. But that is a different matter from the question whether he was a reliable witness as to the state of his belief before the missives were signed. In the light of these considerations I have carefully considered the evidence that has been adduced and which was very fully commented on by counsel who appeared before this House. In the result I have come to the conclusion that the appellant has discharged the burden of proof upon him substantially for the reasons that have been given by my noble and learned friend Lord Reid, which I do not find it necessary to repeat. On that view the parties were ad idem when the missives were signed. No more was intended to be bought and sold than the farm of Blairmuckhill. The description in the dispositive clause of the disposition is the result of a common error. The disposition accordingly falls to be reduced. Reduction of the conveyance is, in my opinion, the only competent remedy in this case. The missives will then revive, and parties will be left to stand on these missives for their respective rights. I would allow the appeal.

In the matter of costs in this House, I agree with my noble and learned friends Lord Morton of Henryton and Lord Reid. The position is anomalous. There is no suggestion that the respondent, financially, is any better off than he was when he received legal aid in the Inner House. It may be that, so long as legal aid is not available generally in connexion with proceedings on appeal from the Court of Session to this House, the special position of a respondent who has received legal aid in the Court of Session and is brought here on appeal could be met by a regulation under section 12 (3) (c) of the Legal Aid Act of 1949, or some other provision of that Act. But that is for the appropriate authority to consider.