

struction of a certain staircase. I concur with all the observations your Lordship has made as to the absence of specification in the complaint, but it appears to me that the true answer is that the insufficiency of the rail—if it were insufficient—is not alleged to be the consequence of negligence, but a defect of construction which was just as obvious to the pursuer when he took the house as he says it was to the owner when he let it. If the pursuer required any structural alteration on the house it was for him to say so before he took it, and it must be held that he took the house because he was satisfied with its arrangements as regards the staircase as well as in other respects.

As to the authorities also I agree with your Lordship. It appears to me that cases against road authorities or against administrators of a similar character have really no bearing on the present question. The case of *M. Martin*, January 24, 1872, 10 Macph. 411, is a very good illustration of the distinction which ought to be taken between the present case and cases where there is relevant averment of negligence, because the ground of judgment in that case was, in the first place, that the stair had been allowed to fall into disrepair, and secondly, that the landlord had undertaken an obligation to look after it and keep it in good repair. The judgment is really founded on the landlord's obligation, which the Court found was implied, if it was not expressed, to keep the stair in proper repair, and has no application to the question which we have to consider here.

Another argument put forward for maintaining the pursuer's case was of a different nature. The pursuer's counsel maintained that the defender was liable for the defect, on the ground that the defect was in the nature of a trap. That is a phrase which is very apt to describe the principle of liability which is probably best expounded in the judgment of Mr Justice Willes in the case of *Indermaur* against *Dames*, 1886, L.R. 1 C.P. 274. The theory is that occupiers of premises—not necessarily owners but occupiers—are bound to take reasonable care that the persons whom they, either expressly or by implication, invite to enter their premises are exposed to no dangers which require more than ordinary care on their part to guard against. The principle is that such visitors using reasonable care for their own safety are entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger of which he knows or ought to know. If he fails to take reasonable care to avert or to warn his visitor of it he may be responsible. But there is alleged in this case nothing of the nature of a concealed danger known to the landlord and not known to the tenant. There was no covert risk at all. The condition of the staircase, assuming it to have been dangerous, was perfectly well known both to the tenant and the landlord; and therefore I am unable to say that such cases as have been referred to have any application to the case

in question. On the whole matter I am of opinion that the action should be dismissed.

LORD PEARSON—I agree in holding that the pursuer has not stated a relevant case. In the first place I think the defender's criticism of the record was well founded when he said that the pursuer's averments are wanting in specification, and that, while they are detailed in matters of comparatively little importance, they become vague and general on the points which directly affect the defender's liability. It is not stated how long the pursuer has occupied the premises, nor is it averred that he himself was not quite well aware of the alleged defective construction of the stair rail. The dimensions of what is called the "very considerable gap" between the wall and the nearest upright are not given; nor is even the age of the injured child stated beyond the averment that he was in pupilarity, which may mean anything up to fourteen. But assuming these difficulties to be overcome, I think there is no relevant averment of fault on the part of the defender. This is not the case of an access, originally safe, being allowed to go out of repair. The fault alleged is in the original design and construction of the railing, and that is a matter which had never been made the subject of a complaint, and was as patent to the pursuer as tenant, and to all who used the staircase as it was to the landlord. The pursuer is the defender's tenant in the subjects. He took the subjects as they stood, and it is not said that he so much as called the landlord's attention to the stairhead railing, which he now avers to have been all along in "an unusual defective and dangerous condition." If there be a failure in duty, it would seem on the averments to be as much on the part of the pursuer as the defender.

The LORD PRESIDENT was absent.

The Court dismissed the action as irrelevant.

Counsel for Pursuer and Appellant—Crabb Watt, K.C.—M'Robert. Agent—Malcolm Graham Yooll, S.S.C.

Counsel for Defender and Respondent—Orr Deas. Agents—Simpson & Marwick, W.S.

Wednesday, November 7.

## FIRST DIVISION.

[Lord Ardwall, Ordinary.

HART v. FRASER.

*Contract—Reduction—Fraud—Error in Essentialibus—Misrepresentation—Contract for Sale of Hotel—Representation by Seller that No Complaints Existed as to Sunday Drinking—Issues.*

By letters of offer and acceptance A contracted to buy and B to sell an hotel with its business and goodwill condi-

tionally upon the licence held by B being transferred to A at the ensuing Licensing Court.

In an action by A against B for reduction of the contract, he averred that prior to the signing of the letters B had assured him, in response to his inquiries, that there had been no complaints as to Sunday drinking in the district generally, nor as to the conduct of his hotel in particular; that, but for this assurance, he would not have entered into the contract, an hotel licence in a suspected district being precarious and of comparatively little value; that at the ensuing Licensing Court, upon his making his application, the chief-constable reported adversely as to the prevalence of Sunday drinking in the district generally and B's hotel in particular; that the magistrates in consequence considered the question of reducing the licence to one of six days only, and that he then withdrew his application; that similar reports had been made within the knowledge of B at the two previous sittings; that B's statement was false and fraudulent, and made with the intention of procuring the sale.

*Held* that the pursuer's averments were relevant to support the issues—(1) Whether the pursuer was induced to sign the missive letter by the fraudulent misrepresentation of the defender; (2) Whether he signed it under essential error as to a material part of the contract induced by the misrepresentations of the defender. (The judgment of the Lord Ordinary (Ardwall), who had disallowed the second issue, *pro tanto reversed*.)

On 11th June 1906 Thomas Hart, 20 Eyre Crescent, Edinburgh, raised an action against Donald Fraser, hotel keeper, Markinch, for reduction of a holograph offer and acceptance by which he became the purchaser of the Bethune Arms Hotel, Markinch.

The offer was in the following terms:—

“40 Rankeillor Street,  
Edinburgh, 27th March 1906.

“Dear Sir,—I hereby offer you the sum of six thousand five hundred pounds (£6500) sterling for your property in Markinch, known as the Bethune Arms Hotel and stabling, together with the separate property in Union Place, Markinch, and the goodwill of the business carried on by you. Said price to include the bar, bar fittings, and working utensils in and about the hotel, and furniture in the public rooms on the ground flat. I agree to take the hotel furniture and furnishings, and the horses, carriages, and stable utensils, and stock of liquids at mutual valuation. It is a condition of this offer that the hotel licence at present in your name be transferred to my name at the ensuing Licensing Court at Kirkcaldy, and that the purchase and valuation prices be settled on 15th May next, or as may be mutually arranged.—I am, Yours faithfully, Adopted as holograph,  
THOS. HART. 27/3/1906.”

The acceptance was as follows:—“Dear Sir,—I hereby accept the above offer.—Yours faithfully, Adopted as holograph,  
“DONALD FRASER.”

The pursuer averred—“(Cond. 2) In the end of February or the beginning of March 1906 the pursuer met the defender in Edinburgh along with Mr George Baikie. At the said meeting the defender offered to sell the pursuer the said Bethune Arms Hotel. Thereupon the pursuer asked the defender whether there had at any time been complaints as to Sunday drinking in the district, or as to the conduct of the hotel. The defender replied that there had been absolutely none. (Cond. 3) Thereafter the pursuer visited and inspected the said hotel, and examined certain of the business books. Subsequently, on the 27th March 1906, he signed the said missive of 27th March 1906, which is first sought to be reduced, and the defender at the same time signed the missive second sought to be reduced. The said missives were prepared by Mr Shepherd, Leven, who acted as agent for both parties. The pursuer at the same time instructed Mr Shepherd to make the necessary application for a transfer of the licence of the said hotel, and shortly afterwards made arrangements for the payment of the price upon a transfer in his favour being granted. (Cond. 4) The Licensing Court for the Kirkcaldy district was held on the 17th of April 1906 in Kirkcaldy. The pursuer and defender were both present in support of the application for the proposed transfer of the Bethune Arms Hotel licence. At the opening of the said meeting the Chief-Constable read a report in which he referred in strong terms to the prevalence of Sunday drinking in Markinch, and said that there were complaints against two of the hotels in this respect, of which the Bethune Arms was one. At the previous two half-yearly meetings of the said Licensing Court for the Kirkcaldy district similar and stronger reports had been made by the Chief-Constable against Sunday drinking in the district. On hearing the said report read the pursuer at once charged the defender with having misled him, but he replied—‘Oh, this is simply a six-monthly occurrence. We take no notice of these.’ (Cond. 5) The Justices considered this question of Sunday drinking to be so important, and the suggestion against the Bethune Arms so serious, that they resolved to consider the expediency of reducing the said licence from a hotel licence to a six days' licence. In particular, Mr Dixon, Markinch, one of the Justices, warned the pursuer that in the event of the hotel licence being transferred the place must be better conducted in future as regards Sunday drinking than it had been conducted in the past. The Justices retired to consider the expediency of reducing the said licence, and the pursuer instructed his agent to withdraw his application, which was accordingly done. (Cond. 6) The statement of the defender made to the pursuer at the said meeting in Edinburgh in the end of February or the beginning of March, that there had been

no complaints about Sunday drinking or against the conduct of the Bethune Arms Hotel, was false in the knowledge of the defender, who had attended several previous meetings of the Kirkcaldy District Licensing Court and had heard the reports of the Chief-Constable, which contained strong representations against Sunday drinking in Markinch, and in this respect against the Bethune Arms Hotel. The said statement by the defender that there had been no such complaints was made fraudulently in order to induce the pursuer to purchase his said hotel, and it was relying on the truth of the said statement that the pursuer made his said offer of 27th March. But for the said representation that there were no complaints as to Sunday drinking in the district the pursuer would not have entered into the said contract, as he considered the matter one of great importance—complaints as to Sunday drinking having to his knowledge led, in other localities, particularly in Cupar, to the reduction of hotel licences to six days' licences. He asked the said question about Sunday drinking because he considered, and considers, that a hotel licence in a district complained against by the Chief-Constable is a more precarious, and therefore less valuable, licence than one in a district in which there had been no complaints. The complaints that had been made as aforesaid as to Sunday drinking and the Bethune Arms Hotel very largely diminished the value thereof, and the price which would have been got for it if the fact of these complaints having been made had been known."

The pursuer pleaded—"(1) The said missives having been procured from the pursuer by the fraud of the defender, fall to be reduced. (2) The pursuer having been induced to sign the said missive under essential error as to a material part of the contract, induced by misrepresentations of the defender, is entitled to rescind the contract."

The defender pleaded, *inter alia*—"(1) The pursuer's averments being irrelevant the defender is entitled to be assoilzied. . . . (3) The pursuer being bound by agreement to purchase the property, decree of reduction should be refused."

The following issues were proposed for the trial of the cause by jury—" (1) Whether the pursuer was induced to sign the missive letter dated 27th March 1906 by the fraudulent misrepresentations of the defender? (2) Whether the pursuer signed the said letter while under essential error as to a material part of the contract, induced by the misrepresentations of the defender?"

On 18th July LORD ARDWALL (Ordinary) approved of the first issue but disallowed the second.

*Opinion.*—"I think this is rather a thin case to begin with, in this sense that we have here a contract made upon the condition as it were of the hotel licence being transferred to the purchaser's name, and of course if he had got a six days' licence instead of a proper hotel licence for seven days, there would have been an end of the contract, and he has protected himself to

that extent by the condition he has put in, but the pursuer alleges, and that with some show of truth, that there was a point beyond that, and that the risks were not confined to the Licensing Court, before which this licence was to come up for the first time, but that there was a risk, if there was a general complaint about Sunday drinking in that district at some future Court, that the licensing authorities might take the opportunity to diminish the number of hotel licences in that district. It may be doubtful how far the pursuer was justified in thinking that a serious risk, or how far it might have entered into his calculations in making the offer he did for this hotel, but in face of the averments of the pursuer to the effect that he knew that in such circumstances where there had been complaints the hotel licences had been diminished in number, and that in point of fact he was very much moved by the representations made by the pursuer that there was no Sunday drinking in the district, I cannot hold that a relevant case has not been stated.

"The only two questions remaining are whether the case should be tried before a jury or before myself, and whether both of these issues should be allowed. As to jury trials, I am not a great believer in that form of trial, and have no more than a becoming respect for that tribunal, but this is really a case more suited to be tried by a jury than by a judge, for the question really is what was the effect on the mind of this man of business of this reputation for Sunday drinking or the freedom from it? Now I think this is a matter which the jury is just the sort of tribunal to deal with. If they have any difficulty in law they can be kept right by the judge who takes the trial, and I cannot disallow the first issue here. I cannot, however, see what part of the contract there was essential error in regard to. On the contrary, as I have just pointed out, the essential error was with regard to this matter which is out of the contract altogether—not a risk provided for by the contract at all, but a risk said to have been caused by the district having a bad reputation. That is not a part of the contract at all, but a representation which induced or did not induce this pursuer to enter into the contract, but that it is an error with regard to a material part of the contract I cannot for a moment hold. I shall therefore disallow the second issue."

Hart reclaimed, and argued—He was entitled to both issues, and the Lord Ordinary was accordingly wrong in so far as he had disallowed the second. The Lord Ordinary admitted that there were relevant averments of error, and error induced by the defender's misrepresentations, but he apparently thought it was error with regard to a matter outwith the contract, and not with regard to a material and essential part of the contract itself, whereas in fact it was error in regard to the most material part of the contract possible, viz., the actual subject-matter of the contract itself, which was not a mere hotel business but an

hotel business of good reputation and untainted record—a totally different article worth a totally different price. See on the whole matter Lord Watson in *Stewart v. Kennedy*, March 10, 1890, 17 R. (H.L.) 25, 27 S.L.R. 469.

Argued for the respondent—Neither issue should be allowed. The so-called misrepresentations were as to matters altogether outwith the scope of the contract, which was purely for the sale of an hotel, fittings and goodwill. The first issue of fraud must accordingly go by the board, because to ground an issue of fraud, the fraud must be fraud *dans causam contractui*, and not fraud as to something accidental. Similarly the second issue must go, because the error must be essential error as to a material part of the contract. If the pursuer had got his licence what case could he have had? He would have got his licence had he not chosen to withdraw his application.

LORD KINNEAR—I am not able to agree with the Lord Ordinary in this case, because I think the question, whether the pursuer is entitled to an issue founded on fraudulent misrepresentation, depends upon the same considerations as the question, whether he is entitled to an issue of essential error as to a material part of the contract induced by the misrepresentations of the defender, although in the one case he may be entitled to a verdict without satisfying the jury that the defender was acting with fraudulent intent. The question is whether there are relevant averments on record entitling the pursuer to either issue. I have come to be of opinion that there are. I do not express an opinion whether the misrepresentations were in fact material to the contract. I think the pursuer is entitled to go to a jury and ask their verdict on that question. I think that both issues ought to be allowed.

LORD PEARSON—I concur.

LORD M'LAREN—I concur. If the pursuer had been disposed to withdraw the issue of fraud I should have been disposed to allow him to do so, and to allow an issue that the misrepresentations which were made, it may be, quite innocently induced essential error. But as the pursuer desires to take the onus of proving that the misrepresentations were fraudulent I do not see why he should not have the opportunity of doing so, and of putting both questions to the same jury.

There being no observations on the form of the issues, we allow both issues as proposed.

The LORD PRESIDENT was absent.

The Court recalled the Lord Ordinary's interlocutor and approved of both issues.

Counsel for the Pursuer and Reclaimer—Graham Stewart, K.C.—Sandeman. Agent—R. M. M'Queen, Solicitor.

Counsel for the Defender and Respondent—Clyde, K.C.—Pitman. Agents—Macpherson & Mackay, S.S.C.

Saturday, November 3.

## FIRST DIVISION.

[Lord Ardwall, Ordinary.]

JOHNSTON (JOHNSTON'S EXECUTOR)  
v. DOBIE (HASTIE'S TRUSTEE)  
AND OTHERS.

*Executor—Executor-Dative qua Factor to Minor and Pupil Next-of-Kin—Effect of Wards Attaining Majority.*

An appointment as executor-dative *qua factor* for minor and pupil next-of-kin does not fall automatically on the wards attaining majority, but subsists until the estate of the deceased has been ingathered and administered, and renders inept the appointment as executor-dative of one of the wards after attaining majority, even though the consent is given of the executor appointed *qua factor*.

*Title to Sue — Executor — Beneficiary — Executor Suing Appointed when Subsisting Prior Appointment—Beneficiary whose Beneficial Title is Derived through Person to whom an Executor has been Appointed.*

In 1887 A was appointed executor-dative of X *qua factor* for her minor and pupil next-of-kin. In 1904 B, a son who had by that time attained majority, was appointed her executor-dative. In his application for the office B took no notice of the prior appointment of A. B having raised an action for the reduction of a discharge granted by X to her father's trustees, held that he had no title to sue (1) as executor inasmuch as standing A's appointment as executor his appointment was inept, or (2) as individual inasmuch as he had no direct beneficial interest, any interest he had being derived through one to whom an executor had been appointed.

This was an action of reduction and count, reckoning, and payment at the instance of William Johnston, commercial traveller, Sefton Park, Liverpool, as executor-dative of his mother, the deceased Mrs Julia Mout Hastie or Johnston, sometime residing in Lochmaben, and as an individual, against (1) Joseph Jardine Dobie, 104 High Street, Lockerbie, as surviving trustee and executor of the late John Hastie, Bruce Villa, Lochmaben, and (2) John Henderson, bank agent, Lockerbie, and others, as trustees and executors of the late James Stewart, solicitor, Lockerbie.

The summons concluded for reduction of, *inter alia*, (1) a discharge granted by Mrs Julia Mout Hastie or Johnston, dated 10th January 1887, in favour of the said Joseph Jardine Dobie and James Stewart as trustees of her father, the said John Hastie, and (2) a minute of sale of certain heritable subjects and disposition following thereon, which subjects it was alleged had been sold by the said Joseph Jardine Dobie and James Stewart (John Hastie's trustees) to