the defenders' ship, "Helenslee," on a voyage from the Clyde to Otago. The terms of the engagement, which were contained in a letter addressed by the defenders' agents to the pursuer, were—"The sum of £25 to be paid for the run out at Otago, and if required, a cabin passage home in the ship to be allowed without salary." The pursuer alleged that the defenders had committed a breach of this engagement by refusing to give him a cabin passage home, instead of which they retained him as a member of the crew, failing to give him his discharge from the ship's articles at Otago, and subjecting him on the voyage home to discipline as one of the ship's company.

The Sheriff-Substitute (DICKSON) assoilzied the defenders, holding that the pursuer had failed to establish his right to a discharge at Otago, and that when the surgeon of a ship engaged for the voyage outward gets a free passage home, it is customary for him to give professional attendance gratuitously to any of the crew who may require it.

The Sheriff (BELL) adhered.

The pursuer appealed.

J. A. REID for him.

SOLICITOR-GENERAL and BIRNIE in answer.

The Court unanimously adhered.

Agent for Appellant—John Walls, S.S.C.

Agent for Respondents—James Webster, S.S.C.

Saturday, December 10.

FIRST DIVISION.

HARE *v.* HOPES.

Contract — Reduction — Fraud—Error in Essentialibus — *Issues — Process — Reclaiming Note* —31 *and* 32 *Vict., c.* 100, § 28—*A. S.* 14 *October* 1868. In a reduction of a certain agreement of partnership and balance sheet of a firm's accounts, where the whole statements on record went to disclose a case of fraudulent misrepresentation and concealment, while the only allegation of essential error contained nothing but the technical terms, without any specification of the circumstances or mode in which it was induced, otherwise than by a reference to the allegations elsewhere made in support of the averment of fraudulent misrepresentation,—*Held* that the pursuer of the reduction was not entitled to an issue of essential error apart from fraud, as well as an issue of fraud. And that to entitle him to such, two distinct and separate cases must be relevantly disclosed on record.

Observed that where the Lord Ordinary has disallowed an issue *in toto*, and his judgment is not acquiesced in, the proper method is to proceed by reclaiming note, and not by a mere motion in the Inner House, as directed by the Court of Session Act and Act of Sederunt of 1868, in the case where a variation of an issue is desired.

This was an action of reduction, declarator, and payment, brought by William Campbell Hare against William and Robert Archibald Hope, the partners of the firm of Charles Dick & Son, brewers in Edinburgh, seeking to have reduced (1) an agreement entered into between the said defenders and the pursuer on 7th January 1869, whereby it was agreed that the pursuer should be assumed a partner of the said firm, of which the defenders were then sole partners; (2) a balance sheet of the affairs of the said firm of Charles Dick & Son as at 15th February 1869, made out and certified as relative to the said agreement. The summons also concluded for repayment of certain sums paid by the pursuer on the faith of the said agreement and balance sheet. And farther, for declarator that, in the event of its being found that the pursuer is or was a partner of the said firm, he is not bound by the said balance sheet, or by his subscription thereto, but that the same is incorrect, and accordingly "the defenders ought and should be decerned and ordained to make out and exhibit a true and correct balance sheet of the affairs of the said firm of Charles Dick & Son as at the 1st day of March 1870," &c.

The averments on record, by which an action of reduction, &c., was supported, were as follows:—That the pursuer, having in November 1868 advertised for a partnership in a brewery, "the affairs of which would bear the strictest investigation," his advertisement was answered by the defenders, in consequence of which some correspondence took place between the parties and their agents, in the course of which the defenders, "in answer to the pursuer's inquiries, represented the concern of Charles Dick & Son as a very extensive and prosperous one. In particular, the defenders, through their agents, represented that the premises in which the business was carried on were very valuable, and belonged to the partners of the firm; that the principal trade consisted in the manufacture and sale of India pale ales; that the consumption of malt was from 4000 to 5000 quarters annually; that the firm had a large and respectable connection in the United Kingdom, and was rapidly acquiring a connection abroad; and that they made their own malt, which would amount to between 6000 and 7000 quarters per annum. In consequence of these representations the pursuer was induced to proceed with the negotiation, and he had meetings and correspondence on the subject with the defender, Mr William Hope. In the course of these meetings and this correspondence, Mr William Hope stated to the pursuer that the business carried on by Charles Dick & Son was a very extensive and prosperous one; that the capital, including the price of the brewery premises, was upwards of £20,000; that the profits of the business had in the previous year exceeded £5000; and that the average profits might be safely estimated at £6000 per annum. Further, in the course of the said negotiations, Mr William Hope, in answer to special inquiries by the pursuer, expressly stated that the water supply of the brewery was excellent, and thoroughly adapted for the manufacture of pale India ales, and that the ales of this description produced by Charles Dick & Son were of the first quality, and in good demand. Relying upon the representations thus made to him by the defenders through their agents, and by the defender William Hope directly, and believing the same to be true, the pursuer, on or about 7th January 1869, signed at Drylaw House, near Edinburgh, the private residence of the defender William Hope, the pretended agreement now sought to be reduced. This agreement was prepared by the agents of the defenders without any previous consultation with the pursuer or his agents, and no draft of the agreement was ever submitted to the pursuer or his agents. The pursuer never saw the agreement until the engrossment of it was laid before him for signature, as after-mentioned. Prior to signing the said pretended agreement

the pursuer had had no adequate opportunity of examining the books and accounts of Charles Dick & Son, or the condition of the premises or manufacturing plant and machinery, and he had no knowledge of the state of their affairs other than that afforded by the representations and statements made to him by the defenders, directly or through their agents, and in particular by the defender Mr William Hope himself." The deed of agreement was then narrated, and the pursuer went on to aver that, notwithstanding the signature of the deed of agreement on 7th January 1869, and during the currency of the fourteen days which were allowed the pursuer to resile from it, it was arranged, at a meeting between him and Mr William Hope, that no contract of partnership should be concluded until the balance sheet of the firm was made up, and the pursuer satisfied that its affairs were as represented. This, it was expected, could be done during the month of February, so that the partnership should commence as at 1st March 1869. "The balance-sheet was not produced until a late hour on the evening of Saturday the 27th February 1869, the last lawful day before the date of commencement of the copartnery. On that day the defenders handed to the pursuer the pretended balance-sheet now sought to be reduced, which they specially represented to the pursuer as containing an accurate statement of the affairs of Charles Dick & Son. On the faith of this representation, and of the previous representations above set forth, the pursuer signed the said pretended balance-sheet, and it was at the same time signed by the defender Mr Robert Archibald Hope. The said pretended balance-sheet was not signed by the defender Mr William Hope." After detailing the contents and statements of this balance sheet, the pursuer averred that he "had neither the time nor the means necessary for enabling him to check the accuracy of the said pretended balance-sheet. He had had no opportunity of carefully examining the books of the firm or of employing an accountant to examine them on his behalf, and after the said pretended balance-sheet was produced he had no time to make arrangements for such an examination. The defenders expressly assured him that the said pretended balance-sheet was substantially true and correct. On the faith of the statements contained in the said pretended balance-sheet, and of the defender's representation that the same were true and accurate, and relying on the apparent corroboration thus afforded of the representations and statements previously made to him by the defenders, the pursuer, on or about 1st March 1869, paid over to the firm the sum agreed upon as his share of the capital, and entered upon the discharge of his duties as a partner of the concern, the business being thereafter carried on under the firm of Hope Brothers & Hare. When the pursuer had for some months acted as a partner of Hope Brothers & Hare, he discovered, and he now avers, that the representations and statements made to him and his agents by the defenders through their agents, and directly by themselves prior to the execution of the agreement of 7th January 1869, were false, and that the same were made by the defenders in the full knowledge that they were false, and with the fraudulent intention of inducing the pursuer to sign the said pretended agreement, and to become a partner of and put his money into the concern of Charles Dick & Son, which the defenders well knew not to be in the prosperous condition represented by them. Further, the pursuer avers that the defenders unwarrantably and fraudulently concealed from him facts and circumstances which they were bound to disclose, and that for the purpose of inducing him to sign the said pretended agreement, and to become a partner of, and put his money into, the said concern of Charles Dick & Son. In particular, it was not true, as represented to the pursuer by the defenders, that the concern was in a prosperous and thriving condition; that the premises belonged to the firm of Charles Dick & Son . . . On the contrary, it was the fact, and well known to the defenders, that the business was not in a prosperous and thriving condition; that the premises did not belong to the firm of Charles Dick & Son, but to the firm of M'Lean & Hope, and that these premises were burdened with £7500 borrowed over them by the latter firm; and that the consumption of malt never in any year exceeded 4000 quarters; that they were not establishing a profitable foreign trade . . . Further, the pursuer has discovered and avers that the said pretended balance-sheet of the affairs of Charles Dick & Son, as at 15th February 1869, and the statements therein contained, are false, and that the defenders well knew the same to be false when they produced the said pretended balance-sheet to the pursuer, and declared the same to be true and correct. In particular, it was not true, as represented in said pretended balance-sheet, that the brewery property was worth £15,197, 16s. 9d.; that the value of the open accounts due to the firm amounted to £17,215, 9s. 6d. . . . On the contrary, it was the fact, and well known to the defenders, that the brewery property was not worth more than £10,000; that the open accounts due to the firm were not worth more than £13,200 or thereby . . . It was on the faith of, in reliance upon, and in the belief of the truth of the said false and fraudulent statements and representations by the defenders, and in consequence of the said unwarrantable and fraudulent concealment on their part, that the pursuer was induced to sign the said pretended agreement of 7th January 1869; to enter into the subsequent arrangement set forth in Article 8 hereof; to sign and accept as correct the said pretended balance-sheet; to pay over to the defenders the said sum of £7000; and to become a partner of the said firm of Charles Dick & Son, afterwards the said pretended firm of Hope Brothers & Hare. At all events, the pursuer, when he signed the said pretended agreement, entered into the said arrangement set forth in Article 8 hereof, signed and accepted as correct the said pretended balance-sheet, paid over the said sum of £7000, and became a partner of said firms, was under essential error, or under essential error induced by the misrepresentations and concealment of the defenders as to the true position of the said firm of Charles Dick & Son, and the respective amounts of assets and liabilities."

The pursuer pleaded, *inter alia*,—"(1) The pursuer is entitled to have the agreement and balance-sheet libelled reduced, in respect that he was induced to sign them (1st) by false and fraudulent representations; and (2d) by fraudulent concealment on the part of the defenders in regard to the affairs and profits of the firm of Charles Dick & Son, and the assets and liabilities of said firm. (2) The pursuer is entitled to have the said agreement and balance-sheet reduced, in respect that they were signed by him under essential

error; and, *separatim*, under essential error induced by the misrepresentations and concealment of the defenders."

The following issues were proposed by the pursuer for the trial of the cause:—

"1. Whether the pursuer was induced to enter into the agreement libelled, No. 10 of process, by false and fraudulent representations made by the defenders as to the affairs of the firm of Charles Dick & Son, and the business carried on by said firm?

2. Whether the pursuer entered into the said agreement, No. 10 of process, under essential error induced by the defenders as to the affairs of the firm of Charles Dick & Son, and the business carried on by said firm?

"3. Whether the pursuer was induced to subscribe the balance-sheet, No. 8 of process, by false and fraudulent representations made by the defenders as to the assets and liabilities of the said firm of Charles Dick & Son?

"4. Whether the pursuer subscribed the balance-sheet, No. 8 of process, under essential error induced by the defenders as to the assets and liabilities of the said firm of Charles Dick & Son?"

The Lord Ordinary (GIFFORD) approved of the first and third of these issues, and appointed them to be tried for determining the questions therein stated, reserving all questions of accounting, and other questions in the case, and disallowed the second and fourth issues. The following note was appended by the Lord Ordinary to his interlocutor:—

"*Note.*—It was admitted by the defenders that the pursuer is entitled to the issues on fraud applicable to the two writs under reduction. The Lord Ordinary has accordingly adjusted these issues. The pursuer insisted for issues of 'essential error induced by the defenders' as to each writ under reduction, and this in addition to the issues laid on fraud. The Lord Ordinary has disallowed these issues, being of opinion that on the record there is no sufficient ground therefor. It is true that an agreement may sometimes be set aside on the ground of essential error innocently induced by one of the contracting parties. An instance of this occurred in the case of *Hogg* v. *Campbell*, 12th March 1864, 2 Macph. 848, 3 Macph. 1018. In such cases, however, the error which is to set aside the contract must be of a precise and definite character, and must not consist, it is thought, of mere mistakes as to value or productiveness, as to which both parties were bound to have satisfied themselves. In *Hogg's* case the alleged error consisted in Dr Campbell's supposing that a very important clause which had been in the draft agreement was in the extended copy. Yet even here the issue was allowed with difficulty. A similar issue asked as to the terms of another deed was disallowed by the Court. In the present case the alleged error is that the pursuer was mistaken as to the value of the assets and as to the amount of the liabilities of the firm which he proposed to join; and as to the quality of the water; the capacity of production, and the general prosperity of the brewery which formed the subject of the contract; and the pursuer says that his mistakes were induced by the misrepresentations and assurances of the defenders.

"Now, if these misrepresentations and assurances were fraudulent, the case is covered by the issues of fraud which have been allowed. If they were innocent, and made in *bona fide*, it is difficult to see that they would warrant the reduction either of the contract or of the balance-sheet. The two parties were at arm's-length negotiating the contract. The subject of the contract was perfectly known, and both parties had perhaps not equal facilities, but equal means for satisfying themselves as to the whole material particulars. Setting aside fraud (and perfect innocence must be assumed in the present argument), it would be very dangerous to hold that the innocent exaggeration or statement of the defenders' sanguine but *bona fide* belief is to vitiate the contract. The pursuer, if he was to trust without examination to the defenders' statements, should have guarded himself by an express warranty. Without this, and if there was no fraud, he took his chance.

"The contract was essentially one involving risks, contingencies, chances. In such cases high hopes and beliefs are often entertained and expressed by some of the parties which the result shows to have been unfounded. But it would be very dangerous to allow the contract to be set aside by any of the parties merely showing that these expressions had induced an erroneous belief. There is the additional objection in the present case to the issues demanded, arising from the vagueness and generality of the alleged errors. The errors are said to relate to the prosperous and thriving condition of the old concern; to the establishment of a foreign connection; to the extent of the manufacture and business done; to the impurity of the water, and its unfitness for making durable India ales, although it made good sweet ales, and so on. Always assuming perfect innocence and *bona fides*, it would be most hazardous and unfair to set aside a contract on the ground of mistakes about such matters. It would make the contract one-sided. The sanguine partners would have to bear all the loss if their hopes were disappointed, whereas the more taciturn or less buoyant partners, while they would reap the fruits of success, if success were attained, would escape the loss resulting from innocent mistake."

Being dissatisfied with this interlocutor, the pursuer applied by motion to the First Division of the Inner House to have the issues rejected by the Lord Ordinary allowed.

Before hearing of the motion, however, he also lodged a reclaiming note.

Observed by the LORD PRESIDENT, that a reclaiming note is the proper way of proceeding where issues have been disallowed *in toto*. Such a case is not covered by the exception allowed by the Court of Session Act 1868, § 28, or by the A. S. 14th October 1868, § 6.

At hearing of the reclaiming note,

The SOLICITOR-GENERAL and MACKINTOSH for the pursuer.

WATSON and ASHER for the defender.

MACKINTOSH argued—That the record disclosed a case of error following on misrepresentation, which might turn out to be careless and even innocent, and this over and above the case embraced in the issues approved of by the Lord Ordinary. To meet this separate case the pursuer proposed the issues No. 2 and 4, which the Lord Ordinary had disallowed. It was no objection that he was obliged to own that there had been misrepresentation leading to the error. All he had to do was to show that the error was (1) *in substantialibus*, and (2) that it may have been excusable. He then went into the record to show that

he had satisfied these two conditions; and referred to the cases of *Adamson*, 21 D. 1012; *Wilson*, 22 D. 1408; *Hogg*, 2 Macph. 848; *Whyte*, 1 Bingham, N.E. 377; and Addison on Contracts, 84. He farther argued that the only question was, whether his strong averments of fraud on the record prevented him taking such an issue apart from fraud in the present case.

Per LORD PRESIDENT—The question is rather whether you have two cases on record. The representations you aver, whether you state fraud or not, are in their essence fraudulent. In *Purdon* v. *Rowat's Trustees*, 19 D. 206, an issue similar to the one you desire was given, but that was a very different case from the present.

MACKINTOSH—Though it may be hard to believe that the representations averred were not made fraudulently, that is no ground for tying down a party to a proof of fraud when he can also show error *in substantialibus* following upon misrepresentation.

Farther argument was not called for.

At advising—

LORD PRESIDENT—The present is a case in which fraud is averred quite relevantly and very clearly; and the two issues adjusted and approved of by the Lord Ordinary very properly raise the question whether the pursuer was induced to become a party to a certain agreement by *false and fraudulent* representations made by the defenders. But the pursuer says he has a separate plea on record, and a separate ground of reduction on which he is entitled to have an issue—namely, the ground of essential error. Now, his averments on record do not, to my mind, disclose a case of essential error at all. Article 14 of his condescendence is the only one which he can even found upon as doing so; and it, after stating that it was on the "faith of the said false and fraudulent statements and representations by the defenders, and in consequence of the said unwarrantable and fraudulent concealment on their part" that the pursuer was induced to sign, &c., proceeds thus—"At all events the pursuer, when he signed the said pretended agreement, and entered into the said arrangement, was under essential error, or under essential error induced by the misrepresentations and concealment of the defenders," &c. Now, though the words "fraud" and "fraudulent representation" were not to be found in the record at all, it would not have mattered, the case in all its bearings would have been one of fraud, for nothing else can be extracted from the averments. It is only in the latter half of this 14th article of the condescendence that any allegation of error is made. We have seen what that allegation is; short as it is, it is not without an alternative. The signature was given "under essential error, or under essential error induced by the misrepresentation," &c., which has been already averred. Now, is that a relevant averment of essential error? It is not even an averment at all. It is the mere use of the technical term "essential error." We must be told wherein the error consists, what were the inducing circumstances and motives—we must have some explanations, of which at present we have not a word. The alternative is certainly a great deal nearer relevancy, and if the misrepresentations and concealment averred had been innocent it might have been a good case for reduction upon essential error. But far from this, the only representations alleged to have been made in the case are in their very essence fraudulent and nothing else. I am, therefore, clearly for adhering to the Lord Ordinary's interlocutor.

LORD DEAS—An issue upon essential error in the one party to a transaction, and assumed innocence on the other party, is one that very rarely can be granted. It is probably only applicable to cases in which error is alleged with regard to the subject matter of the contract, as in those cases of *Wilson* and *Adamson* quoted to us. Those were very different from this, where not the subject matter of the contract, but the inducements to enter into it, are called in question. I quite agree therefore with what your Lordship in the chair has said with regard to this particular case.

LORDS ARDMILLAN and KINLOCH concurred.

The Court adhered.

Agents for Pursuer and Reclaimer—Mackenzie, Innes, & Logan, W.S.

Agents for Defenders and Respondents—Millar, Allardice, & Robson, W.S.

Saturday, December 10.

GRANT *v.* CALEDONIAN RAILWAY CO.

(Hearing before the Judges of the First Division with Lord Neaves.)

Reparation — Solatium — Contributory Negligence — Railway — Liability for Accident — Level Crossing — Proof. Circumstances in which (*diss.* Lords Deas and Kinloch) a child of seven, in charge of her brother of thirteen years of age, having been run over and killed by a train while crossing the railway at a private level crossing, the railway company were not held liable to the father in damages and solatium.

The driver not having slowed his engine, and it being doubtful whether he had sounded his steam whistle on approaching the crossing as required by the company's regulations, and the crossing being a peculiarly dangerous one, because upon a curve, from the concave to the convex side of which the child was passing, and there being no watchman at the gates, the child having waited to let a down train pass, had immediately dashed across without waiting to see whether there was a train coming in the opposite direction, and was at once knocked down by the engine of an up train, which happened also to be passing the spot at the same time. *Held* (1) that the driver was not bound to slow his engine; (2) that the crossing, being a private one, the company were not bound to keep a watchman at it; (3) that it was a reasonable precaution to require the driver to sound a whistle; but (4) (*diss.* Lords Deas and Kinloch) that whether he did so or not the child was guilty of contributory negligence, so as to be responsible for her own death.

Held, farther, that either the child was unfit to take care of herself, and therefore the parents were accountable for her death; or else when under the charge of her brother she was able to take care of herself; and in a question such as this, must be dealt with as an adult person.

Observed that less complete proof would satisfy the Court of the omission to sound