

Brown (since deceased), Mrs Margaret Brown or Thomas, Christina Brown (since deceased), Mrs Helenore Brown or M'Gregor, Miss Louisa Brown, John Henderson Brown (since deceased), and Miss Mary Catherine Brown; (3d) Miss Margaret Wilhelmina Nisbet, daughter of his younger daughter Mrs Catherine Henderson or Nisbet; but at the time of his death he had eleven, for Agnes Nisbet was born in the interval. The parties before us are the children of Mrs Nisbet on the one side, and the whole of the other grandchildren on the other, and the question between them is in regard to the construction of the codicil which the testator added to his settlement. The deed of settlement itself does not raise any question of construction. It is very clearly expressed. I need not quote the different provisions of liferents and annuities. The important parts of the deed are the third and fourth purposes. He provides in the previous part of the deed that there shall be no division until ten years after his death. He then proceeds, "*Third*," &c. (*reads third purpose of trust*). The period contemplated in this purpose has arrived, and the first thing to ascertain is, who are the now existing grandchildren? There are now only eight surviving, — two Hendersons, four Browns, and two Nisbets. Now, taking this purpose of the deed alone, there could be no doubt that the residue, after setting aside sufficient to meet the claims of the liferenters and annuitant, is now to be divided among these eight grandchildren. But then there is a fourth purpose of the deed, into which the codicil is said to introduce a difficulty. This fourth purpose provides for the time when the liferents shall fall in as follows:—"I hereby," &c. (*reads fourth purpose of trust*). Here, again, there is no room for doubt in interpreting the clause in the deed—at least at present. It is true there is no provision for grandchildren dying and leaving issue, and thus future difficulties may arise, but no such question falls now to be decided. The whole difficulty now before us arises from the codicil, by which he provides and declares, "That when the period of division of my trust-estate specified under the fourth purpose of said trust-deed and settlement shall arise, my said trustees shall pay over to the child or children then in life, procreated of the body of my daughter Catherine Henderson or Nisbet, one equal share of the residue of my means and estate, whatever that share may amount to, and that over and above the equal share provided to each of my other grandchildren who may then be in life, all in manner set forth in the said trust-deed and settlement." Stopping here, there is not much difficulty in seeing that he is providing for the last period contemplated in the settlement—namely, the falling in of the liferents. But then there follows a clause which may be called exegetical or explanatory, "that is to say, the child or children of the said Catherine Henderson or Nisbet shall respectively receive double the sum as their share and interest in my succession which will be exigible by any individual child" of his deceased son, or of his other daughter. The daughters of Mrs Nisbet say that the effect of this last clause is to give them a preference, not only in the fund which will be freed by the falling in of the liferents, but also in the fund at present falling to be divided. Certainly there are some words which would seem to support and favour this contention. On the other hand, it is contended that the clause is to be read in connection with the first part of

the provision in the codicil, and as being confined to the fund to be divided under the fourth purpose of the trust-deed. I confess I am of opinion that this is what was intended, and that the use of the words "share and interest in my succession" was not meant to have any other meaning than in the earlier part of the provision, where he speaks of "the residue of my means and estate." One reason which leads me to this conclusion is, that I think I see the testator's object in inserting this exegetical sentence. The first part of the provision in the codicil is ambiguous, and the subsequent clause is intended to explain it. Observe what is said in the first part, "my trustees shall pay over to the child or children then in life, procreated of the body of my daughter Catherine Henderson or Nisbet, one equal share of the residue of my means and estate, whatever that share may amount to, and that over and above the equal share provided to each of my other grandchildren who may then be in life." Now, that might mean that however many children Mrs Nisbet might have they were only to receive one additional share among them. Whereas, if we look at the last clause, we have his real intention explained, that Mrs Nisbet's child or children shall respectively receive double the sum which will be exigible by any other individual grandchild. The result of my opinion is, that we should answer the first question in the affirmative, and the second question in the negative. With regard to the third and fourth questions, it appeared that there was no dispute between the parties on the subject. We are not therefore called upon to answer them.

The other Judges concurred.

Expenses out of the fund having been moved for, the Court held that in Special Cases the parties must be dealt with just as ordinary litigants, and the successful party, in the absence of special circumstances, be found entitled to expenses. The parties here designed as of "the second and fourth parts" were accordingly found entitled to expenses against the other parties.

Agent for the Judicial Factor—Ebenezer Mill, S.S.C.

Agent for the Parties of the Second and Fourth Parts—Robert Menzies, S.S.C.

Agent for the Parties of the Third Part—H. W. Cornillon, S.S.C.

Friday, December 9.

SECOND DIVISION.

FREER v. ALBION SHIPPING COMPANY.

Contract—Ship Surgeon—Usage. A ship surgeon having been engaged for the outward voyage for a certain salary, was entitled under his contract of service to a free passage home.

Held, in an action at his instance for damages for breach of contract, that according to custom and usage he was bound to give professional attendance gratuitously to the crew on the homeward voyage.

This was an appeal from the Sheriff-court of Lanarkshire against the interlocutors of the Sheriff pronounced in an action against the Albion Shipping Company at the instance of the appellant (Freer), a surgeon in Glasgow, concluding for damages for alleged breach of contract. The pursuer had been engaged to act as surgeon on board

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) assailed 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