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

one of themselves, viz., James Stewart. There were also conclusions for an accounting and for payment of a balance alleged to be due.

(A supplementary action of reduction at the instance of the same pursuer against the same defenders with regard to another discharge relative to the proceeds of a policy of assurance granted by Mrs Julia Hastie or Johnstone in favour of Joseph Jardine Dobie and James Stewart, was heard along with the present action and determined by its decision.)

The pursuer's mother, the late Mrs Johnston, died intestate on 20th July 1887 predeceased by her husband. She left several children, who at the date of her death were all under age, some being in minority and others in pupilarity. On 2nd September 1887 her brother John Hastie was appointed her executor-dative *qua* factor for her minor and pupil next-of-kin, and on that title he obtained confirmation. Seventeen years later the pursuer presented a petition to the Sheriff craving to be appointed her executor-dative *qua* son and next-of-kin, and on 7th October 1904 the Sheriff-Substitute made the appointment as craved. No notice was taken in the application of the previous appointment of Hastie to the office.

On 5th January 1905 Hastie wrote the pursuer as follows:—"Dear Sir,—My appointment in September 1887 to be executor and factor to your mother being a temporary one while you and the rest of the family were minors and pupils it has come to an end. Therefore I have no further right to act, and I do not claim, and do not intend to claim, any right or title whatever in your mother's executry estate. —I am, yours truly, JOHN T. HASTIE."

Defences to the action were lodged by (1) Joseph Jardine Dobie and (2) James Stewart's trustees (afterwards represented by the respondent Salmon).

The pursuer averred—"(Cond. 1) . . . The pursuer sues as executor-dative and as one of his mother's next-of-kin. Mr J. T. Hastie simply acted for Mrs Johnston's pupil children to uplift a small sum to settle her funeral expenses and some accounts due by her at her death. His duty then ended, as he stated. The pursuer's appointment as sole executor was then made, and Mr Hastie has no right or title on the subject."

Both sets of defenders pleaded "(1) No title to sue."

On 14th March 1906 the Lord Ordinary (ARDWALL) sustained the defenders' first plea-in-law and dismissed the action.

Opinion.—"The first plea to be considered in this action is that of no title to sue. The pursuer William Johnston sues as executor-dative and also as next-of-kin of his deceased mother. His extract decree is produced. The operative words are in these terms—'The Sheriff decerned and hereby decerns the petitioner executor-dative *qua* son and next-of-kin to the said deceased Mrs Julia Mout Hastie or Johnston;' and it is dated 7th October 1904. It is objected for the defenders that this title is inept, because upon 2nd September 1887 John Thomas Hastie (who is still alive) was decerned executor to the same person. An extract of the decree in his favour is in process, and the operative words are—'The Sheriff decerned and hereby decerns the petitioner executor-dative *qua* factor for the minor and pupil next-of-kin to the said deceased Mrs Julia Mout Hastie or Johnston on her executry estate as craved.' This decerniture as executor of John Thomas Hastie has never been recalled, and as he gave up an inventory and obtained confirmation it seems that it is now incompetent to present a petition for recal though that might have been done before confirmation, nor has John Thomas Hastie ever been discharged as executor, discharges as executors being as a rule obsolete in practice, though still competent in Commissary Courts. It was contended for the pursuer that the appointment of John Thomas Hastie was limited both in time and in extent—in time by the attainment of majority by his wards, which has now happened, and in extent by the assets which he had actually given up in his inventory and confirmed to. I am unable to accept this argument. The words '*qua* factor for the minor and pupil next-of-kin' do not seem to me to limit John Thomas Hastie's appointment as executor, but merely to set forth the character of his relationship to the deceased in respect of which he obtained decerniture, but I think that all the same his decerniture gives him a universal title to the executry estate of Mrs Julia M. Johnston. It could never be argued, for example, that the decerniture of a woman *qua* relict of a deceased person limits her rights as executrix to securing her own share as widow of the executry estate. It appears to me that the appropriate course for the pursuer to have followed was to have applied for confirmation *ad omissa*, and as pointed out by Erskine (iii, 9, 37) anyone applying to be executor *ad omissa vel mala appreciata* must call the principal executor as a party, and if it appears that the executor has been acting *bona fide* the subjects omitted may be added as an eik to his confirmation, but if the principal executor has acted *dolose*, or does not wish to take up the alleged omissions, then the applicant for confirmation *ad omissa* may himself be appointed executor *ad omissa*.

"As things stand, however, and if the views I have above expressed as to the first decerniture are correct, there are at present two persons professedly clothed with a universal title as executor to administer the estate of the deceased Mrs Julia M. Johnston, and in that state of affairs I think that the first decerniture must exclude the second, and that accordingly the pursuer has no title to sue. Still less, of course, is he entitled to sue as one of the next-of-kin, there being a person having a judicial title to ingather the estate. . . ."

The pursuer reclaimed, and argued—(1) The appointment of Mr Hastie as executor *qua* factor fell automatically on his wards attaining majority. His title was limited

from the first. He was appointed for a temporary purpose only. The terms of the appointment ("decerns the petitioner executor-dative *qua* factor for the minor and pupil next-of-kin") showed that it was to fall on the children attaining majority—*Johnstone* v. *Lowden*, February 15, 1838, 16 S. 541. Appointments of factors *loco tutoris* or *curatoris* fell automatically. If not, they fell on a new appointment being made. A petition for recal was not an available process. If a formal step was required, an action of reduction would have to be resorted to, unless the executor resigned office—Currie on Executors, 3rd ed. p. 73, *et seq.* [LORD M'LAREN referred to the Executors (Scotland) Act 1900 (63 and 64 Vict.), c. 55]. (2) Apart from his title as executor the pursuer had a good title to sue as a beneficiary—*Aberdein* v. *Stratton's Trustees*, March 29, 1867, 5 Macph. 726, 3 S.L.R. 346; *Duncan* v. *Duncan*, December 14, 1892, 20 R. 200, 30 S.L.R. 167.

Argued for respondent — (1) The Lord Ordinary was right. An executor-dative *qua* curator retained office after his ward had attained majority—Currie on Executors, 3rd ed. p. 104, *et seq.* An appointment *qua factor loco tutoris* was in the same position, so that Mr Hastie's appointment must first be taken out of the way. The executor's duty was to ingather the whole estate—A.S., February 13, 1730, *vide* Currie, p. 100. He had a universal title. To hold that he could be automatically displaced would be unworkable in practice. (2) As to the pursuer's title as an individual, it was not averred that the executor refused to act or had an adverse interest. The pursuer was not a beneficiary. He was only connected with the testator through his mother and as her executor.

At advising—

LORD M'LAREN — As I agree with the Lord Ordinary in his very careful exposition of the facts and the law applicable to this case, I will add little. The only question we have to consider at the present time is the title of the pursuer to sue the reduction of two discharges which were granted by his mother to the testamentary trustees of her father, and the question arises in this way. The pursuer's mother Mrs Hastie or Johnston had an interest as a child in the estate of her deceased father John Hastie. The administration of her father's estate seems to have become vested in a sole trustee, and apparently Mrs Johnston had great difficulty in getting from the trustee her share of the succession. Eventually, however, she received two substantial sums, one of which was represented to her to be her share of the moveable estate, and the other was represented to be the value of her share of the heritable estate; and in consideration of each of these payments Mrs Johnston granted a discharge to the trustee in the most unqualified terms. On Mrs Johnston's death, her children being all in pupilarity or minority, a relative of the name of John Thomas Hastie was decerned executor-dative *qua* factor to the pupil children of Mrs Johnston, and upon that title he obtained confirmation. One of these children who is now of age is seeking, as in his own right, to reduce the discharges granted by his mother, to which I have just adverted. He recognised that he would need some title to reduce the discharges. He could not have applied at the proper time to be conjoined in the office of executor, because he was a minor, nor did he attempt to have the appointment of Mr Hastie recalled. I do not say whether that would or would not have been a competent proceeding, but what he did was to apply to the Sheriff in a petition which took no notice of the previous appointment of Mr Hastie, but simply craved for an appointment in his own favour as executor-dative of Mrs Johnston *qua* next-of-kin. Under this application the pursuer obtained an appointment as executor-dative. Now the objection to his title is that the decree-dative is inept, because the office of executor for Mrs Johnston is already filled by the appointment of Mr Hastie—an appointment which I may remark was made seventeen years before the application which we are now considering. The only answer that could be made to this objection is, that because Mr Hastie was appointed in the character of factor to pupil children, his appointment fell on the attainment of majority by all these children. I have not been able to satisfy myself that that answer is sound. There seems to be no direct authority on the question, but all that we know of the nature of the office of executor points to this, that it is an appointment which—on whatever ground or in whatever character it may be given—will subsist until the administration of the entire estate has been completed. So much is this the case that it has never been in use for an executor to obtain a discharge, because it is held he cannot get a discharge until he has administered the whole estate; and conversely that after he has administered the whole estate he needs no discharge because his office has come to an end.

I ought to mention that it was also suggested that the pursuer's relationship as one of the next-of-kin was sufficient in itself to entitle him to reduce these documents. A good deal was said about his having an interest in the grandfather's estate to which these discharges apply, but I think it is perfectly clear that he is not in the position of an immediate beneficiary in his grandfather's estate, because his mother was a direct beneficiary, and he can have no title to challenge the administration of the grandfather's estate except such as he derives from his mother, and that is the title which he has attempted to put forward by confirming as executor-dative. Now, it has sometimes been observed that when the next-of-kin desire an executor, or a trustee who has been confirmed executor, to engage in hostile litigation they have a right to the use of the executor's name on condition that they give him a satisfactory guarantee against the risks of litigation. I do not know that these opinions have ever been brought to

the test of a legal decision, and it is quite unnecessary for the present to consider the matter, because in the first place it is not sought to compel Mr Hastie to reduce this discharge, and secondly, it is not said he has ever been offered an indemnity for the use of his name to follow out an action of reduction.

It is suggested by the Lord Ordinary that the difficulty might be got over by the pursuer's appointment and confirmation as executor *ad omissa*. I should desire to reserve my opinion as to the competency of such a proceeding, because I see great difficulty in giving effect to it. So far as appears from the papers before us Mr Hastie confirmed to every part of Mrs Johnston's estate. I do not think it was in the least necessary that he should enter in the inventory of the estate the right of action to reduce Mrs Johnston's discharges. I do not think that I ever heard of a right of reduction being confirmed to. On the contrary, the right of raising necessary actions is part of the office of executor. It accrues to the office because the executorship is a general title of administration and needs no separate confirmation. That being so we should bear in mind that it is a necessary condition of confirmation *ad omissa* that a *prima facie* case must be put before the Commissary—now the Sheriff—of some estate of the deceased which has been omitted. That results from the nature of the title that is sought, and I can see that a serious question might rise whether a mere right of challenging a deed could be represented as property of the deceased which has not been confirmed to, so as to entitle anyone interested to obtain confirmation to it.

The second action, which relates to the other discharge, is admittedly ruled by the first, and as to both I move your Lordships that we adhere to the Lord Ordinary's interlocutor.

LORD KINNEAR—I am of the same opinion for the reasons your Lordship has stated.

LORD PEARSON—I agree with the Lord Ordinary that the plea of no title should be sustained. The reclaimer sues as executor-dative of his mother, who died in 1887. He was appointed to the office in 1904, apparently for the purpose of suing the present action. It turns out that in 1887 Mr John T. Hastie, who is still alive, was appointed to the same office *qua* factor for the minor and pupil next-of-kin, that he gave up an inventory and obtained confirmation, and that his appointment has never been recalled. It is said that his inventory and confirmation did not include the estate now sued for. But there are well understood rules of practice which prescribe the course to be followed when it is alleged that an executor, already appointed with a universal title, has omitted certain items of the estate from his inventory. Confirmation *ad omissa* may be obtained if there is estate which can be taken up by confirmation; but that is only done after special intimation to the executor already appointed, that he may himself take up the estate or move that the two appointments be conjoined. I think these rules ought to be maintained, for after all they are not mere rules of practice. There is substance in them, for it is of the utmost importance that all concerned, and particularly the debtors and creditors of the estate, should know with certainty with whom they have to deal.

A letter written by the executor previously appointed, dated 5th January 1905, is founded on as showing that the way was clear for the second appointment which was made in 1904. But the letter is a purely private matter and cannot affect the scope or duration of the original appointment. An executor cannot so demit his office and make way for a fresh appointment.

Nor do I think that the first appointment can be regarded as limited in point of time on the ground that it was of an executor-dative *qua* factor for minor and pupil next-of-kin. Such an appointment is not necessarily vacated as soon as one or even all of the next-of-kin shall have attained majority. The appointee is not a mere *locum tenens*, but is clothed with the full office and powers of an executor; and anyone else desirous of administering to part of the estate must do so by obtaining confirmation *ad omissa* or in some other recognised mode.

The pursuer further maintained that at all events he has a title to sue this action as an individual. But here again he is met by the observation that the proper person to raise the questions with John Hastie's trustees is either a beneficiary under that trust or the representative of a beneficiary, and the pursuer does not hold either of those positions.

It follows that it is unnecessary to consider to what extent, if at all, the pursuer's averments are relevant and sufficient to be remitted to proof.

The LORD PRESIDENT was absent.

The Court adhered.

Counsel for the Pursuer and Reclaimer—Crabb Watt, K.C.—W. Thomson. Agent—D. Howard Smith, Solicitor.

Counsel for the Defender and Respondent, Dobie—J. R. Christie—A. A. Fraser. Agent—Robert Anderson, S.S.C.

Counsel for the Defender and Respondent, Salmon (who had been appointed Judicial Factor on the late James Stewart's estate)—Watt, K.C.—A. M. Anderson. Agents—Cuthbert & Marchbank, S.S.C.