refused to act, and had succeeded in having him removed, there would have been no incompetency in entertaining an action at his instance. I am quite willing to hear what the parties may have to say.

LORD ARDMILLAN—The general rule is that we will not sist a new pursuer against the wish of the defender. We have here three trustees — the debtor, the debtor's brother, who declines to be a party to the action, and Mr Morison. The original pursuer was thus only one of three trustees. Under these circumstances a judicial factor has been appointed. Now, I don't think that we could allow the judicial factor to be sisted so as to do away with Mr Morison. But the defender will be entitled to be heard on the question, whether the action has been so badly laid that it cannot be made a competent action by sisting the judicial actor. Mr Morison could grant no proper discharge, but the judicial factor could grant a discharge. I think we should allow the judicial factor to be sisted as a party concurring with the pursuer.

LORD JERVISWOODE concurred.

The Court pronounced the following interlocutor:—

"In respect that the judicial factor on the trust-estate of the deceased Walter Gowans has now been sisted as a party concurring with the pursuer, Alexander Morison; recall the interlocutor of the Lord Ordinary reclaimed against, and remit to his Lordship to proceed with the cause, reserving all questions of expenses: With power to the Lord Ordinary to dispose of the expenses in the Inner House with the other expenses in the cause."

Counsel for Mr Morison—J. G. Smith. Agent—Alexander Morison, S.S.C.

Counsel for Mr Gowans—Trayner and A. Taylor-Innes. Agents—Lindsay, Paterson, & Hall, W.S.

*B.*, Clerk.

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*Tuesday, November* 4.

## SECOND DIVISION.

[Lord Ormidale, Ordinary.

## RUTHERFORD *v.* EDINBURGH CO-OPERATIVE BUILDING CO. (LIMITED).

*Contract—Reduction— Essential Error — Misrepresentation.*

The purchaser of a house finding the cellar, owing to local circumstances, damp, brought an action, after the lapse of more than a year, against the sellers, to have the contract of sale reduced; he founded upon (1) essential error and (2) misrepresentation, and further claimed damages. *Held* that there was no ground of action relevantly stated, as the purchaser had bought the house after satisfying himself as to its condition, and that there might have been a good ground of action for the expense incurred in rendering the cellar available for ordinary purposes.

This case came up by reclaiming note against he interlocutor of the Lord Ordinary.

The summons contained reductive conclusions, and continued as follows:—"The defenders ought and should be decerned and ordained by decree foresaid to repeat and pay to the pursuer the foresaid sum of £520, being the price of said subjects, with interest thereon from the date of citation till payment, at the rate of five per centum per annum. As also the defenders ought and should be decerned and ordained by decree foresaid to make payment to the pursuer of the sum of £150 in name of damages on the premises, together with the sum of £50 sterling, or such other sum, more or less, as our said Lords shall modify, as the expenses of the process to follow hereon."

The pursuer, Rutherford, is a spirit dealer in Leith, and the defenders an association formed for building purposes, carrying on business in Edinburgh. Early in 1871 the pursuer had a correspondence with the manager of the defenders' company in regard to the purchase of the shop No. 8 Walker Terrace, Dalry Park, Edinburgh, then in the course of erection, and the contract of sale was finally arranged in the month of March 1871. The contract was embodied in a disposition, dated 1st May 1871, of which reduction was now sought. Shortly after April 1871 Mr Rutherford obtained possession of the shop, and found that the cellar was not at all properly drained; on the contrary, water to the depth of about three feet accumulated therein. He averred that he had (Cond. 4) recently learned the reason why water accumulated in the cellar, which was that the floor of the cellar was about 3 feet below the level of the street drain; and further (Cond. 5) that the defenders, or at least their manager, who acted for them, knew at the time they sold the shop that it was intended to use it as a spirit shop, and that it was essential to have a cellar in which to store liquors; also, that they knew that the cellar was under the level of the street drain, and that it could never be dry, or fit for the purpose for which it was sold; and that they unduly and fraudulently concealed this fact. And (Cond. 6) that if he truly bought a cellar of the kind furnished, he was under essential error when he did so, induced by fraudulent misrepresentations or undue concealment on the part of the defenders. The pursuer further stated that he had suffered damage to the extent of £150, and that by certain operations at a cost of £50 the dampness might to some extent be remedied.

The defenders, in answer, stated that certain things at the time of the purchase were pointed out by the pursuer, and these were all attended to. No complaints were made by him as to the state of the premises until more than a year after his entry. They did not know his expectations or intentions, nor did they sell the premises for any particular purpose, the pursuer in purchasing having stipulated that he should be at liberty to use them as he chose. The defenders were unaware of anything defective, and believed the premises to be properly constructed; of their condition Mr Rutherford had as good opportunity of judging as they themselves.

The pursuer pleaded—"(1) The contract of sale sought to be reduced having been entered into when the pursuer was under essential error in regard to a material particular affecting the value of the subjects sold, the contract ought to be set aside. (2) The contract sought to be reduced having been entered into when the pursuer was under essential error as to the subject sold, induced through misrepresentation or fraudulent misrepresentation or

undue concealment on the part of the defenders, the said contract ought to be reduced and set aside, and the defenders ordained to repay the price. (3) The defenders having broken their contract of sale, ought to be found liable in damages as concluded for, with expenses."

The defenders pleaded—" (1) The statements of the pursuer are not relevant or sufficient to support the conclusions of the summons. (2) The defenders are entitled to absolvitor in respect of the provisions of section 5 of the Act 19 and 20 Vict. cap. 60. (3) The statements of the pursuer being unfounded in fact, the defenders are entitled to absolvitor. (4) The pursuer having seen the condition of the premises when completed, and been satisfied therewith, and having thereafter paid the price and taken and since retained possession thereof, he cannot now insist in the present action."

On 10th June 1873, the Lord Ordinary (ORMIDALE) pronounced the following interlocutor and note:—"The Lord Ordinary having heard counsel for the parties on the defenders' first plea in law, and having considered the argument and proceedings, sustains said plea in law, and in respect thereof dismisses the action and decerns, &c.

"*Note.*—The pursuer's object in this action is to reduce a disposition of a shop and cellar which he purchased from the defenders, for which he paid the price, and of which he obtained possession so far back as the beginning of April 1871, and has continued ever since to retain possession. Nor does the pursuer say that he intimated any objection whatever to the subjects so purchased and taken possession of by him till the present action was raised in January 1873.

"The pursuer now avers, however, that the cellar which forms part of the subjects in question, owing to its being below the level of the street drain, 'can never be free from water, or at least damp, and can never be of any use to the occupier of the house.' He therefore concludes for reduction of the disposition to the subjects, and for repetition of the price, being £520, with interest, and £150 of damages.

"The pursuer's grounds of action are embodied in his first two pleas in law, and are—1st, 'Essential error in regard to a material particular affecting the subjects sold,' and 2d, 'essential error as to the subject sold, induced through misrepresentation, or fraudulent misrepresentation, or undue concealment on the part of the defenders.' The Lord Ordinary has been unable to find in the record any statement relevant or sufficient, more especially keeping in view the length of time the pursuer has been in possession without objection, to support the action on these grounds, or any of them.

"The pursuer himself says that his contract with the defenders is embodied in the disposition, which was granted to and accepted of by him. The disposition is No. 6 of process, and is in the usual terms.

"It contains no provision or stipulation to the effect that the subjects were sold and purchased for any particular purpose. Nor does the disposition afford any evidence whatever in support of the pursuer's action in other respects. It, indeed, negatives the grounds on which the action is laid.

"But the pursuer says that the defenders, 'or at least their manager,' knew that the subjects were intended for a spirit shop, and that it was essential that the cellar should be at least moderately dry; and he goes on, in the same article, also to state that 'the defenders at and before the date of the contract knew that the cellar was under the level of the street drain, and that it could never be dry or fit for the purpose for which it was sold;' and the pursuer adds, what in reality constitutes the whole foundation of his action, 'this fact they unduly and fraudulently concealed from the pursuer.' The Lord Ordinary cannot think that this is sufficient, especially keeping in view the pursuer's other statements, and, in particular, his statement to the effect that the contract of sale was arranged in March 1871, and that the shop having been finished in April, he 'shortly after' obtained possession, and then found that the cellar was not at all properly drained, that, 'on the contrary, water to the depth of about 3 feet accumulated in said cellar, and did not flow away;' and yet, notwithstanding this early knowledge by the pursuer, he not only retained possession without objection till this action was brought in January last, and continues still in possession, having used, and continuing to use the subjects as his own, but he also completed his purchase by paying without objection, as the disposition bears, £420 of the price on the 14th of June 1871, the date of its execution, the other £100 having been paid in the month of March previous.

In this state of matters the pursuer would, the Lord Ordinary thinks, have required to have averred, in the clearest and most specific manner, a case of fraud against the defenders to entitle him to rescind the contract in question; but he has entirely failed to do so. There is, indeed, no averment at all of misrepresentation, and in regard to 'undue concealment,' it is difficult to understand how there could have been any. The pursuer does not say that anything of the nature of device or artifice was resorted to by the defenders in order to deceive or throw him off his guard. It is obvious, indeed, on his own showing, that he had every opportunity of informing himself as to the nature and worth, advantages and disadvantages, of the subjects in question before he purchased them, and therefore, if he made a bad bargain, *sibi imputet.*

"The Lord Ordinary is, in these circumstances, of opinion that the pursuer has made no averments relevant and sufficient to support the action, and he has accordingly dismissed it with expenses."

At advising—

LORD JUSTICE-CLERK—I am of opinion that in this case the Lord Ordinary has taken the only course open to him on the record. The action is one for reduction of a contract, and also for damages; but there is really nothing in the case save the question of reduction.

The grounds on which reduction is sought are (1) essential error, and (2) misrepresentation. As regards the first ground, that of essential error, the term is wrongly used. There was no error in essentials here at all. There may have been doubt as to the use, but that, although perhaps a ground under certain circumstances for rescinding a contract, is not essential error [His Lordship here remarked on the case of *Campbell* v. *Earl of Wemyss.*] As to the second ground, that of misrepresentation, there was none, for there was no representation at all. I don't say there may not be grounds of action in a different form and with fresh averments, and that the seller might not be called on to pay the expense incurred in putting this part of the house into a state fit for occupation

but that is not at all the ground on which the case has been brought before this Court.

I have come to the conclusion that everything in this action, as it stands, is irrelevant.

LORD COWAN—A contract between parties regularly entered into, as this was, is not to be readily set aside. The whole case rests upon the statements contained in Arts. 4 and 5 of the condescendence. The only defect in the contract alleged as a ground of action is one as to which the purchaser was bound before entering into the contract to satisfy himself. He should have ascertained particularly the state of the cellar before he bought the house, and we can only presume that in such a matter he took due precautions. Essential error, my Lords, is clearly out of the question here, and as regards the other point, that of misrepresentation and, in point of fact, fraud, I am unable to discover any misrepresentation or fraud at all. Therefore, I entirely concur in your Lordship's view. I am not prepared to say that all the expense incurred to put the cellar into a state in which it might be available for use might not have been repayable by the defenders, and that there would not have been for that amount a good ground of action against them. But when we come to the damages sought under this record, for what are these asked? Is it for breach of contract? There was not any.

I cannot consent to any amendment being made upon this record.

LORD BENHOLME—We must enquire what is truly the nature of the summons in this action, which the Lord Ordinary has found irrelevant. It is an essential in the summons that it contains a reductive conclusion. In Art. 7, however, of the condescendence, the repetition of the price is associated with a claim to damages;—"together with the damages above specified," are the words used. In order to enable the pursuer to make any way in his action, it is necessary that he should reduce the contract. Now, on what grounds is this reduction sought? The main ground undoubtedly is essential error, and this I am quite unable to see. To establish essential error in this case the pursuer must set forth that the cellar was bought for a particular purpose. It is not enough to say that the cellar does not suit the purpose for which it was bought, but he must say, (and he nowhere does say), that there was an express purpose for which it had been bought, and that it does not suit *that*. On the whole, I agree with the Lord Ordinary. I am not of opinion that delay forms any part of the grounds of his interlocutor; certainly it is mentioned in his note, but is not part of the judgment, which upon that point we are not called on to impeach.

LORD NEAVES concurred.

The Court adhered.

Counsel for the Pursuer and Reclaimer—Smith and Scott. Agent—P. H. Cameron, S.S.C.

Counsel for the Defenders and Respondents—Asher. Agent—J. Cossar, S.S.C.

*R.*, Clerk.

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# REGISTRATION APPEAL COURT.

*Monday, October* 20, 1873.

(Before Lords Benholme, Ardmillan, and Ormidale.)

[Peeblesshire.

## YOUNG *v* NEWBIGGING.

*Lease—Assignation—Joint Tenant and Occupant.*

A father who held under a lease which excluded assignees and sub-tenants, assigned it to his sons. *Held* that, in the absence of an objection from the landlord, the vote must be sustained.

This case was an appeal by Mr Thomas Young, banker, Innerleithen, against a decision of the Sheriff of Peebleshire, repelling an objection against the name of John Newbigging being entered on the roll.

Mr Newbigging's name was entered on the assessor's list (with those of two of his brothers) as joint tenant and occupant of Corstane farm. The Special Case prepared for the Court stated that the farm "was let to James Newbigging, the father of the said parties, and to his heirs, by Mr Robert Macqueen, the proprietor, by nineteen years' lease, dated 17th and 18th June 1858. Said lease contained a 'clause expressly excluding assignees and sub-tenants.' The said James Newbigging died on 6th November 1872. He left a *mortis causa* disposition and settlement dated 1st October 1872, whereby the said lease was assigned to his above-named sons, John, Thomas, and William, none of whom was the heir; and the said deed (which also conveyed to them his whole other estate and effects, heritable and moveable, and appointed them his sole executors) likewise contained the following clause in reference to his only other sons, Joseph and James Newbigging, one of whom, Joseph, was his eldest son and heir-at-law—"And I hereby declare and explain that I have already given to Joseph Newbigging and James Newbigging, my only other children, their full shares of my heritable and moveable means and estate, and therefore that they are not included in these presents; and I further hereby declare that I have no claim against either of them." It was objected by the appellant that the joint-tenancy of the said John Newbigging had not subsisted for twelve months prior to 31st July 1873, and that he was not entitled to the benefit of the succession clause of section 9 of the Reform Act, 1832. The Sheriff held, in law, that the said John Newbigging having been placed on the assessor's list in respect of a qualification as joint tenant and occupant of sufficient amount to confer the franchise under section 9 of the original Reform Act, 1832, he was, in the circumstances, entitled to the benefit of the succession clause of the said section of the said Act, and so to be now registered, notwithstanding his joint-tenancy had not subsisted for twelve months prior to 31st July 1873, and he therefore repelled the objection.

It was argued for the appellant that the clause referred to was a right which came from a *mortis causa* deed independently of the ratification of the landlord. Here they had circumstances in which the succession clause could not apply. But even assuming that the clause was to apply to a lease not