and that involves the consideration of what elements of fact are necessary to constitute the crime of breach of the peace. The clearest case of breach of the peace consists in engaging in hostilities either in the street or in a private ground, for I agree that it makes no difference whether the offence be committed in a public or private place, provided the lieges be alarmed. But breach of the peace is not confined to acts of this description. "Peace" is not used as the antithesis of "war." Breach of the peace means breach of public order and decorum, accompanied always by the qualification that it is to the alarm and annoyance of the public. Mere inarticulate noises and cries not calculated to be offensive to anyone have been held not to amount to breach of the peace. On the other hand, where the brawling is of such a kind as to be offensive and alarming it is not necessary that those who hear it should be alarmed for themselves. It is enough that offensive language should be uttered in a noisy and clamorous manner so as to cause reasonable apprehension in the minds of those who hear it that some mischief may result to the public peace—that is, to other persons than themselves.

I am quite satisfied that the language used here, heard in the public street in Stranraer, with the aggravation that it was used at night, and accompanied by noisy conduct, was calculated to be particularly disturbing, and that facts have been proved sufficient to justify the Magistrates in convicting.

Lord Rutherfurd Clark concurred.

The Court sustained the conviction.

Counsel for the Appellant—A. S. D. Thomson. Agent—R. Broatch, L.A.

Counsel for the Respondent—Ure. Agent—Peter Pearson, S.S.C.

COURT OF SESSION.

Saturday, June 29.

FIRST DIVISION.

[Lord Kinnear Ordinary.

STEWART *v.* KENNEDY.

(*Ante*, p. 338.)

Contract—Sale—Essentials of Sale—Entailed Estate—Reduction—Issues—Essential Error.

An heir of entail in possession having entered into a contract for the sale of the entailed estate, the Court construed the contract to mean that the seller was under a legal obligation to apply to the Court for approval of the sale under the 5th section of the Entail Amendment Act 1853, as amended by the Entail Acts of 1875 and 1882.

In an action by the seller to have the contract reduced on the ground, *inter alia*, of essential error, in respect that in entering into the contract he believed he would be bound by it to apply to the Court for an order of sale under the Entail Act 1882, whereby an entailed estate might be converted into entailed money, and would not be bound to sell at the price proposed if the Court should hold it to be inadequate—*held* (*diss.* Lord Shand) that the error alleged was not in the essentials of the contract, but as to its import and effect, and an issue of essential error disallowed.

Opinion (*per* Lord Shand) that the contract being in the opinion of the pursuer subject to a suspensive condition, there never was *in idem placitum consensus et conventio* between the parties, and that the pursuer was therefore entitled to an issue of essential error.

Process—Jury Trial—Issues—Appeal to the House of Lords—Competency of Motion to Proceed with Cause pending Appeal.

In an action of reduction of missives of sale the Court (Lord Shand *diss.*) appoved of an issue for the trial of the cause, but disallowed certain other issues. The defender thereafter moved to have a day fixed for the trial of the cause, but the Court, in respect that the pursuer had presented a petition to the House of Lords against the interlocutor approving of the issue, *refused* the motion.

In consequence of the judgment of the Court pronounced on 8th February 1889 in the case of *Kennedy* v. *Stewart*, reported *ante*, p. 338, Sir Archibald Stewart raised the present action against John Kennedy, in which he sought reduction (1) of the letter written by him on 19th September 1888, which was in these terms:—"*Murtly Castle*, 19*th Septr.* 1888.—Dear Sir,—Having reference to my interview and conversation with you and Mr Glendinning yesterday, I now desire to say that I am willing to dispose of the entire estate of Murtly, &c., consisting of about 33,000 acres, with all the buildings and appurtenances thereto belonging, and all the rights, revenues, and issues thereof for ever, on the basis of twenty-five years' purchase of the present, or even an appraised valuation, of the nett rental thereof, as may be ascertained by an agreed appraisement, you appointing one, and me the other, and if the two cannot agree, a third party to be chosen by the two. Payment to be made in cash unless it be otherwise agreed as to any part, and possession to be given not later than the 15th of May 1889. This offer to be open for your acceptance for two weeks from this date, and on your notifying to me or to my agents (Messrs Dundas & Wilson, C.S.) of such acceptance on or before the expiry of that time it will be binding on me. In the event of your acceptance the sale is made subject to the ratification of the Court.—Yours truly, A. D. Stewart. J. S. Kennedy, Esq." And (2) of the letter to him by Kennedy dated 20th September 1888, which was in these terms:—"*Elmpark, Ettrick Road, Edinburgh*, 20*th Sept.* 1888.—Sir A. Douglas Stewart, Bart., Murtly Castle, Murtly.—Dear Sir Douglas,—I hereby accept your offer of the entire estate of Murtly, &c., with all the buildings and appurtenances thereto belonging, and all the rights, revenues, and issues thereof for ever, as contained in your letter to me of yesterday's date, and I agree to purchase said estate, &c., at twenty-five years' purchase of the present nett rental thereof, and that on the conditions set forth in your said letter, a copy of which is annexed hereto.—Yours

faithfully, JOHN S. KENNEDY. *P.S.*—I have acted more promptly than I would otherwise have liked to do, as I must return to the Continent at once to join my wife. I leave here to-night or to-morrow morning.—J. S. K."

With reference to the circumstances under which the said letters were written, the pursuer averred as follows:—"Early in the month of July 1888 the pursuer received a letter from Mr Peter Glendinning of The Leuchold, Dalmeny Park, desiring to know, 'in the interest of an American gentleman,' whose name he did not disclose, whether the pursuer entertained any idea of selling all or any of his estates, and if so, at what price. The pursuer was not unwilling, if a price should be offered of which he and his legal advisers approved, to convert his entailed estates into entailed money, according to the procedure authorised by the Entail (Scotland) Act 1882. The pursuer replied to Mr Glendinning that he would be glad to see him when he was in the neighbourhood. Mr Glendinning came to Murtly, and saw the pursuer on 13th July. On 18th September 1888 the defender Mr Kennedy (whom the pursuer then saw for the first time) and Mr Glendinning came to Murtly, and were shown over the Castle and grounds, partly by the pursuer and partly by his servants. The pursuer had also given a written order to enable them to visit Rohallion, Strathbraan, and Grantully, and to see the various objects of interest, which it is believed they did on the same day. On the forenoon of the next day, 19th September, Mr Glendinning unexpectedly arrived at Murtly Castle, where the pursuer and Lady Stewart were alone. The pursuer was at and about this time a frail and infirm old man, suffering from illness, and in a nervous and excitable condition. Owing to his physical and nervous state, as well as his advanced age, his mind and will were not in a good state of control. He was in a weak and facile state of mind, and easily imposed upon, unfit to conduct business or to make a bargain, and unable, from his physical and mental conditions, to resist pressure or to endure flurry or excitement. Mr Glendinning, taking advantage of these circumstances, and acting as agent for, or on behalf of, Mr Kennedy, did, by undue pressure or solicitation, and by fraud or circumvention, impose upon the pursuer, and did obtain or procure from him the said pretended letter first set forth in the summons, to his lesion as after mentioned. Mr Glendinning, after expressing regret that Mr Kennedy had been disappointed with the estates, and had not made an offer to purchase them, and enlarging on the advantages to the pursuer of such a sale, suddenly produced from his pocket a draft letter which he earnestly pressed the pursuer to copy in his own handwriting, and sign as his own letter. He represented to the pursuer that the matter was urgent and would brook no delay, and hurried and pressed him to copy and sign it immediately. The pursuer was unwilling to do so, but ultimately, being ill, nervous, and excited, and weak and facile as above mentioned, he yielded to the pressure put upon him by Mr Glendinning, and copied out the draft letter and signed it. The letter thus written and signed by the pursuer is that first set out in the summons. As soon as the pursuer had copied and signed the letter Mr Glendinning put it in his pocket and left Murtly. Throughout the negotiations for a sale of the estates above described, and in his interview with Mr Glendinning, the pursuer had in his mind the method with which, as already explained, he was acquainted, viz., the conversion of the estates into a fund of entailed money under the procedure prescribed by the Act of 1882. Mr Glendinning was well aware that the pursuer had presented a petition under that Act, as already mentioned, and that he was thus acquainted with its general scope and purpose. The pursuer was not aware of any other mode of selling an entailed estate, and it never entered his thought that he might be committing himself to sell the estate on the footing of paying compensation to the next heir or heirs of entail. Mr Glendinning at the said interview represented to the pursuer that the effect of writing the said letter would be merely to give the pursuer a little hold on Mr Kennedy in the event of his accepting its terms. Mr Glendinning thereby induced the pursuer to believe that the result of the acceptance by Mr Kennedy of the offer contained in the said letter would be a conditional bargain; that the pursuer would be bound to go to the Court for authority to sell the estates under the procedure which he knew of to Mr Kennedy, and if the Court should approve of the whole terms of the proposed bargain as fair and reasonable, and should ratify the same, that Mr Kennedy would be bound to purchase on the same terms; but that, if the Court should hold that the price was inadequate, the pursuer would not be bound to sell at the price proposed. The pursuer was induced to believe, and did believe, that the whole matter would on Mr Kennedy's acceptance be still open for investigation and consideration in the application to the Court, and that he might obtain the advice of his law-agents as well as the protection of the Court as above mentioned. The pursuer when he wrote out and signed the said letter was under essential error as to its meaning and effect as above set forth, and said error was induced by the representations made to him by Mr Glendinning. The said representations were false and fraudulent. Or otherwise, Mr Glendinning believed that the meaning and effect of the said letter were such as the pursuer believed and was induced by Mr Glendinning as above stated to believe them to be, in which case the pursuer avers that the contract embodied in the said letter and the defender's reply thereto was entered into under mutual essential error on the part both of the pursuer and defender as to its tenor and effect as above set forth.

The pursuer pleaded, *inter alia*—"(1) The pursuer is entitled to decree of reduction as concluded for, in respect that the said letter dated 19th September 1888 was impetrated from him to his lesion by Mr Glendinning, as agent for or on behalf of Mr Kennedy, by undue pressure and solicitation, and by fraud or circumvention, he being in a weak and facile condition, and easily imposed upon, as set forth in the condescendence. (2) The pursuer is entitled to decree of reduction as concluded for—1st, Because the said letter of 19th September 1888 was signed by him under essential error. 2nd, Because in signing the said letter the pursuer was under essential error induced by the said Mr Glen-

dinning. 3rd, Because in signing the said letter the pursuer was under essential error, induced by false and fraudulent representations made by Mr Glendinning."

The defender pleaded, *inter alia*—"(1) The pursuer's statements are irrelevant."

The pursuer proposed the following issues for the trial of the cause:—"(1) Whether, on or about 19th September 1888, the pursuer was weak and facile in mind, and easily imposed upon; and whether Mr Peter Glendinning, of The Leuchold, Dalmeny Park, taking advantage of the said weakness and facility, did, by fraud or circumvention, impetrate and obtain from the pursuer the letter, dated 19th September 1888, No. 7 of process, to his lesion? (2) Whether in granting the said letter the pursuer was under essential error as to its import and effect? (3) Whether in granting the said letter the pursuer was under essential error as to its import and effect, induced by the said Peter Glendinning? (4) Whether in granting the said letter the pursuer was under essential error as to its import and effect, induced by false and fraudulent representations made by the said Peter Glendinning? (5) Whether the said letter, and the acceptance, No. 11 of process, were granted by the pursuer and defender under mutual essential error as to their import and effect?"

The Lord Ordinary (KINNEAR) on 28th May approved of the first issue proposed, and appointed it to be the issue for the trial of the cause, but disallowed the other issues.

"*Note.*—The averments appear to me to be sufficient to support the first issue, but the remaining issues proceed on the assumption that the issue of facility and fraud or circumvention has been negatived, and on that assumption there is in my judgment no relevant averment of error.

"It is not alleged that the parties were under error as to any of the essential terms of the contract, but only that the pursuer did not know at the time that he could be required to execute the contract in the manner determined by the judgment of the Court. But a contract deliberately executed on the terms which the parties intended cannot be set aside on the ground that one of them misunderstood its legal effect. They are bound by their contract according to its true construction, and the pursuer cannot be relieved of his obligation because upon a question of construction judgment has been given against him."

The pursuer reclaimed, and argued—The averments on record entitled the pursuer to an issue both of essential error and of fraudulent misrepresentation. As to the former the pursuer had but one idea in his mind at the time that he consented to the sale, and that was the conversion of his entailed estate into entailed money under the provisions of the Entail Act 1882. This, by the decision of the Court, it had been found impossible for him to do, and in that respect there was such essential error as entitled the pursuer to get behind the contract. No doubt *ignorantia juris neminem excusat*, but the "jus" thus referred to was the public law of the country which everyone was to be held to know—*Mercer* v. *Anstruther's Trustees*, March 6, 1871, 9 Macph. 618—whereas the special law applicable to any particular contract was really a question of fact—*Cooper* v. *Phibbs*, L.R., 2 Eng. & Ir. App. 149, Lord Westbury at p. 170; *Beauchamp* v. *Winn*, L.R., 6 Eng. & Ir. App. 223, Lord Chelmsford at p. 234. The error here was one of fact and not of law, and the essentials upon which the parties were at variance was the price, instead of the liferent interest of the whole purchase price; the pursuer, after providing for compensations, would, in consequence of the decision of the Court, only have the benefit of a very small balance. Of the five grounds of error for setting aside a contract enumerated in Bell's Prin. sec. 11, the present case fell under (sub-sec. 3) the price, and (sub-sec. 5) the nature of the contract. Similar averments had been held sufficient to entitle a pursuer to an issue of error—*Maconochie* v. *Macindoe*, December 23, 1853, 16 D. 315; *Johnston* v. *Graham*, July 15, 1856, 18 D. 1234; *Wemyss* v. *Campbell*, June 6, 1858, 20 D. 1000; *M'Laurin* v. *Stafford*, December 17, 1875, 3 R. 265. There was in the present case a suspensive condition which distinguished it from those cited on the other side—*Johnston* v. *Johnston*, March 11, 1857, 19 D. 706. Glendinning's actings showed, if not a case of fraud, then one of mutual error, and the pursuer was entitled on his averments to an issue on one or other of these grounds. As to the mode of trial, the pursuer was entitled to have the issues sent to a jury unless he consented to the cause being tried otherwise—*Trotter* v. *Happer*, November 24, 1888, 16 R. 141.

Argued for the respondent on the 2nd, 3rd, and 4th issues—The pursuer's averments did not disclose a case of essential error, nor had the authorities cited any bearing on the present question. In order that error might be a ground of reduction it was necessary that it should be in the substantials of the contract and prevent consent. If the pursuer were to be successful in setting aside this contract, then any party who had entered into a bargain which was construed in a certain way by the Court might make out that he was not to derive the benefit he contemplated from his bargain, and claim to go before a jury on a case of error *in essentialibus*. Further, essential error to invalidate the contract must affect both parties. Mere misunderstandings were not sufficient, and in the present case all the essentials of the bargain had been completed. The parties had fixed the price, and all that the Court had to do was to safeguard the interests of succeeding heirs. Its ratification had nothing to do with the price—Pollock on Contracts, pp. 390 and 403; *Bentley* v. *Mackay*, 4 De Gex, Fisher, & Jones, 285; Ersk. iii. 1, 16; Stair, i. 9, 9, and iv., 40, 24. Error in the subject or person was to be distinguished from error as to the legal effects of the bargain when carried out, which latter was not a ground of reduction. There was no error here as to the price, only as to its disposal, and that was not an essential—Bell's Prin. sec. 11. In the following cases, resembling the present, an issue of essential error was disallowed—*Hog* v. *Campbell*, March 12, 1864, 2 Macph. 848; *Yeatman* v. *Proctor*, November 17, 1877, 5 R. 179; while in *Beresford's Trustees* v. *Gardner*, January 27, 1877, 4 R. 363, an issue of fraudulent misrepresentation, as well as one of essential error, was sought, but the latter only was granted. In the present case there was no

relevant averment of essential error induced by misrepresentation, and the issues based on these averments should be disallowed, as all that could go to the jury was the pursuer's *innuendo*—*Munro* v. *Strain*, February 14, 1874, 1 R. 552; *Dryer* v. *Birrell*, February 8, 1883, 10 R. 585. As to issue No. 1—There was no issuable matter, for it was not alleged in what the fraud consisted, and how the pursuer was unduly pressed into the bargain. With regard to the mode of trial, this was essentially a case to be tried by a Judge without a jury in order that justice might be done to both parties. The questions were involved, and there was a sentimental side which would be sure to weigh unduly with a jury—*Hume* v. *Young*, January 19, 1875, 2 R. 338; Mackay's Practice, i., p. 35; The Evidence (Scotland) Act 1866 (29 and 30 Vict. cap. 112); *Trotter* v. *Happer*, November 24, 1888, 16 R. 141.

At advising—

Lord President—There are some matters in this case upon which I think none of your Lordships have ever entertained any doubt. The first of these is as to the right of the pursuer to obtain the first issue. I am very clearly of opinion that there is a relevant case presented on record in support of that first issue. The other matter to which I refer is that there is no relevant averment on record of misrepresentation or fraudulent concealment inducing the essential error alleged upon the part of the pursuer; and therefore there remains for consideration only the question of the pursuer's right to the second issue as to essential error. That question, I think, must be taken on the assumption that the pursuer fails on his first issue, and also on the assumption that he was not led into the supposed error by misrepresentation or undue or fraudulent concealment. I am of opinion that there is no relevant averment of essential error on record, and that the proposed issue faithfully reflects the irrelevant averment. The error alleged and proposed to be submitted to the jury is error as to the import and effect of the contract sought to be reduced. But a contract cannot be reduced on the ground of error unless the error be in the essentials of the contract. In innominate contracts it is sometimes difficult to ascertain or define precisely what are the essentials, but it is not so in nominate contracts, such as the contract of sale with which we are here concerned. The essentials of this contract are the identification of the parties contracting, the subject sold, and the amount of the price; and as regards these in the present case there is no room for doubt. The parties are certainly ascertained, the lands are sufficiently described in the missive, and the price is twenty-five years' purchase of the nett rental. As to the application of the price the purchaser has no interest or concern, and nothing can be an essential of a contract which does not concern both the parties. Neither is there any error as to the nature of the contract, as in the case of a person signing a disposition believing it to be a lease, or a bond for borrowed money believing it to be a testament. The parties well knew they were making a contract of sale and nothing else. The error which the pursuer says he laboured under when he signed his letter was, that according to its terms he believed he would sufficiently fulfil his obligation as an entail proprietor by selling under the authority of the Statute of 1882, and thereby converting the entailed lands into entailed money. It has been found by our judgment in the previous action that if he entertained this belief he was wrong as to the construction of the offer which he made, and which was accepted, and that according to its true construction he was bound to proceed under the Act of 1853 to obtain ratification by the Court of a sale made and a disposition granted before the Court's interposition is asked. The condition thus introduced into the contract of sale was a potestative condition, which the seller was bound to fulfil to the utmost of his power, and the Court upon an application under the Act of 1853 cannot alter the terms of the contract of sale made by the parties. The Court is no doubt bound to see that the pecuniary interests of the creditors and heirs of entail are not prejudiced by the contract, and if they are it will be the duty of the Court to refuse the application before them on the ground that the sale was for that reason *ultra vires* of the seller. But there is no medium course between ratifying or refusing to ratify the sale according to its terms and conditions. The pursuer has made a contract of sale complete in all its essential parts, but a question arose between the parties as to the construction of one of its clauses not affecting the essentials. That question has been decided against the pursuer by this Court acting as a Court of construction, and the pursuer now demands that because he was wrong in his construction he shall be entitled to set aside the contract. If this plea were listened to, every litigant who is unsuccessful in a question as to the construction and effect, or, to use the pursuer's own words, the import and effect, of the contract would at once have the remedy of reducing the contract which he had deliberately made, and afterwards persistently misconstrued. For these reasons I am against granting the second issue proposed, and on the whole matter I am for affirming the interlocutor of the Lord Ordinary.

Lord Mure—I agree in the opinion which your Lordship has so very clearly expressed as to the second issue of essential error. I think there is no mistake here as to the nature of the contract. The contract is a simple contract of sale, and as I read the letter of the pursuer the subject-matter of that contract, the parties to it, and the price at which the property is to be disposed of, are all fixed; and these are the essentials of a contract of sale. Now, that being so, I am unable to see that what the pursuer here alleges as to his mistake in the matter is an error of a description that is relevant to reduce that contract. The error alleged is simply that he misunderstood or mistook the effect of the stipulation, that the sale should be subject to ratification by the Court; that he thought that would have a particular effect; and he finds he is now mistaken as to what that effect would be upon the application being made. Now, I do not think that is such an error as a party can be allowed to propone as a good ground for reducing a contract; and on that ground, and for the reasons stated by your Lordship, I agree that the interlocutor of the Lord Ordinary should be affirmed.

LORD SHAND—I agree with all of your Lordships in holding that the pursuer is entitled to have an issue for the trial of the cause founded on his averments of facility and lesion in entering into the contract which he seeks to reduce. I am also of opinion that there is no relevant statement of misrepresentation by Mr Glendinning as an inducing cause to lead the pursuer to enter into the contract. The single averment of misrepresentation is made in these terms:—"Mr Glendinning represented to the pursuer that the effect of writing the said letter" (meaning the letter of offer to sell the estates) "would be merely to give the pursuer a little hold on Mr Kennedy;" and I do not think that on any reasonable construction of the effect of these words, even in the circumstances in which they are said to have been used, they will bear the meaning which the pursuer has affixed to them in article 7 of the condescendence.

I am further of opinion that no good cause has been shown for having the trial of the cause before a judge whose verdict is subject to an appeal in place of a jury. On the contrary, it appears to me to be extremely desirable that the tribunal whose verdict shall be final on the facts in this case, where so much must depend on the manner in which the evidence of the pursuer and Mr Glendinning is given, as well as on the substance of that evidence, should themselves see and hear the witnesses.

But with all anxiety to avoid any difference of opinion as to the issues to be sent to trial, I have, after the best consideration I could give to the matter, come to the conclusion that the pursuer has stated a case which entitles him to an issue of essential error on his part in entering into the contract.

The former action between the parties related exclusively to the meaning of the contract and the mode of enforcing it. Of the two meanings which were presented by the parties, the Court were of opinion that the construction for which the present defender contended was the true construction according to the proper and legal meaning of the terms used.

The pursuer, accepting this decision as conclusive, as indeed he is bound to do, says, however, in the present case, that if that be the true construction and legal meaning of the words employed in his letter of offer, then he was under essential error, for in using the language he did, and which indeed was a transcript of a paper brought to him by Mr Glendinning, he never intended to make the contract to which he has been held bound, and the difference between that contract and the bargain which by the terms of his offer he intended to enter into, is so material in regard to the substance and effect of this contract itself as to amount to an error in the essentials of the contract against which the law will give redress, though it may be there will be liability on his part for at least the expense which has been thus caused to the other contracting party. The question for determination is—taking the decision of the Court as settling the true meaning of the pursuer's offer of sale—Was there ever really *in idem placitum consensus et conventio*, or were the parties making a contract as to the meaning of which there was an essential difference—a difference in essentialities—between them?

The important words of the offer in the present question, without which indeed it could scarcely have arisen, are these—"In the event of your acceptance the sale is made subject to the ratification of the Court." These words, it must, I think, be conceded, admit of construction—by which I mean it may be fairly said of them that they might in the minds of the contracting parties respectively be used and taken in a different sense—in one sense by the proposed seller, in another sense by the purchaser. Both parties knew they were dealing with an entailed estate, and by a sale "subject to the ratification of the Court," might honestly and fairly be meant (as the pursuer says he understood the words) a ratification which inferred examination and inquiry by the Court into the transaction in the interest of the heirs of entail, and therefore the consideration by the Court of the question of the adequacy of the price, in the view that the entailed estate was to become entailed money, in which the future heirs of entail were interested; or it might properly mean, as the defender understood it, and the Court has held it did mean, on a sound construction of the language, that the Court was to give its approval of the sale and proceedings without any inquiry as to the future interest of heirs of entail, on the footing that the estate was to be disentailed without any substitution of entailed money, in which case all that the Court had to regard was, that present interests affecting the estate were duly provided for, without any regard to the question whether the price was adequate or not. It is clear on his statement that whether the difference was vital and essential or not, it was one of great importance to the pursuer. The difference was so great, as I think I shall immediately show, that in the pursuer's view the contract was made subject to a suspensive condition which might never be purified, while according to the meaning to which the Court has given effect there was no such suspensive condition, because the pursuer was in a position to secure the approval of the Court to the sale, and bound to take the proceedings necessary to obtain this.

It was partly in the view of this material difference which might exist in the understanding of the parties of the meaning of the language which they used, that in the outset of the opinion in the former case I expressed myself thus—"I concur with Lord Mure in thinking that the only question to be determined in this case is in regard to the meaning of the words 'In the event of your acceptance the sale is made subject to the ratification of the Court,' and I think in determining the meaning of these words we must have regard to what the purchaser was entitled to take to be their meaning. It is not a question entirely of what was in the mind of the seller when these words were used; but the question is, how was the purchaser entitled to read these words when he gave a written acceptance of the offer?"

Now, what the pursuer in this action states is, that being quite aware that the Entail Statutes enabled him to sell the estate of Murtly and to convert the price into entailed money, and believing that this could be effected by a private sale, he entered into the contract of sale with that view. He knew by his previous experience, in an application which he had formerly pre-

sented to the Court, that the Court itself made independent inquiry into the propriety of the bargain, and particularly as to the price, in the interest of future heirs of entail, and that the Court would only ratify or approve of the sale if fully satisfied as to the advantage to be gained by the sale, and he therefore stipulated as a condition of his contract that the sale should be "subject to the ratification of the Court." He stated in article 7 of the condescendence that he understood that he was entering into a "conditional bargain," "that he would be bound to go to the Court for authority to sell the estates under the procedure which he knew of to the defender, and if the Court should approve of the whole terms of the proposed bargain as fair and reasonable, and should ratify the same, that Mr Kennedy would be bound to purchase on the same terms, but that if the Court should hold that the price was inadequate, the pursuer would not be bound to sell at the price proposed."

The present question is to be decided on the assumption that this statement is true, and that the pursuer is prepared to prove it. It is clear that on this assumption the pursuer, who was concluding a bargain involving the sale of an estate admittedly worth nearly £400,000 without the intervention of any law-agent, and with a certain degree of haste, was stipulating for a means of completely safeguarding himself against any improvidence in the bargain which he agreed to in such circumstances. But I apprehend, as I have already indicated, that he was in his view, and as he believed by the very language of his offer, stipulating for a ratification by the Court which operated as a suspensive condition of the sale, and not a mere potestative condition only, for if the result of independent inquiry by the Court was that the price agreed on was inadequate, as the pursuer now avers it to be, then there would be no ratifcation on approval, and consequently no sale.

Now what, on the other hand, was the contract which the defender meant to conclude and did conclude by the language used? It was in effect an absolute not a conditional sale—at least a sale in which there was no suspensive condition which could in any way prevent the sale being carried out. He understood the words "subject to the ratification of the Court" to mean merely the formal approval of the transaction which the Court would necessarily give on the pursuer's application, and on his meeting all claims against the estate, and paying compensation to the next heir for his interest. In this question the Court is called on not to construe the language used, but to go behind the language of the contract to the intention and mind of the parties. Taking it so, according to the pursuer's statement, the sale which the Court has held to have been made was a sale such as he did not know that it was even in his power to make, and it would not be surprising that he should have been ignorant of his right to compel the nearest heir of entail to consent to a disentail on payment of compensation, as this power was only introduced by the Act of 1882.

Was there then here *consensus in idem* between the parties? Each of them no doubt knew perfectly the person with whom he was dealing, and knew the subject of the contract, the estates of Murtly. But were they of the same mind, consenting to the said contract in reference to the price, and in reference to the nature of the contract itself? Professor Bell in his Principles, in section 11, referred to in the argument, states, and I do not doubt with perfect accuracy, that error *in essentialibus* may exist (sub-sec. 3) in relation to the price or consideration, and (sub-sec. 5) in relation to the contract itself supposed to be entered into. Taking the last of these points first, the pursuer was consenting to a sale subject to a suspensive condition which might operate to prevent a concluded sale ever being carried out; he was consenting to a sale which could only be carried out after an independent inquiry by the Court, and after the Court became satisfied that the transaction was advantageous to the heirs generally. It seems to me that such a contract differs *in essentialibus* from what in effect is an absolute sale, a sale subject to a potestative condition only, which the pursuer can be compelled to carry out. A sale which in the intention of the seller is made subject to a suspensive condition, as contrasted with an absolute sale made contrary to his intention, in a particular case where the condition is vital and important, may be quite as truly a difference in essentials as to the nature of the contract itself as the difference between a lease which a party thinks he is agreeing to when he is truly agreeing to a sale, which is the case commonly cited as the clearest illustration of an error *in essentialibus* as to the nature of the contract.

Then as to the price, there was so far agreement between the parties that the price should be twenty-five years' purchase of the rental. But the defender consented to the purchase on the footing that the price was absolutely fixed and certain. The pursuer, however, consented to the sale on the footing only that the price should be reconsidered by the Court after inquiry, and that unless the Court thought the price adequate it should not be accepted. This again appears to me to have been a difference *in essentialibus* between the parties in the making of the contract.

The Lord Ordinary in his judgment has said—"It is not alleged that the parties were under error as to any of the essential terms of the contract, but only that the pursuer did not know at the time that he could be required to execute the contract in the manner determined by the judgment of the Court. But a contract deliberately executed in the terms which the parties intended cannot be set aside on the ground that one of them misunderstood its legal effect. They are bound by their contract according to its true construction, and the pursuer cannot be relieved of his obligation because upon a question of construction judgment has been given against him;" and I understand his Lordship's view there expressed is approved of by your Lordships now. If his Lordship in saying that it is not alleged that the parties were under error as to "any of the essential terms" means that the pursuer and the defender were agreed not only as to the language to be used, but also as to the nature and substance of the contract itself in all its essential terms and conditions, and that the pursuer has averred nothing to the contrary, then for the reasons I have explained I cannot agree in his Lordship's view.

If, again, in the following part of the passage now quoted his Lordship means that where there

has been in all material respects *consensus in idem placitum* between the parties to a contract, one of them cannot be relieved of it because of his discovering at a later time that its effect or consequences will in some respect be injurious to him, or not so beneficial to him in the result as he expected, then I agree in the statement. For example, if in the present case the parties in entering into the contract were agreed as to its essentials—both understood that the contract was unconditional and the price absolutely fixed—the pursuer could not, I think, obtain relief on the ground that he was under the erroneons belief that the price when obtained could be entailed as a substitute for the land, and that he would not be bound to pay compensation to the next heir. That would be a case where the parties were agreed as to the essentials of the contract they were entering into—were agreed as to the terms, meaning thereby the essential conditions and not merely the language of the contract, although one of them did not realise what its legal effect or consequences to himself ultimately would be. If the error were one merely as to the application of the price, the parties being agreed on the essentials of the contract, there would, I think, be no such remedy as the pursuer here asks. But the pursuer's position, it appears to me, entirely differs from this, for his case is, that though the language used was unfortunate for him he shall not be bound by it as construed by the Court, because the parties were not in their intention consenting to and entering into the same contract. A contract may be "deliberately executed in the terms which the parties intended," meaning by this, in the language used to express their meaning, and yet there may be misunderstanding as to the true meaning and effect of the language, clear error *in substantialibus*, and an absence of mutual consent to the same contract. In this instance the parties agreed to the language used, but they differed vitally in intention as to the meaning and effect of the important words, "the sale is made subject to the ratification of the Court."

The defender argued that because the construction of the contract has been decided against the pursuer the pursuer could have no remedy by way of reduction on the ground of essential error, and the Lord Ordinary seems to have given countenance to that view when he says—"the pursuer cannot be relieved of his obligation because upon a question of construction judgment has been given against him." I confess I find myself unable to follow this reasoning. Of course if the pursuer had succeeded in his argument in the former case on the true construction of the argument he would never have required to resort to the remedy of an action of reduction of the agreement on the head of error, though in that case it might have been open to the defender on the other hand to have raised such an action on the ground that he never understood that he was entering into a contract as so interpreted—a contract conditional in its nature, and at a price not conclusively binding on both parties. It is only because the pursuer finds that the contract has been construed as an absolute sale on his part at a price finally fixed, that he brought this action on the ground that there was never any real consent on his part to such a bargain. The same thing might occur, and no doubt has occurred, where loose or ambiguous description of lands, the subject of a contract of lease or sale, has been given in the deed or correspondence between the parties. Each will properly in the first instance maintain his construction of the contract as creating the greater or lesser right. But the defeated party will surely not be precluded from setting aside the contract altogether on the ground of error in its inception and absence of *consensus in idem* as to the subject of the contract, because the construction of the language used is determined against him.

I do not see that it forms any ground for refusing the remedy of reduction on the head of essential error that on the question of construction judgment has been given against the pursuer. And on the grounds I have stated I think the pursuer is entitled to an issue putting the question whether in entering into the contract he was under essential error as to its nature and effect, which is, I believe, the form of issues under which questions of essential error have been in use to be tried.

Lord Adam—I do not understand that there is any dispute that the pursuer and defender entered into a contract here, and that that contract is contained in a letter from the pursuer addressed to the defender dated 19th September 1888, and the defender's answer of the 20th of September.

That the parties entered into a contract by that letter and answer I do not think there is any doubt. Nor do I think there is any doubt as to the nature of the contract which they thereby entered into. It was a contract of sale, and not a contract of lease, or anything of that sort. The meaning of error as to the nature of a contract is that the parties have been in error as to the kind of contract—contract of sale or contract of lease, or any other contract that they meant to enter into. If there is error as to that, then a party may have relief, but not otherwise. If there is no error as to the nature of the contract I have always understood that no averment of error is relevant to reduction, unless it was an averment of error as to essentials of the contract; and I have always understood that the essentials of a contract of sale are three, viz., the person, the subject, and the price. If there is no error on these three points, then I understand there can be no relief against such a contract, however much in point of pecuniary value one of the parties may be prejudiced by the contract which he has entered into. If the error does not enter into one of these three essentials he can have no redress. Now here, as I understand, there is no mistake as to the person. The pursuer and defender made the contract with each other. There is no mistake as to the subject. The estates of Murtly and Grantully were the subject of the contract. There is no mistake as to the price. The price is distinctly fixed by the written contract between the parties, viz., twenty-five years' purchase of the nett rental. These three essentials of a contract of sale are embodied in the offer and acceptance, and I do not find any error as to these essentials at all. But the error which the pursuer says he fell into was this—he says, when I used the words in my

letter, "In the event of your acceptance, the sale is made subject to the ratification of the Court," I mistook the meaning of the word ratification; what I had in my mind was that proceedings must be taken under the Entail Act of 1882, the effect of which is that the Court would order a sale of the subjects, and would determine the price, and further, that when the price was determined it should just be a substitution of entailed money for entailed land. That, he says, is what he meant by ratification. Whereas he says the Court have found that the meaning of it is this, that you shall prepare a disposition, and the Court (as they have the power to do on being satisfied that the interests of the creditors and of the next heir of entail are secured) will approve, and must approve of that disposition, and so the sale will be carried out. That is the error which he avers, and from which he wants relief. Now that is not an error which to my mind goes to the essentials of the contract at all. It appears to me to be simply this, that Sir Douglas Stewart understood that the price of from £300,000 to £400,000 should be disposed of in a particular way. Now, Mr Kennedy, the defender, the other party to the contract, has no concern with the application of the price, and therefore I cannot see how that can be an essential of the contract. Nor do I see that the magnitude of the pecuniary or other result arising from the construction put upon the contract by the Court can make that an error *in essentialibus*. We had a case lately in which the error of the parties as regards amount was very considerable. I refer to the case of *The Steel Company of Scotland* v. *Tancred, Arrol, & Company*, February 1, 1889, 16 R. 440, where the pecuniary result arising from one reading of the contract amounted to many thousand pounds. Yet the magnitude of the result of a certain construction of the contract did not affect the question of the essentiality, simply because it did not go to one of the essentials of the contract itself. Now, what is there more in this contract than that? The contract is in writing, and the Court have construed it, bringing out certain results. But this does not affect the essentials of the contract. The price is the same as before, the subject is the same, and the persons are the same. All Sir Douglas Stewart can say is this, I entered into a contract, and when I used the word ratification I used a word which, as the result has shown, I was not fully acquainted with the meaning of. That is all. But in my humble opinion that does not go to the essentials of the contract. If Sir Douglas Stewart has used language which the Court has been forced to construe to his prejudice, I do not see that the defender has anything to do with that. It does not in my mind go to the essentials of the contract, and therefore I think with your Lordship that there is no relevant averment of essential error on this record. On these grounds I concur with your Lordship.

The Court adhered and remitted to the Lord Ordinary to proceed with the cause.

On 29th June the defender applied to the Lord Ordinary (KINNEAR) to fix a day for the trial of the cause.

The pursuer objected, on the ground that the judgment above referred to had been appealed to the House of Lords.

The Lord Ordinary reported the case to the First Division.

Argued for the defender—The issues proposed by the pursuer did not in any way depend upon each other, and the very worst that could happen to the pursuer was that he might have to undergo two jury trials, but that would only be in the contingency of his failing in the trial in this Court on the issue allowed, and at the same time his being successful in his appeal to the House of Lords. There were many reasons also why the trial should be allowed to proceed without more delay; the pursuer was old and infirm, and if anything happened to him before this trial was concluded the defender's chance of getting this estate would be at an end; and the purchase price was very large, and it was a hardship on the defender to have so large a sum tied up for an indefinite time. On the ground of expediency the motion should be granted, and it was quite competent.

Argued for the pursuer—The course proposed by the defender if not incompetent under the Court of Session Act 1850 (13 and 14 Vict. cap. 36), sec. 13, was most inexpedient, and no sufficient reason had been suggested why the Court should depart from the rule usually followed in such cases—*Johnston* v. *Johnstone*, 1859, 3 Macq. 619 and 624.

At advising—

LORD PRESIDENT—The motion of the defender is founded on section 13 of the Court of Session Act 1850, which provides as follows:—"And be it enacted that no reclaiming-note to the Inner House and no petition of appeal to the House of Lords in any process before the Court of Session, shall be held to remove such process from before the Lord Ordinary or the Court, as the case may be, as regards any point or points not necessarily dependent on the interlocutor so submitted to review, but such process shall for all purposes and to all effects not necessarily dependent on such interlocutor remain before the Lord Ordinary or the Court, as the case may be, and shall be proceeded in by the Lord Ordinary or the Court notwithstanding such reclaiming-note or appeal if it appear to the Lord Ordinary or the Court to be expedient and proper." The first question which we have to determine then, is, whether the present application is "necessarily dependent on the interlocutor submitted to review" by the pursuer's appeal to the House of Lords.

Now the interlocutor submitted to review is Lord Kinnear's interlocutor of 28th May, and it is in these terms:—"The Lord Ordinary holds the issue, No 12 of process, as now amended, as adjusted and settled, approves of the same as now authenticated accordingly, and appoints the same to be the issue for the trial of the cause;" and this interlocutor we affirmed on the 25th June.

If the judgment of this Court is reversed by the House of Lords on the ground that there are relevant averments of essential error, then it is apparent that there must be more than one issue in the cause. But Lord Kinnear has decided that there is to be one issue only, and accordingly what the House of Lords will in the first place have to determine is whether Lord Kinnear's judgment is sound or not.

If that judgment is reversed, then the issue approved by the Lord Ordinary will not be the

issue for the trial of the cause, and it is in every way undesirable that there should be two trials. I have great doubts as to the competency of our proceeding with the cause here pending this appeal, and if any doubts exist as to the competency, that puts an end to the expediency of the course proposed.

I am therefore for refusing the motion.

LORD MURE and LORD ADAM concurred.

LORD SHAND was absent.

The Court refused the motion.

Counsel for the Pursuer — Balfour, Q.C.— Asher, Q.C. — Dundas. Agents — Dundas & Wilson, C.S.

Counsel for the Defender—Lord Adv. Robertson Q.C.—Murray—Dickson. Agents—Tods, Murray, & Jamieson, W.S.

Saturday, June 29.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

BLASQUEZ *v.* LOTHIANS RACING CLUB AND ANOTHER.

Reparation—Slander—Wrongful Expulsion from Ring at Race Meeting—Jury Trial.

A went to the meeting of a racing club, and was admitted to the ring on payment of the usual charge of 10s. B, a bookmaker, having pointed him out to the inspector of the ring as a man "who owes me money," A was expelled from the ring by the police.

In an action of damages by A against the racing club and B the defenders submitted that the case was not appropriate for jury trial, in respect that it involved difficult questions (1) with regard to the construction of the Jockey Club rules, under which the meeting was held, and which conferred on the racing club and its members neither direction nor authority in controlling the proceedings; (2) with regard to the right conferred by payment for admission to the ring, which they averred was a mere licence liable to be withdrawn for certain reasons; and (3) as to whether it was actionable to charge a person with failure to pay his gambling debts, betting being illegal. *Held* that the case was appropriate for trial by jury, and issues ordered.

Reparation—Slander—Issue—Innuendo—Counter Issue.

In an action of damages for slander the pursuer obtained an issue whether the defender in the ring or paddock of the "Lothians Racing Club and Edinburgh Meeting" at Musselburgh, and in the presence of certain parties named, falsely and calumniously said of and concerning the pursuer, "This is the man who owes me money," or used words of similar import, meaning thereby that the pursuer was owing him money on betting transactions which he dishonourably refused to pay, and was a person who ought not to be allowed to remain in the said ring or paddock, to the loss, injury, and damage of the pursuer?

The defender proposed a counter issue. *Held* that the counter issue must fully meet the *innuendo*, and must include the words "and was a person who ought not to be allowed to remain in the said ring or paddock."

On 5th October 1888 Raymond Blasquez attended the meeting of the Lothians Racing Club held on Musselburgh Links. On payment of the usual charge of 10s. he was admitted to the paddock or ring. Shortly after he had entered the ring a bookmaker named Cosmo Reid came up in company of the inspector of the ring, and pointing to Blasquez said to the inspector "This is the man who owes me money," or some words to that effect. Having received this information the inspector ordered a detective to remove Blasquez from the ring, which was done.

In consequence of his expulsion from the ring Blasquez brought the present action of damages against the members of the Racing Club and Cosmo Reid. Damages were laid at £5000 against the defenders jointly and severally, or alternatively at £3000 against the members of the Racing Club, and at £2000 against Cosmo Reid.

The pursuer's averments were to the effect that he had been wrongfully and unwarrantably expelled from the ring by the inspector, in the presence of a number of people to whom only one explanation of the incident was possible, namely, that the pursuer had been guilty of criminal or dishonourable conduct which debarred him from associating or meeting with gentlemen. As the meeting was under the management and control of the Racing Club they were responsible for the pursuer's expulsion from the ring. Reid's statement that the pursuer owed him money, and which was made in the presence of, amongst others, Augustus Powell, medical student, Edinburgh, and Walter Sprott, of the Edinburgh police force, was false and calumnious, and was meant to imply and did imply that he was owing him money on betting transactions which he dishonourably and fraudulently refused to pay, and that he was unfit to remain in the ring, and ought to be publicly and ignominiously expelled therefrom.

The defenders, the members of the Lothians Racing Club, in answer averred that the meeting was held as usual under the rules of racing of the Jockey Club, under which the Lothians Racing Club and its members had neither direction nor authority in the conduct of the proceedings at the meeting other than that they nominated the stewards and the clerk of the course, who required to be approved by the committee of the Jockey Club, and when so approved had the entire control and authority independently of the said Lothians Racing Club. Payment for admission to the ring conferred no absolute right, but a mere licence or franchise which was liable to be withdrawn; and in accordance with the rules of racing, and of all meetings conducted under the Jockey Club rules, the stewards and the clerk of the course, and the inspector of the ring, acting under their authority, had power to