that the pursuer is entitled to recover his cattle if they are still extant. If the defender is not in a position to deliver either or both of the cattle, the question will arise as to the pursuer's remedy for the value, which has not been disposed of by the Sheriff-Substitute. In the meantime I agree with the decision which your Lordship proposes.

LORD PEARSON—I agree so far with the learned Sheriff that the pursuer has no case merely in respect of Telford's fraud, or merely in respect that he sold the cattle to Telford under essential error. But I think the real question here arises at a prior stage. The Sheriff's view is that there was here a contract; and if there was, then he is perfectly right in his view of the law. I am unable to find that the proof establishes any contract to which the pursuer was a party. Telford did not represent himself as being principal, but as an agent. The pursuer was entirely deceived both as to the identity and also as to the intention of the person with whom he supposed he was contracting and intended to contract, and in that essential part of a contract there was no *consensus in idem*, and therefore no sale. I think that the case falls within the principle of the English cases of *Higgons* and *Cundy;* and that the delivery to Telford gave him no such title of possession as would enable him in law to transfer the property of the cattle to another.

The Court pronounced this interlocutor—

"*Find in fact* (1) that on January 31, 1906, Alexander Telford falsely and fraudulently represented to the pursuer and appellant that he was the son of Mr Wilson, Bonnyrigg, and that he had authority from Mr Wilson to purchase two cows; (2) that the appellant, who knew Mr Wilson of Bonnyrigg to be a farmer and in good credit, was deceived by said representation, and agreed to sell two cows to Mr Wilson on the usual credit, and delivered the cows to Telford; (3) that the respondent, on February 2 following, purchased the said cows from Telford in good faith and without notice of the appellant's right, and paid the price demanded by Telford: *Find in law* (1) that the appellant did did not sell the two cows to Telford or to Wilson of Bonnyrigg, that the cows were not delivered to Telford upon a contract of sale, but notwithstanding such delivery continued to be the appellant's property; (2) that the appellant was imposed upon and is not chargeable with negligence in delivering the cows to Telford as the supposed agent of Wilson; and (3) that the respondent having obtained the two cows from a person who had no title either of property or possession thereto, is under obligation to restore the cows to their true owner, the appellant, or to account to the appellant for their value as at the date when he acquired them; and remit the cause to the Sheriff-Substitute to dispose thereof in conformity with this finding, and decern."

Counsel for the Pursuer (Appellant)—Morton. Agent—William Brotherston, W.S.

Counsel for the Defender (Respondent)—Wark. Agents—Macpherson & Mackay, S.S.C.

Friday, December 20.

SECOND DIVISION.

[Lord Dundas, Ordinary.

ADDISON *v.* BROWN.

Lease—Agricultural Lease—Farm Road—Access—Implied Grant.

In a lease of a farm the subjects let were described by enumerating "the fields or enclosures, marked numbers [specified in detail] on a plan." There were three roads upon the farm, none of which were included in the numbers specified. *Held* that the tenant was entitled to use not only two of the roads, without which it was impossible to obtain access to portions of the farm, and as to which the landlord raised no question, but also the third road which ran through the middle of the subjects let, and which was in a reasonable and obvious sense intended for their use, although not, strictly speaking, essential for the purpose of access.

Per Lord Ardwall—"If a tenant takes a farm through or alongside of which he sees roads laid down on the landlord's property, he is entitled to assume, as an implied term of his contract of tenancy, that he shall be entitled to use all existing roads, unless it be specially stipulated that he shall not do so."

By lease entered into between George Bayley of Manuel, Writer to the Signet, Edinburgh, on the one part (therein called the first party), and Abram Addison on the second part (therein called the second party), George Bayley let to Abram Addison the mills and farm of Manuel for a period of nineteen years from Martinmas 1892.

The following is excerpted from the lease:—"All and Whole the mills of Manuel Mill, with the kiln, water-wheels, troughs, mill-dam, and race, and use as heretofore of the water of Avon for said mill, with the fixed machinery in said mills belonging to the first party, and with the dwelling-house and office houses and two cot-houses at Burnbridge, all as now let to Peter Roberts, and together also with those lands now let to him and to Thomas Binnie, and those other lands in possession of the first party, and heretofore let by him as grass parks, which whole lands hereby let consist of the fields or enclosures marked numbers two, three, ten, fifteen, sixteen, seventeen, twenty, twenty-two, twenty-five,

twenty-seven, twenty-nine, and thirty-four, and intervening numbers, thirty-six, thirty-eight, thirty-nine, forty, and forty-three and fifty-six, and intervening numbers on the plan of the estate of Manuel made by James Young & Son, and dated Eighteen hundred and fifty-two, which has been seen and examined by the second party, which lands, lying in the parish of Muiravonside and county of Stirling, are computed or conjectured to extend to one hundred and twelve acres imperial or thereby, although no extent is guaranteed, and the second party shall be held to have satisfied himself as to their true extent before entering into these presents. . . . There is hereby reserved to the first party—(*First*) The cottage at Causewayend on the road adjoining the enclosure number thirty-nine on the foresaid plan; . . . (*Third*) the right to himself and others having his permission to use all roads through said lands. . . . The second party binds himself and his foresaids to keep the road from the public road at the gate of the avenue to Manuel House to the mills hereby let in good repair, and leave same in that state at the termination of this lease. . . ."

The farm on its north-east, north, and north-west sides was bounded by a public road, which ran in a more or less semicircular form from a point A on the east to a point J on the west. There were three private roads on the farm, none of them included in the numbers let. One of these roads ran from the farm on the south in a north-easterly direction to the public road at the point A, the other in close proximity to it to the cottages at Burnbridge, which were situated close to A. A third road or farm track ran almost due east and west through the middle of the farm from point A upon the public road to point J upon the public road. This road or track was marked on the plan by the letters A, B, C, D, E, F, G, H, J. It was possible to reach every part of the farm let by means of the two private roads first mentioned, and the public road and a short section of the third road at its extreme westerly end between J and G. Many portions of the farm could, however, be more readily reached by the remaining portion of the central road between G and A.

Robert Ainslie Brown in 1903 purchased the estate of Manuel from Mr Bayley, and shortly afterwards closed the road from A to G, and prevented Addison from continuing to use it as he had hitherto done.

In the present action against Brown, Addison sought (1) declarator that he was entitled to use the road, and interdict against interference with his right; he also concluded for (2) an award of damages on account of past interference with his right.

The Lord Ordinary (DUNDAS) on 8th January 1907 pronounced the following interlocutor, after proof—"Finds, declares, and decerns, in terms of the first declaratory conclusion of the summons that the pursuer has the right as tenant of the farm and lands under the lease libelled to the free and uninterrupted use of the road libelled, and rights of passage over the same for himself as tenant foresaid, his servants, employees, and others, and for horses, cattle, and carts used by the pursuer as tenant foresaid, and for all purposes connected with the said farm and lands: Decerns against the defender for payment to the pursuer of the sum of £30 sterling in full of the petitory (second) conclusion of the summons."

Opinion.—"The proof allowed by my interlocutor of 6th July has now been led—at quite unnecessary length, in my opinion—upon both sides. I have come, without much difficulty, to the conclusion that the pursuer is entitled to decree in terms of the principal declaratory conclusion of his summons. Parts of the evidence are instructive, but it appears to me that the decision of the case must turn upon the proper construction to be put upon the pursuer's lease. The lease, which is dated 11th and 21st September 1892, is framed in singular and rather puzzling terms. It lets to the pursuer (1) the mills of Manuel Mill, with water-power, machinery, &c., and the houses 'all as now let to Peter Roberts;' (2) 'those lands now let to him and to Thomas Binnie;' and (3) 'those other lands in possession of "the landlord" and heretofore let by him as grass parks.' The lease continues thus—'which whole lands hereby let consist of the fields or enclosures marked numbers' (specified in detail) 'on the plan of the estate of Manuel made by James Young & Son, and dated Eighteen hundred and fifty two, which has been seen and examined by the "tenant," which lands . . . are computed or conjectured to extend to one hundred and twelve acres imperial or thereby, although no extent is guaranteed.' The estate plan is No. 16 of process; Mr Carfrae's tracing of part of it, with letters imposed, is No. 6 of process; and the relative schedule of contents, dated in 1852, is No. 15 of process. Mr Carfrae, the pursuer's first witness, explains that, as shown in his table No. 97 of process, the arable and pasture lands actually leased to the pursuer extend to 112·065 acres, exclusive of scarcements, sites of fences, roads, water, wood, banks of burns, and all houses. There are only three roads of any material importance in the case. In the first place there is the road in dispute, marked on No. 6 of process by the letters A to J. The bulk of this road, A to G, extending to ·861 acre, is No. 35 on the plan. No. 35 is not one of the numbers specified in the pursuer's lease. The part G to H, extending to ·101 acre, seems to be included in No. 36, which is specified in the lease. The remainder of the road, H to J, extending to ·042 acre, forms part of No. 37, which is not so specified. The second road leads from the mill to the point A on the public road. It is No. 21 on the plan, extends to ·575 acre, and is not specified in the lease. The third road leads from the mill to Burnbridge by the water side. It is No. 23 on the plan, consists of ·507 and ·74 acre (total ·581 acre), and is not specified in the lease. To complete matters I may point out that a road or way leading from the mill to the dam-

head or weir and sluices—which by the lease the pursuer is bound to keep in good order—seems to be, to the extent of ·229 acre, included in No. 10, which is specified in the lease, and to the extent of ·76 acre in No. 8, which is not specified therein. If, therefore, the extent of the pursuer's leasehold were to be ascertained upon a literal construction of the words of let, it would appear that he has no access at all to his mill and steading. The defender concedes that such a construction is inadmissible, and he says that he is bound and willing to afford the pursuer such access as are 'ways of necessity' for the proper working of the farm. These accesses are, in the defender's view, the two roads from the mill to the public road, above described; and the portion J to G of the road in dispute. This attitude does not seem to me to be logical or satisfactory. I do not think that both of the roads indicated could be 'ways of necessity.' But it is, in my judgment, clear that the lease is open to construction in regard to the matter of access, and that it must be construed, as a whole, according to the reasonable meaning of its language. A very important clause occurs, whereby the landlord reserves, *inter alia*, '(Third) the right to himself and others having his permission to use all roads through said lands.' This, I apprehend, must mean either an exclusive reservation by the landlord of all the roads or a reservation to himself in common with his tenant. The latter view is maintained by the pursuer, and is, in my judgment, the correct one. The former view I find it impossible to sustain, although no doubt the words used are susceptible of such an interpretation. The defender's counsel was constrained to admit that the reservation, in the sense in which he reads it, is superfluous; but he argued that some of the other reservations in the lease—particularly that of a cottage at Causewayend—are so also. In this I think he is mistaken. The cottage is situated in field No. 39, which is expressly let to the pursuer, and the reservation has therefore a distinct purpose and effect. Be this, however, as it may, it would, in my opinion, approach the grotesque if one were to hold, as matter of construction, that the parties to this lease intended to stipulate that the landlord should have exclusive right to use all the roads, and the tenant should have none at all. That this is not the proper construction of the language used appears to me to be confirmed by reference to another clause in the lease, by which the tenant is taken bound to keep the ground from the mills up to the point A on the plan in good repair, and leave it in that state at the termination of his lease. This is, I think, plainly an instance in which parties contemplated that the tenant should use a road—for obligation to maintain must surely imply right to use—which is not expressly let to him, and which indeed bears on the plan a number not included amongst those which are so let. The pursuer also founded upon a clause in the lease which provides that, if the tenant should desire to have additional drains 'in the lands hereby let,' and the landlord should be satisfied as to the expediency of such drains, the latter was to supply the drain tiles, and the former to perform the carriages and execute the drainage works at his own cost. It appears in the evidence that during the lifetime of the late Mr George Bayley the pursuer executed a considerable drainage operation upon a part of the road now in dispute, his purpose being, as the witnesses depone, to dry the road. This was done with the knowledge and approval of Mr Bayley, who supplied the drain tiles, the pursuer bearing the cost of the carriage and the labour. I think that this episode goes some way to confirm the view that the pursuer had, according to the contemplation of the parties, right to use the road as part of the subjects of his tenancy. Upon a proper construction of the lease, therefore, it is, in my opinion, matter of plain implication that the pursuer had and has right to the reasonable use of this road, as of the others upon his farm. If this view is well founded, there is an end of the matter. I may, however, say a few words as to the evidence of possession by previous tenants. The proof does not throw much direct light upon this matter, because it appears that between 1856 and the pursuer's entry in 1892 the fields lying along the road in dispute were never let to one and the same tenant. It is to be observed, however, that prior to 1856 Alexander Brock was tenant of the whole farm; his lease says nothing about roads; but there is a good deal of evidence to the effect that he was in the habit of using the road in dispute, as and when it suited him to do so, in the working of the farm. After Alexander Brock there was short tenancies by Andrew Osler and George Brock; and from 1861 to 1892 Peter Roberts had the mill; but during the whole period from 1857 to 1892 the grass parks along the road in dispute were let to separate tenants. The roup rolls are contained in Nos. 25 and 26 of process. There is some evidence to the effect that Peter Roberts was at one time lessee of fields Nos. 33 and 18 of the plan, and that he used the road in dispute in connection with them. So far as it goes the evidence as to previous possession seems to support—or at all events is quite consistent with—the pursuer's understanding of his own rights under his lease. There is, I think, sufficient evidence to show that the pursuer after his entry, and down to a period subsequent to the advent of the defender, made use of the road in dispute for various purposes and in different manners. He depones that, before he took the lease, the late Mr Bayley expressly told him that he would have the use of the road for working the farm. I have some hesitation in accepting this statement implicitly; but apart from it altogether, I consider, for the reasons which I have stated, that the pursuer had and has a right to a reasonable use of the road, and that the defender is not entitled to deprive him of it. It is satisfactory to know that the defender is not by this decision losing any right which

he had in view in making his purchase, for he frankly states in his evidence that, before buying, the question of roads did not occur to him, and he had not considered what access the tenant had over the farm.

"In the view which I take of the case it is not necessary to decide whether or not the road between A and G on the plan is a 'way of necessity' in the legal sense of these words. My impression is in the negative. I think that the pursuer and his witnesses exaggerate the importance of the road as an adjunct of the farm. But it seems quite clear that, with a moderate amount of putting in order, it would at certain seasons and under certain conditions be of use and advantage to the farmer. The pursuer must, therefore, have an award of damages; but the amount must, in my judgment, be a modest one. The pursuer's own claim is, I think, a greatly exaggerated and, as regards one item of £20, an uncandid one. I consider that he will be sufficiently compensated by a sum of £30. It will be unnecessary to deal with any of the other conclusions of the summons, except that for expenses. . . ."

The defender reclaimed, and argued—The road in question, so far as in dispute, was not expressly included in the subjects let; it could therefore only be impliedly included if it was a way of necessity, *i.e.*, a way without which it would be impossible to use the farm. It was not such a way, because by means of the other two private roads and the public road, and the small portion of this road, J to G, it was possible to obtain access to every portion of the farm—Erskine, ii, 6, 9; *Duncan* v. *Scott*, February 22, 1876, 3 R. (H.L.) 69; *Galloway* v. *Cowden*, January 30, 1885, 12 R. 578, 22 S.L.R. 371; *Carmichael* v. *Penny*, June 26, 1874, 10 S.L.R. 634; *Cullens* v. *Cambusbarron Co-operative Society, Limited*, November 27, 1895, 23 R. 209, 33 S.L.R. 164; *Dodd* v. *Burchall*, 1862, 31 L.J., Ex. 364; *Union Lighterage Company* v. *London Graving Dock Company* (1902), 2 Ch. 557, at 573, Where a grantee of land was entitled to a way of necessity over another piece of land belonging to the grantor, and there were more ways than one to the land of the grantee, the grantee was entitled to one way only which the grantor might select — *Bolton* v. *Bolton*, 11 Ch. D 968. *Thomson* v. *Murdoch*, May 21, 1862, 24 D. 975 was referred to.

Counsel for the respondent was not called upon.

LORD JUSTICE-CLERK—We have had a long and able argument on behalf of the reclaimer in this case, but I have come to be clearly of opinion that he has not set before us any grounds on which we should interfere with the interlocutor of the Lord Ordinary. I have considered that interlocutor, and also the note in which the Lord Ordinary has set forth his views more than once. I think that that note so fully expresses the justice of the case, that I need add nothing to what the Lord Ordinary has said. I move your Lordships to affirm the judgment of the Lord Ordinary.

LORD STORMONTH DARLING — The pursuer here, as tenant of the farm and lands of Manuel Mill, claims right under his existing lease of the farm, granted by a former proprietor in 1892, to use a road passing through the farm by a defined line shown on a plan of the estate which is referred to in the lease. The farm is an ordinary agricultural and pasture farm, with the addition of a mill. The road is not a public one, but neither is it a private one in the sense of being one for the exclusive convenience of the proprietor. It is simply a farm road, passing through the lands let, with gates upon it, and nobody pretends that it is in very good order.

I quite admit that it is necessary for the pursuer, in order that he may succeed, to show that his right is a contractual one, either expressly or by plain implication. But this right does not depend on the clause in the lease defining the enclosures actually let for tillage or grazing purposes. These are defined by enumerating certain numbers on the estate plan, and of course for their proper purpose they are conclusive. But that does not prevent its being otherwise shown that there are certain adjuncts of the farm, such as accesses to and from the fields for ordinary agricultural purposes. Nor is it necessary, in my opinion, to show that these are "ways of necessity" in the sense of their being the only possible accesses to and from the fields. It is enough, as I think, that they are, in a reasonable and obvious sense, intended for the use of the farm through which they run, and that they have been actually so used. The Lord Ordinary has decided the case in favour of the pursuer, both on a consideration of the lease and of the oral evidence. I think he is clearly right, and I should be content simply to express my concurrence in his judgment and the reasons for it.

But lest I should seem to disregard the strenuous, if somewhat redundant, argument of Mr Cooper on behalf of the reclaimer, I should like to say that the case of *Duncan* v. *Smith* in 1876, 3 R (H. L.) 69, seems to me about as unlike the present case as can be imagined. That was a case in which a tenant claimed the right to use a road which formed no part of his farm, but was, simply and obviously, the private approach to his landlord's mansion-house. All that he had to found on was a "collateral licence," as Lord Cairns expressed it, granted by a former proprietor to a former tenant and referred to in a chance conversation between the tenant and the man who showed him the boundaries of the farm. It was no wonder that the House of Lords held that the old permission was in no sense of the nature of a contract "appurtenant to the possession of the farm."

LORD LOW— It is, no doubt, the case that the road in question is not expressly included in the subjects let to the pursuer, but that is equally true of any road upon the farm, including the road which forms the only access to the

mill and the farmhouse and steading. That arises from the fact that the lands let are described in a somewhat unusual way. In the lease the mill and houses are first described, and then the lands are in the first place described generally as "those lands now let to Peter Roberts and to Thomas Binnie, and those other lands in possession of the first party" (that is, the landlord), "and heretofore let by him as grass parks." That description was evidently, and I think with reason, regarded as being too vague, and accordingly the lease proceeds—"Which whole lands hereby let consist of the fields and enclosures marked numbers," and then the numbers are given "on the plan of the estate of Manuel made by James Young & Son, and dated 1852."

The numbers by which the various fields are marked upon the plan did not include the roads, which were also marked by distinctive numbers, and accordingly the defender is justified in saying that the roads are not among the subjects expressly let to the pursuer.

The roads, however, are mentioned in the lease. The pursuer is taken bound to keep the road leading from the public road to the mill and farmhouse in good repair, which implies that he had right to use that road. Further, the lessor reserved "the right to himself and others having his permission to use all roads through the lands." I think that that reservation plainly implies that some right to the roads through the lands had been conferred upon the tenant, otherwise there would have been no point in the proprietor reserving right to himself.

The defender, however, contended that there was only one implied right to the tenant to use such roads as were actually necessary for the possession and enjoyment of the subjects let. He admitted that the road to the mill and farmhouse was in that position, and also the portion of the road in question between the letters J and G on the plan; because without the use of that portion of the road the pursuer would have no access at all to the fields marked 16, 17, 34, and 39 on the plan. It will be observed that the portion of the road between J and G is the portion furthest away from the farm steading, and the natural and most direct way to which is along the other portion of the road. The defender, however, maintains that the pursuer is not entitled to use any part of the road except that between J and G, and that to reach that part he must take a long round by a public road by which he can enter the road at the point J.

That certainly appears to me to be *prima facie* an extravagant contention, but the defender tries to justify it on the ground that the part of the road between the steading and the portion J to G is so steep that it is impracticable for carts, whereas the public road by which the point J can be reached is comparatively level. Now, there is no doubt that some parts of the road in question (which runs uphill from the steading) are so steep as to be unsuited to heavy cartage. It is, however, proved that the first part of the road, which is not very steep, forms the best way, and has been used for the purpose of carting manure to the field No. 32 on the plan, and that the remainder of the road is quite suitable for such purposes as moving stock, or taking horses to lands which are being ploughed. Further, I see no reason why the road should not be used for leading corn crops home to the steading, it being downhill all the way.

This therefore seems to me to be a clear case of implied grant, because the road in question runs right through the farm, and is plainly of the nature of a service road, and it is also in my judgment required for convenient and comfortable enjoyment of the farm.

I therefore have no doubt that the judgment of the Lord Ordinary was right.

LORD ARDWALL—I agree. The documents founded on by both parties here consist of the lease, a plan, and a schedule relative thereto. There are several roads on this farm, all of them treated in the same way as the road specially in question in this action. They are excluded from the fields let by the lease, and they are scheduled under the head of "roads" in the schedule relative to the plan which was shown to the pursuer when he took the farm. The defender's argument amounts to this, that the pursuer is not entitled to the use of a single road upon the farm, and might be interdicted from using any one of them unless he is prepared to show that the road he proposes to use is what Mr Cooper calls a "road of necessity." This contention is in my opinion almost too ridiculous for serious consideration, but it has been so completely demolished by the Lord Ordinary in his opinion that I content myself with adopting that opinion so far as this point is concerned.

The reason of this particular road not being included in the portions of ground let to the pursuer may very possibly have been that the landlord desired to make it clear that the road was not in whole or in part to be ploughed up when the tenant came in the ordinary rotation of crops to plough up any of the fields through or alongside of which the road passes; or the whole roads may have been omitted from the lands let in the tenant's interest so as not to impose upon him the duty of keeping them up without a special stipulation; and a special stipulation was inserted in the lease binding the pursuer to maintain one of these roads.

My opinion as to roads on a farm is that if a tenant takes a farm through or alongside of which he sees roads laid down on the landlord's property, he is entitled to assume as an implied term of his contract of tenancy that he shall be entitled to use all existing roads unless it be specially stipulated that he shall not do so, and that was not done here, as the Lord Ordinary has very clearly shown in his examination of the terms of the lease.

The Court adhered.

Counsel for the Pursuer (Respondent)—M'Clure, K.C.—Mercer. Agents—Cunningham & Lawson, Solicitors.

Counsel for the Defender (Reclaimer)—The Lord Advocate (Shaw, K.C.)—Cooper, K.C.—Welsh.

Friday, December 20.

SECOND DIVISION.

[Sheriff Court at Stirling.

GREIG *v.* CHRISTIE.

Passive Title—Succession—Vitious Intromission.

J. C. was accustomed to conduct the sale of crops and cattle of a farm, and out of the proceeds to pay the rent, but in the view taken by the majority of the Court had no right to or interest in the stock, &c., of the farm, of which A. C., his nephew, was tenant. J. C. borrowed £57 from G., ostensibly to pay the rent of the farm. J. C. died and A. C. was appointed his executor *qua* next-of-kin, but did not take out confirmation. He unlocked his uncle's cash-box, took out of it a cheque, and took it to the drawer and got him to exchange it for one in his own favour. G. raised an action against A. C., maintaining that he had vitiously intromitted with the cheque, and had thereby incurred liability up to its amount.

The Court (Lord Stormonth Darling *dissenting*) finding that the cheque represented the price of the cattle in which J. C. had no right or interest, *held* that the *onus* was accordingly on the pursuer to prove that there was any balance due to J. C. by the farm, against which he would have been entitled to retain the proceeds of the cheque, and that he had failed to discharge that *onus*, and *assoilzied* the defender.

David Greig, retired farmer, raised an action in the Sheriff Court at Stirling against Alexander Christie, farmer, Bankend, near Stirling, as executor-dative of the deceased James Christie, farmer, Bankend, or otherwise as vitious intromitter with the goods, gear, and effects of the deceased. The pursuer sought to recover £57, which in sums of £20, £12, and £25 he had lent to James Christie, his brother-in-law, ostensibly, as the receipts (which are quoted in the opinion of Lord Stormonth Darling) bore, to enable him to pay rents and taxes.

The defender pleaded, *inter alia*—"(4) The defender not having intromitted with any property whatever which belonged to the late James Christie, he ought to be assoilzied with expenses. (5) In the event of its being found that any funds or property with which the defender has intromitted truly belonged to the deceased James Christie, said intromissions being *bona fide*, and in the belief that said funds and property did not belong to said deceased, defender should only be found liable to the extent of his actual intromissions."

The defender was the nephew of the deceased James Christie, and was appointed executor-dative jointly with seven sisters, but he and they had not taken out confirmation. The defender after his uncle's death opened his cash box and took out of it £10 and a cheque drawn in his uncle's favour for the sum of £46, 5s. 7d. The £10 was expended on funeral expenses. The cheque he took to the drawers, Messrs Speedie Brothers, and got them to exchange it for another cheque in his own name. The cheque represented the price of certain shorthorn bulls, and in the view taken by the majority of the Court James Christie had no right or interest in them, or in the farm of Bankend, or in the stocking thereof. He had at one time been joint-tenant with his brother, the defender's father, but had left to take a larger farm for himself, and it was upon his failure in this larger farm he had returned to live at Bankend.

The evidence in the case is reviewed in their Lordships' opinions (*infra*).

On 9th October 1906 the Sheriff-Substitute (MITCHELL), after a proof, assoilzied the defender.

The pursuer appealed to the Sheriff (LEES), who on 3rd December 1906 pronounced this interlocutor—"Finds that the pursuer is a creditor of his brother-in-law, the late James Christie: Finds that the pursuer has failed to prove that the defender has confirmed as executor of the said James Christie or has vitiously intromitted with his effects: Finds in these circumstances as matter of law that the defender is not liable in payment to the pursuer under the conclusions of the action: Therefore refuses the appeal: Of new assoilzies the defender from the conclusions of the action, and decerns," &c.

Note.—. . . "After James's death the pursuer locked and took away the key of his cash-box containing a gold watch, ten or fourteen pounds in notes, and a cheque by Speedie Brothers, the cattle auctioneers, in James's favour for £46, 5s. 7d. I do not think it is proved that the cash exceeded £10. Later on the defender opened the box and took out the £10 to go towards James's funeral expenses, and he took the cheque to Speedie Brothers, and got one in his own name in place of it. Were or were not these acts vitious intromissions with James's estate? The funeral expenses were a preferable debt, and perhaps in the circumstances not much need be said about them. . . ." [*The Sheriff then dealt with the exchanging of the cheque, and held that in the circumstances, the cheque representing stock belonging to the farm, there was no vitious intromission.*]

The pursuer appealed, and argued—(1) The evidence showed that James left estate consisting of half the farm stock. After his return to Bankend his name appeared in the factor's book as joint-tenant with his brother, and after the latter's death