Monday, March 10.

(Before Lords Herschell, Watson, and Macnaghten.)

SIR A. D. STEWART *v.* KENNEDY AND ANOTHER.

(*Ante*, p. 386; vol. xxvi., p. 625; and 16 R. 857.)

Contract—Sale of Entailed Estate—Essentials of Sale—Reduction—Alleged Misunderstanding by Vendor—Trial—Issues—Essential Error—Misrepresentation.

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 13th section of the Entail Act 1882.

The seller, proceeding on the construction that the sale was absolute, raised an action for the reduction of the contract on these grounds, (1) that the offer was obtained by fraud and circumvention; (2) that he was under 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 money, and would not be bound to sell at the price proposed if the Court should hold it to be inadequate; (3) error induced by the purchaser's agent; (4) false and fraudulent representations by the said agent. The Lord Ordinary appointed the issue of facility and circumvention to be the issue for the trial of the cause. On a reclaiming-note the First Division adhered, and so far the parties acquiesced. Their Lordships refused an issue of essential error, on the ground that the error alleged was not *in essentialibus*, but concerned only the import and effect of the contract, Lord Shand *dissenting*, on the ground that the pursuer was entitled to both issues.

The pursuer appealed to the House of Lords, and asked an additional issue—the second or else the third, and if neither was granted, then the fourth.

Held (*aff.* the judgment of the Court of Session) that the alleged error of the pursuer was by itself insufficient to invalidate his consent; and (*rev.* the judgment of the Court of Session) that in view of the pursuer's averments an issue of essential error induced by the purchaser's agent must be allowed.

This case is reported *ante*, p. 386; vol. xxvi., p. 625; and 16 R. 857.

The pursuer appealed.

At delivering judgment—

LORD HERSCHELL—My Lords, by this action the appellant Sir Archibald Douglas Stewart, who is heir of entail in possession of the estate of Murtly, seeks to reduce an alleged contract for the sale of this and other estates to the respondent Mr Kennedy.

The record having been closed, the Lord Ordinary proceeded to adjust the issues to be tried. The pursuer, who is the appellant at your Lordships' bar, proposed five issues for trial. Of these the Lord Ordinary only approved of the first, viz.—"Whether on or about the 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 and circumvention impetrate and obtain from the pursuer the letter dated 19th September 1888, to his lesion?" The Inner House affirmed the interlocutor of the Lord Ordinary, concurring with him in the rejection of the other issues.

The second issue proposed was in these terms—"Whether in granting the said letter the pursuer was under essential error as to its import and effect?"

The first question which your Lordships have to consider is, whether this issue ought to be allowed? The appellant avers that he understood and intended the contract to impose on him the obligation to sell only in case the Court approved of the terms, and upon application made under the Entailed Estates Act of 1882 ordered a sale at the price and upon the conditions specified in the letter of the 19th September 1888. Your Lordships have held that this is not the true construction of the contract between the parties, and that it imposed an absolute obligation to sell on the terms contained in the letter, and to take the requisite steps under the provisions of the Entailed Estates Acts to carry out the contract. Under these circumstances the appellant insists that there was essential error entitling him to have the contract reduced.

The majority of the learned Judges in the Court of Session have held, as I understand their judgments, that even if the appellant did understand and intend the contract to be that which he alleges, the error was not in the essentials of the contract. The Lord President said—"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 missives, and the price is twenty-five years' purchase of the existing 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." Again, Lord Adam says—"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." And later on, after stating the nature of the error insisted on, he says—"That is the error 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."

My Lords, on the best consideration I have been able to give to the matter I am not prepared to dispose of the case upon these grounds. It appears to me that the error, if it existed, was one which affected the substance of the contract. To agree to sell, in any event, at a price fixed appears to me to be one thing; to agree to sell at that price only in case the Court, upon a consideration of all the circumstances should come to the conclusion that the estate ought to be sold at that price appears to me to be quite another thing. I think it is a fallacy to say that the difference affected only the application of the purchase money, whether it was to be settled in the same way as the entailed estate or divided between the liferenter and the next heir. It went really deeper than this. It affected both parties to the contract, for it concerned them both whether the sale was an absolute one or to take effect only if the Court were so well satisfied that the price and other conditions were proper as to order a sale on those terms. And I cannot say that the alleged error was one which did not touch the price, inasmuch as it involved the question whether there was to be a sale at that price absolutely or only if the Court approved of it.

But assuming that the suggested difficulty does not stand in the appellant's way, and that the error averred is in the essentials of the contract, the question remains whether he is entitled to have the contract reduced merely because he understood and intended it to be other than it really was, and without that misunderstanding having been induced by the conduct of the other party. The contention of the appellant is certainly a sufficiently startling one. He made the respondent an offer, which all the Courts, includiug the tribunal of ultimate appeal, have held to bear a certain construction. This offer the respondent accepted. And now it is sought to reduce the contract simply on the ground that the appellant did not intend to make the offer which the Courts have held that he did make. Such a contention is far-reaching in its consequences. It would apply in every case where the parties differed in their construction of an essential part of the contract. After litigating the matter through all the Courts without success it would always be open to the defeated litigant to reduce the contract provided he could show that he understood the contract to bear the interpretation for which he had contended.

My Lords, unless it can be distinctly shown that this has been held to be the law of Scotland, I am not prepared to yield to the argument urged on behalf of the appellant. The consequences of so doing would, I think, be mischievous. As the Lord President said in the present case—"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 a contract would at once have the remedy of reducing the contract which he had deliberately made, and afterwards persistently misconstrued."

No authority was cited in which such a claim has been given effect to. Much reliance was placed upon the passage in Bell's Commentaries, where it is said that "Error in substantials, whether in fact or in law, invalidates consent where reliance is placed on the thing mistaken." It was urged that this proposition was stated broadly without limitation. But this is a mere general statement of the law of essential error, and cannot, I think, have the extensive application given to it which the appellant desires. The fact that innumerable contracts have been made, and that countless controversies have arisen as to their construction in essential particulars, and that yet no case can be pointed to in which the Courts have given relief upon the ground now under consideration, satisfies my mind that it cannot be the law of Scotland. The authorities cited, when carefully examined, tell, in my opinion, against the appellant. They show, I think, that in the case of bilateral obligations it was always considered essential that the error which was sought to be taken advantage of by one party to reduce the contract should have been induced by the other party to it. It is true that in some instances an issue has been allowed in the same terms as that now under discussion. But the case set up by the pleadings, and intended to be tried under them, was that there had been essential error induced by the misrepresentation of the other party to the contract.

The only other point which has to be dealt with is, whether there are relevant averments in the seventh and eighth condescendences entitling the appellant to a trial of the third of his proposed issues, viz.—"Whether in granting the said letter the pursuer was under essential error as to its import and effect induced by the said Peter Glendinning." I have entertained upon this point considerable doubt, but I have arrived ultimately at the conclusion that the issue ought to be allowed. I must not be understood as indicating an opinion that the proper inference from the facts stated is that the error into which the pursuer alleges that he fell was induced by Glendinning. Upon that I express no opinion one way or the other. All that I intend to determine is that the pursuer is entitled to have the question submitted for trial by the jury.

I therefore move your Lordships that the interlocutors of the 28th of May and the 25th of June 1889 be reversed in so far as they disallow the third issue proposed by the pursuer, and the said interlocutor of the 25th of June in so far as it finds the defenders entitled to expenses, and that the cause be remitted, with directions to

allow the said issue, and to find neither party entitled to expenses of adjustment in the Inner House. The appellant having failed in the most substantial point submitted to the House, I think there ought to be no costs of the appeal to your Lordships' House.

LORD WATSON—My Lords, this is an action brought for the purpose of reducing and setting aside a contract of sale of the entailed estate of Murtly contained in missives of offer and acceptance by the appellant and respondent. In a separate action at the instance of the respondent (the purchaser) for implement of the contract your Lordships recently affirmed a judgment of the Court of Session, construing adversely to the appellant a stipulation in his letter of offer to the effect that in the event of its acceptance the sale was made "subject to the ratification of the Court."

The reduction proceeds on the footing of the construction which your Lordships adopted, and four grounds of rescission are stated by the appellant—(1) That the offer was impetrated from him by fraud and circumvention; (2) that he was under essential error as to the import and effect of the stipulation I have referred to; (3) that such error was induced by Peter Glendinning, who transacted with him on behalf of the respondent; and (4) that it was induced by false and fraudulent representations made by that individual.

The learned Judges of the First Division unanimously allowed the appellant an issue of fraud and circumvention in usual form, and so far the parties acquiesce in their decision. The appellant pressed for a second issue of essential error, failing which, for an issue of error induced by misrepresentation, and failing that, for an issue of error induced by fraudulent misrepresentations. The majority of the Court refused to grant an issue upon any of these grounds. Lord Shand dissented, being of opinion that the appellant was entitled to a simple issue of "essential error."

I find myself in the position of being unable to accept without considerable reserve the views of the majority of the Court, if I understand them aright, whilst I am constrained to differ from the opinions expressed by Lord Shand with respect to the issue of essential error which his Lordship was prepared to allow.

I concur with all their Lordships as to the accuracy of the general doctrine laid down by Mr Bell (Bell's Prin. sec. 11) to the effect that error in substantials such as will invalidate consent given to a contract or obligation must be in relation to either (1) its subject-matter, (2) the persons undertaking or to whom it is undertaken, (3) the price or consideration, (4) the quality of the thing engaged for, if expressly or tacitly essential, or (5) the nature of the contract or engagement supposed to be entered into. I believe that these five categories will be found to embrace all the forms of essential error which, either *per se* or when induced by the other party to the contract, give the person labouring under such error a right to rescind it. In the present case no error is alleged except in reference to the nature of the contract of sale constituted by the missives in question, and it is not averred that the same error was entertained by the respondent or his representative Mr Glendinning.

Mr Bell does not in his useful treatise deal with the important question, how far in the case of contracts and onerous unilateral obligations an erroneous belief, entertained by one party only will give him a right to rescind. Without venturing to affirm that there can be no exceptions to the rule, I think it may be safely said that in the case of onerous contracts reduced to writing the erroneous belief of one of the contracting parties in regard to the nature of the obligations which he has undertaken will not be sufficient to give him the right unless such belief has been induced by the representations, fraudulent or not, of the other party to the contract.

The Lord President (Inglis) in his judgment, after referring to various kinds of error which are not alleged by the appellant, goes on to say—"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." If his Lordship merely intended to affirm that the error alleged by the appellant was not of itself a good legal ground for setting aside the contract of sale I should not disagree with him. But the terms of judgment are calculated to suggest that such error as is alleged can in no case constitute error *in substantialibus*, and that the proposition which I have quoted was sufficient ground for disallowing all the issues proposed by the appellant. Lords Mure and Adam appear to have been of the same opinion. At anyrate I cannot find in the judgments delivered by the majority any expression of opinion with reference to the legal effect of the alleged error when coupled with the appellant's allegations to the effect that it was induced by misrepresentation.

Lord Shand held, I think rightly, that the error averred by the appellant is "error in substantials" within the meaning of that phrase as used by Bell. I cannot read the words "nature of the contract itself" in the limited sense which the Lord President appears to have attached to them. The nature of the contract involves in my opinion far wider considerations than that of the legal category to which the contract is assigned by lawyers. One contract of sale may differ as essentially from another (apart from all considerations of subject, persons, price, or quality of subject) as a contract of sale does from a contract of pledge or lease. And I venture to think that an absolute contract to execute a conveyance of an entailed estate, and then to obtain its approval by the Court, is in its very nature different from a conditional

contract to sell the same estate for a fixed price if in an application for an order of sale under the Act of 1882 the Court shall sanction a private sale at that price, and the next heir of entail does not exercise his power of forbidding the bargain.

But Lord Shand goes a great deal further than holding that the appellant's error with reference to the nature of the contract of sale was an error in substantials. He expresses the opinion that the mere existence of such an erroneous belief in the mind of the appellant affords a sufficient ground for annulling the contract. So far as I can judge, his opinion rests upon the inference or assumption that in such a case there cannot be *duorum in idem placitum consensus atque conventio*, which is necessary to the constitution of a mutual contract. To give any countenance to that doctrine would in my opinion be to destroy the security of written engagements. In this case I do not think it has any foundation in fact. By delivering his missive offer to Mr Glendinning the appellant represented to the respondent that he was willing to be bound by all its conditions and stipulations, construed according to their legal meaning, whatever that might be. He contracted, as every person does who becomes a party to a written contract, to be bound, in case of dispute, by the interpretation which a court of law may put upon the language of the instrument. The result of admitting any other principle would be that no contract in writing could be obligatory if the parties honestly attached in their own minds different meanings to any material stipulation. As soon as one of them obtained the final judgment of a competent court in favour of his construction the other would be at liberty to annul the contract. It is a significant fact that although courts are constantly resorted to for their decision on the conflicting views of parties as to the meaning of their written contracts, and not unfrequently interpret them in a sense contemplated by neither of the litigants, not a single case has been cited in which it has been attempted to void a contract on that ground.

I am of opinion that the alleged error of the appellant is by itself insufficient to invalidate his consent, but that it will be sufficient for that purpose if it can be shown to have been induced by the representations of the respondent, or of anyone for whose conduct he is responsible. Whether the appellant is entitled to an issue raising the matter of representation chiefly depends upon the relevancy of his averments in the seventh article of his condescendence. Had his averment as to the particular representation made by Mr Glendinning stood alone I should have hesitated to hold that it was sufficient. But having regard to the other allegations made on record with respect to the actings of Mr Glendinning, and to the knowledge imputed to him of the petition which the appellant had presented to the Court, I have come to the conclusion that an issue of essential error induced by Mr Glendinning ought to be allowed. If the surrounding circumstances are established, the question will arise whether the representation imported that the effect of the offer when accepted would be to give the appellant a little hold on the respondent, whilst it did not absolutely bind the appellant himself. These are matters well fitted for the consideration of a jury, and I purposely abstain from further observation upon them.

I concur in the judgment which has been moved by my noble and learned friend on the woolsack.

LORD MACNAGHTEN—My Lords, I entirely agree in the conclusion at which my noble and learned friends have arrived, and in the reasons assigned for that conclusion.

This judgment was pronounced — That the interlocutors of the 28th of May and the 25th of June 1889 be reversed in so far as they disallow the third issue proposed by the pursuer, and the said interlocutor of the 25th June in so far as it finds the defender entitled to expenses, and that the cause be remitted, with directions to allow the said issue, and to find neither party entitled to expenses of adjustment in the Inner House.

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COURT OF SESSION.

Tuesday, March 11.

SECOND DIVISION.

(WHOLE COURT.)

SIMSON'S TRUSTEES.

Succession—Antenuptial Contract of Marriage—Acquirenda — Legacy Excluding Marriage-Contract Trustees — Nominal Trust—Fee.

A lady by her antenuptial contract of marriage bound and obliged herself to hand over all *acquirenda* during the subsistence of the marriage to her marriage-contract trustees. An aunt, in full knowledge of the terms of the said antenuptial contract of marriage, directed her testamentary trustees to pay to her niece a share of her estate, declaring that notwithstanding the provisions of said contract the trustees under the same were not to be entitled to claim said share, but that it was to be her niece's absolute property, free from the control of the said trustees, and further declaring that in the event of its being necessary to give effect to her wishes and intentions, her testa-