

as in this case, the contract itself contemplates variations upon the specification, then such variations when ordered by the architect, if they fairly fall within the scope of the contract, are just as binding upon the principal as if they had been ordered by himself.

Then again I must say that it is perfectly hopeless to contend that when an estimate proceeds upon a schedule of prices the sum named in the estimate can ever be conclusive as between the parties. The purpose of stating prices in the schedule and providing for measurement is that when these prices are applied to the measurement the arithmetical result obtained is the measure of the sum due, although it may be to some extent in excess of the sum that was estimated. The estimated sum is only, as its name imports, the best opinion of the architect or tradesman given at the time as to what the work is likely to cost when the scheduled prices are applied to the measurement. Now it is sometimes prescribed in a building contract that the payments shall be made upon the architect's certificate. If there had been such a clause in this case I think, in agreement with your Lordship, that it would not have been possible to dispute the architect's certificate upon any of the trivial grounds which are set forth in this record. But then that has not been done, and although it may have been right from a mercantile and business point of view that the architect should give a certificate, and while one might even say that a reasonable man would probably have paid upon the certificate, yet it is not legally binding, and I think it is the right of the defender to call upon the architect to prove in the witness box what he would have put into the certificate. I am far from saying that I should hold this to be in every case conclusive. That depends upon circumstances. There might be works certified by the architect which in the judgment of any impartial person were altogether outside the scope of the contract and which the architect had no authority to order. But such cases can be dealt with as they arise. In the present case I agree with the conclusion to which your Lordship has come.

LORD KINNEAR—I am of the same opinion.

LORD PEARSON was absent.

The Court pronounced this interlocutor—

“Recal the interlocutors of the Sheriff-Substitute and of the Sheriff, dated 7th November 1906 and 9th March 1907 respectively: Of new repel the first, second, and third pleas-in-law for the defender: Allow the parties a proof, but restricted to their respective averments as follows, viz., the pursuer's averment that the additions and alterations mentioned in cond. 2 were all ordered and authorised by the defender's architect as such and as acting for the defender, and the defender's

denial of said averment: Remit to the Sheriff-Substitute to take said proof,” &c.

Counsel for Pursuer (Respondent)—Hunter, K.C.—Mair. Agents—Macpherson & Mackay, S.S.C.

Counsel for Defender (Appellant)—J. B. Young. Agent—D. C. Oliver, Solicitor.

Thursday, December 19.

FIRST DIVISION.

[Sheriff Court at Stirling.]

MORRISSON v. ROBERTSON.

Contract—Sale—Essential Error—Fraud—Corporeal Moveable Handed, under Ostensible Sale, to a Party who has Purported to be Another—Recovery of Corporeal Moveable from Innocent Third Party Purchasing for Value.

A, a dairyman, who had on former occasions sold cows to a person he knew to be of credit, was approached, at a market where he had withdrawn two cows from the sale-ring, by B, who was unknown to him, but who led him to believe he was the son of, and acting for, the purchaser of former occasions. A arranged the price and delivered the two cows to B upon credit. Some days later B sold to C for value. A brought an action against C to recover the cows or their value. *Held* that A could recover from C, inasmuch as there had been no contract of sale between A and B, and B was unable to give a title.

Higgins v. Burton and Another, 1857, 26 L.J., Ex. 342, followed; *Cundy v. Lindsay*, 1878, 3 App. Cas. 459, applied.

Robert Morrison, dairyman, Pathhead, raised an action in the Sheriff Court at Stirling against Peter Robertson, Cambusbarron, Stirling, *inter alia*, for delivery of two cows as therein described, “which were sold by Alexander Telford (*alias* Wilson) to the defender” on or about February 2, 1906.

The pursuer averred that two of his cows passed on 31st January 1906, ostensibly by way of sale, into the hands of a man Telford, on the latter's representation that he was Wilson jr., son of a certain dairyman known to the pursuer; and on 2nd February, by sale, from Telford's hands into defender's.

The pursuer, *inter alia*, pleaded—“The cows in question having been obtained by the said Alexander Telford from the pursuer either by theft or under essential error, or both, he is entitled to delivery thereof as craved.”

The defender, *inter alia*, pleaded—“(1) The averments of the pursuer are insufficient to support the conclusions of his action. (2) The two cows in question having been obtained by the man Wilson or Telford by a voidable title, and his title not having

been voided at the time of the sale, and the defender having bought the cows in good faith and without notice of the seller's defective title, the pursuer has no claim for delivery thereof. (6) The pursuer having by his own negligence brought about the loss to himself, is barred from insisting in the present action."

On November 16, 1906, the Sheriff-Substitute (MITCHELL) repelled the defender's first plea-in-law so far as it bore upon the pursuer's case of essential error, and before further answer allowed a proof.

Note.—". . . It seems clear that error with regard to the identity of a supposed purchaser is error in substantial, prevents consent, and negatives a supposed contract (Bell's Prin., s. 11; 1 Com., 313; *Stewart v. Kennedy*, 17 R. (H.L.) 25); and the precise question here appears to be whether fraud inducing such error makes it cease to be such error and to have such effects. Recent cases in Scotland are, apparently, wanting; and no very distinct authority from the constitutional writers was referred to. Professor G. J. Bell, who was quoted on both sides, distinguishes essential error and fraud, and he does not consistently make it clear that the presence of fraud takes such error out of the category of essential error, with the results of such error as to third parties. In England there appears to be a succession of cases where essential error made void a supposed sale, induced by fraudulent misrepresentations, to the effect of declaring that there was no sale, and of giving recovery to the original seller out of the hands of an innocent purchaser (Benjamin on Sales, fifth ed., p. 462, also p. 459), and I do not see that there is a difference in principle in this point, which makes these cases inapplicable. Most of these cases are founded on in a note in Lord McLaren's edition of Bell's Commentaries (vol. i. p. 261); *Kingsford v. Murray*, 26 L.J. Ex. 83; *Higgons v. Burton*, 26 L.J. Ex. 342; *Hardman v. Booth*, 32 L.J. Ex. 105; see also *Cundy v. Lindsay*, 3 App. Cas. 459; and the doctrine of that note sets forth the view that in the absence of *consensus in idem placitum*, produced by fraud, there is essential error, with no contract, no transfer, and no title to re-transfer, and, specifically, there is no such title in the person of a fraudulent buyer who has induced the belief in a seller, as the inductive cause for sale, that he is selling to some one else. . . ."

On January 8, 1907, the Sheriff-Substitute, after the proof, pronounced this interlocutor:—"Finds in fact (1) that pursuer on or about 31st January 1906, in or near Messrs Oliver & Sons' auction mart, Cattle-market, Edinburgh, upon a representation made by a person who afterwards turned out to be a certain Alexander Telford, of no fixed residence, that he was the son of a Mr Wilson, Westrigg, Bonnyrigg, and was acting for him and with his authority in the matter, ostensibly entered into a contract with the said Alexander Telford whereby pursuer purported to sell a brown and white Ayrshire milch cow and a brown and white cross milch cow to the said

Alexander Telford as such son, and as acting for and with the authority of said supposed Mr Wilson; (2) that pursuer understood the said supposed Mr Wilson, Westrigg, Bonnyrigg, to be a certain James Wilson, dairyman, Bonnyrigg, whom he knew and whom he considered of good credit; (3) that there was and is no Westrigg in or close to Bonnyrigg, and that said representation by the said Alexander Telford was a false representation; (4) that pursuer was in error with regard to the person to whom he supposed he was selling the said cows, and was induced to sell them as aforesaid by the said false representation on the part of the said Alexander Telford, and that he would not have done so but for said representation; (5) that pursuer's foresaid understanding, though erroneous, was natural and reasonable, and that his subsequent actings were also natural and reasonable in the circumstances; (6) that the said Alexander Telford got possession of the cows, and has not to any extent paid or given value for them to pursuer; (7) that the said Alexander Telford on or about the 2nd February 1906, in Messrs Speedie Brothers' auction mart in Stirling, sold, that is, purported to sell, by private sale the said cows to the defender, at the price of £24 for the two, and that defender obtained possession; (8) that said price of £24 was a fair price, and the defender was in *bona fide* in said purchase: Finds in law (1) that in said supposed sale pursuer was in essential error, induced by false representation on the part of said Alexander Telford, and that there was no sale of said cows, or either of them, by pursuer to said Alexander Telford; (2) that the said Alexander Telford had no title to sell, and did not effectually sell, said cows, or either of them, to defender; (3) that pursuer is not barred by his actings from seeking to recover said cows from defender: Therefore ordains the defender to deliver the said cows to the pursuer within eight days. . . ."

Note.—". . . Essential error is a doctrine of Scots Law, applicable I think to the facts of this case, and for similar facts the English decisions seem to arrive at the same conclusion on the ground of no contract of sale, the cases cited coming apparently under the corresponding rule or principle of mutual assent—Benjamin on Sales, 5th ed., pp. 92, 93, and 98. The recent Scots cases *Bryce v. Ehrmann*, 7 F. 5, referred to and distinguished in *Weiner v. Gill*, and *v. Smith*, 1906, L.R., K.B. Div. 575, does not seem to go at all on different lines from those above referred to. I find then that pursuer has proved this part of the case which I found relevant on 16th November.

"It was argued on the proof for defender that there could be no case of essential error here with regard to identity of the purchaser, as there was a person actually present to whom the cows were actually delivered; and it was even urged that it did not matter to the pursuer to whom he sold. But identity and credit are inseparable in reality, and are in effect so treated

in the cases cited; and it is admitted that Alexander Telford had no credit or means. The postponement of payment arranged for and the method of it seems to me specially to connect the identity and the credit of this purchaser. Opinions in one or two of the English cases raise other subtleties, which, however, I think do not affect the application of the decisions to the present case.

“Defender’s other argument is that pursuer is barred through his negligence in the matter. But assuming that defender was not negligent himself, I think, on a fair estimate of the circumstances of a sale of cattle, the pursuer was not wanting in ordinary prudence in believing and acting on Telford’s story. . . .”

On March 8, 1907, the Sheriff (LEES) pronounced this interlocutor—“*Finds in fact* (1) that the pursuer on 31st January 1906 sold on credit two cows to a man named Alexander Telford; (2) that Telford stated to the pursuer that he was the son of a Mr Wilson, Westrigg, Bonnyrigg; (3) that there is no Westrigg near Bonnyrigg; (4) that the pursuer causelessly assumed that the Mr Wilson mentioned was a dairyman at Bonnyrigg with whom he occasionally had dealings; (5) that Telford did not say to the pursuer that he was the son of this dairyman, or give him any cause to assume that he was; and (6) that some days afterwards the defender in good faith, and for a full price, bought the said cows from Telford: *Finds* in these circumstances, *as matter of law*, that the pursuer has no claim against the defender for delivery of the said cows or for damages: Therefore assoilzies the defender from the conclusions of the action, and decerns. . . .”

Note.—“. . . . It is plain the pursuer has no case against the defender merely in respect of Telford’s fraud. The pursuer was willing to sell, and possession of the cows was got by Telford with his consent. . . .”

“But then it is said the pursuer was under essential error in selling to Telford. What was that error? Not as to Westrigg. The alleged error was in supposing that the Wilson mentioned by Telford was a dairyman with whom the pursuer occasionally dealt. But this error was not induced by Telford. It was the pursuer’s own hastiness that caused the error. . . .”

“I have looked at the cases mentioned by the learned Sheriff-Substitute, but I am not satisfied that they rule the point. Telford’s misrepresentation was not the cause of the sale. The pursuer was willing to sell, and if he had got his money he could not have claimed restoration of the cows on the ground that he would sell only to the dairyman. He was in the market to sell, and it was not the sale that was induced by his rash assumption but the willingness to give credit. . . .”

The pursuer appealed, and argued—There was no contract of sale with Telford. The pursuer had been induced to enter into an alleged contract of sale by the false representation of Telford that he was another person; therefore there was no contract,

and consequently Telford had no possessory title to the cows which he could transfer to the defender—*Cundy v. Lindsay*, 1878, 3 App. Cas. 459. Admittedly there was no question of agency, and there was a third *persona*—a separate entity in the sense of *King’s Norton Metal Company, Limited v. Edridge, Merrett, & Company, Limited*, 1897, 14 T.L.R. 98, A. L. Smith (L.J.) at p. 99—viz., “Wilson of Bonnyrigg,” to whom the pursuer was led to believe he was selling. He was not so selling, and therefore no sale had taken place—*Hardman and Others v. Booth*, 1863, 32 L.J. Ex. 105, Pollok (C.B.) at p. 107. The judgment of the Sheriff should be recalled and that of the Sheriff-Substitute affirmed.

Argued for the defender (respondent)—The Sheriff was right. There had been a sale to Telford by the pursuer, though such sale might be reducible on the ground of fraud, but until it was reduced the contract of sale stood and Telford could give a good title. Further, Telford had been put in possession in such fashion as to give him a title to re-transfer—Sale of Goods Act 1893 (56 and 57 Vict. cap. 71), sec. 25 (2),—and the pursuer having so delivered the cows to him was barred from attempting to recover from the defender. The English cases cited were all distinguishable. In *Hardman v. Booth*, *ut sup.*, the contract was and could only have been with the particular party who, however, had not authorised the purchase. In *Cundy v. Lindsay* there was nothing on which to base a contract with the defaulting party—all through the seller thought he was dealing with Blenkiron & Company. In *Higsons v. Burton*, 1857, 26 L.J. Ex. 342 (cited by the Court) the so-called sale was carried through with one who had been the known agent of the supposed purchasers. Here there was a sale to Telford, and though the goods might have been obtained on false pretences, the defender was a *bona fide* purchaser for value, without notice, and consequently had a good title. If, as was the fact, the contract had been made with Telford, it was of no consequence that he had misdescribed himself—*King’s Norton Metal Company, Limited v. Edridge, Merrett, & Company, Limited*, *ut sup.*

At advising—

LORD M’LAREN—In this action the pursuer Robert Morrison, who is a dairyman, sues for the delivery of two cows which he says are his property, but which, having been obtained from him by fraud, have actually passed into the possession of the defender by what is not disputed to be a *bona fide* purchase. The case which the pursuer makes on record is of this nature. He says that he had taken the cows to market for sale, but there were no offerors at his price, and then he says that shortly after the cows had been withdrawn from the sale ring, a man, who afterwards turned out to be Alexander Telford, of no fixed residence, came up to the pursuer and falsely represented that he wanted to purchase two cows on behalf of his father, Mr Wilson, Westrigg, Bonnyrigg. The pur

suer says that he had already sold cows to James Wilson, a dairyman at Bonnyrigg, although he was not very well acquainted with him. But he knew that he was a dairyman at Bonnyrigg, as when he purchased cows through the sale ring in the Edinburgh auction marts his name was always given as "Wilson, dairyman, Bonnyrigg"; and the pursuer believed that the Mr Wilson, Westrigg, Bonnyrigg, whom the said Alexander Telford falsely represented as his father, was the said James Wilson, who is a person of good credit. Then he says that he did not know Alexander Telford at all, but he was induced by the said false representations to believe, and did believe, that this Telford was the son of the said James Wilson, and that he had the authority of the said James Wilson to purchase cows on his behalf. These are the pursuer's averments. I do not think it necessary to go into the evidence, but it may suffice to say that the pursuer's averments are completely proved. He was induced by the fraudulent representations of Telford, which I have just read, to part with two of his cows upon credit. I think that these facts were not seriously disputed, and on the other hand it was not disputed that the defender had purchased the cows for value which he paid, without suspicion that they had been improperly obtained.

Now in these circumstances the question arises whether the pursuer can recover the cows as his property, or whether they have by their transmission to a purchaser for value been irrevocably taken out of the pursuer's possession. This appears to me to be just one of those questions which a lawyer who is willing to think for himself could have no difficulty in solving even if he had not precedents to guide him. If there had been a contract of sale, then although the pursuer might have had an action of damages against the person who obtained the goods by fraud, or might have had an action for reducing the sale, yet if in the meantime the property of the cows had passed by lawful sub-sale to a third person, then the right of that third person, the analogue of the defender in the present case, would be indefeasible. Having acquired the property by purchase from some one who had a lawful title, he would have had a good defence to an action of this nature. But then the case of the pursuer is that there was here no contract of sale. If Telford, the man who committed the fraud, had by false representations as to his own character and credit, obtained the cows from the pursuer on credit, then I think that would have been the case of a sale which, although liable to reduction, would stand good until reduced. But then that was not at all the nature of the case. The pursuer never sold his cows to Telford. He believed that he was selling the cows to a man Wilson at Bonnyrigg, whom he knew to be a person of reasonably good credit, and to whom he was content to give credit for the payment of the price. This belief that he was selling the cows to Wilson was induced by the fraudulent statement of Telford that he

was Wilson's son. It is perfectly plain that in such circumstances there was no contract between Telford and the pursuer, because Telford did not propose to buy the cows for himself, and because the pursuer would not have sold them on credit to a man of whom he had no knowledge. Neither was there any sale of the cows by the pursuer to Mr Wilson, Bonnyrigg. Wilson knew nothing about them and never authorised the purchase; the whole story was an invention. There being no sale either to Wilson or to Telford, and there being no other party concerned in the business in hand, it follows that there was no contract of sale at all, and there being no contract of sale the pursuer remained the undivested owner of his cows, although he had parted with their custody to Telford in consequence of these false representations.

So much being premised, then I think it follows that as Telford had no right to the cows he could not give a good title to the defender even under a contract for an onerous consideration. He had no better title to sell the cows to any third person than he would have had if he had gone into the pursuer's byre and stolen the cows. This seems to me to be perfectly clear upon a consideration of known principles, but it is satisfactory that in the judgment which we are to give according to the law of Scotland we are confirmed by a decision of the English Court of Exchequer, in circumstances which are in all respects parallel to those in the present case—I mean the case of *Higsons v. Burton*, 1857, 26 L.J. Ex. 342. There never were at any time, as I think, such differences in the law of sale in the two parts of Great Britain as would have affected the present question; but under the Sale of Goods Act these differences have been reduced to the vanishing point, and I can have no difficulty in holding that a decision given by an English Court in a case of this kind is an authority which is entitled to the greatest weight, and which if sound would be directly applicable to the same state of circumstances arising in Scotland. Therefore, both on principle and on authority, I think that the pursuer has established his case, and is entitled to a decree for the vindication of his property.

LORD KINNEAR—I agree with your Lordship. I think the principle upon which the case must be decided is so well established that it requires little explanation, but since we are differing from the learned Sheriff-Depute it may be well to refer shortly to the authorities, which appear to me to be conclusive. Probably the most apposite is the judgment of the House of Lords in *Cundy v. Lindsay*, 1878, L.R., 3 A.C. 459; and the first observation with which Lord Chancellor Cairns begins his opinion is certainly directly applicable, viz., that it is always a disagreeable duty "to determine as between two parties, both of whom are perfectly innocent, upon which of the two the consequences of a fraud practised upon both of them must fall," and that discharg-

ing that duty we can “do no more than apply rigorously the settled and well-known rules of law.” Then his Lordship proceeds to lay down rules which according to his judgment must determine the question whether a purchaser in good faith and for value has or has not acquired a title to property which he has purchased from a seller to whom the property did not belong. He states, in the first place, a distinction with reference to a purchase in market overt which has never been recognised by the law of Scotland, and which we may therefore dismiss. But the other rules which he lays down are all common to the law of both countries. His Lordship says—“By the law of our country the purchaser of a chattel,” or as we should say corporeal moveable, “takes the chattel as a general rule subject to what may turn out to be certain infirmities in the title. . . . If it turns out that the chattel has been found by the person who professed to sell it, the purchaser will not obtain a title good as against the real owner. If it turns out that the chattel has been stolen by the person who professed to sell it, the purchaser will not obtain a title. If it turns out that the chattel has come into the hands of the person who professed to sell it by a *de facto* contract—that is to say, a contract which has purported to pass the property to him from the owner of the property—there the purchaser will obtain a good title even although afterwards it should appear that there were circumstances connected with that contract which would enable the original owner of the goods to reduce it and to set it aside, because these circumstances so enabling the original owner of the goods or of the chattel to reduce the contract and to set it aside, will not be allowed to interfere with a title for valuable consideration obtained by some third party during the interval while the contract remained unreduced.” This last rule is one example of a general principle which has governed the decision of many cases of a different kind, of which *Oakes v. Turquand* (1867), L.R., 2 H.L. 325, in the liquidation of Overend & Gurney, is a familiar instance. The principle is that a contract obtained by fraud is not void but voidable; and since it follows that it is valid until it is rescinded, the rescission may come too late if in the meantime third persons have acquired rights in good faith and for value. But then, on the other hand, if such third persons have acquired their title through a person who himself did not acquire the goods by virtue of any contract with the true owner, or to whom they were not intentionally transferred by the true owner upon any title, then the purchaser can obtain no better title than the person from whom he acquired, who *ex hypothesi* had no title at all. The doctrine is established by a great mass of authority, and I agree with your Lordship in thinking that the case of *Higgins v. Burton*, and other cases which were referred to in the course of the argument, such as the case of *Hardman v. Booth*, 1863, 32 L.J., Ex. 105, decided in England, are very valuable authori-

ties which we may well follow. But the truth is we do not require to go beyond our own books for authority for a doctrine which is stated distinctly by our institutional writers, and which has been followed in the decisions of this Court from a very early date. It is stated with great precision by Lord Stair (Inst. iv, 40, 21), who takes exactly the distinction which Lord Cairns takes in *Cundy v. Lindsay*, between a title obtained by virtue of a contract which may be set aside as fraudulent and possession which is supported by no contract at all. Thus he says—“In moveables, purchasers are not quarrellable upon the fraud of their authors, if they did purchase for an onerous equivalent cause. The reason is because moveables must have a current course of traffic, and the buyer is not to consider how the seller purchased, unless it were by theft or violence, which the law accounts as *labes reales*, following the subject to all successors.” There is the distinction quite clearly put; and it is stated with equal precision by Mr Bell (Prin., sec. 527), who gives in his illustrations a series of decisions beginning so far back as 1629 with the case of the *Bishop of Caithness*, in which the doctrine has been applied by this Court.

Therefore I think that Mr Morton in his able argument put his case on exactly the right ground when he said that there was no contract between his client and Telford, the fraudulent person. He said that if Telford had obtained the cattle by fraudulent contract he should have had nothing to say, but that there was no contract at all with Telford; and upon the facts I agree with your Lordship that that is an exactly accurate statement. If a man obtains goods by pretending to be somebody else, or by pretending that he is an agent for somebody, who has in fact given him no authority, there is no contract between the owner of the goods and him—there is no consensus which can support a contract. The owner—in this case the pursuer—does not contract with the fraudulent person who obtains the goods, because he never meant to contract with him. He thinks he is contracting with an agent for a different person altogether. He does not contract with the person with whom he in fact supposes that he is making a contract, because that person knows nothing about it and never intended to make an agreement; therefore there is no agreement at all. I think the fallacy of the reasoning of the learned Sheriff-Depute becomes quite apparent when one considers that in order to make a contract of sale you must have a certain seller and a certain buyer. The learned Sheriff says that the pursuer was willing to sell and was in the market to sell; but then a general desire to sell to someone is not a contract to sell to any particular person, and it is as clear as evidence can make it that the pursuer never intended to sell to Telford. He knew nothing about him, he never thought of him, and never intended to deal with him. Therefore there was no consensus which could lead to any agreement. For these reasons I entirely agree with your Lordship

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 *Higgins* 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 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,