[19*th August* 1833.]

JOHN GRIEVE (Waddel's Trustee), Appellant.— No. 38.
Dr. Lushington—Robertson—Sandford.

THOMAS WILSON, Respondent.—*Campbell—Wilson.*

Obligation—Error.—Circumstances in which it was held (affirming the judgment of the Court below) that an obligation to pay a debt was not founded on such error as was sufficient to set it aside.

2D DIVISION.
Lord Cringletie.

IN 1807 Robert Waddel granted an heritable bond and disposition in security for 600*l.* to James Wilson over Liltycockee and Longridgemuir, in virtue of which Wilson was infeft; and having died, the right to it was acquired by the respondent. Waddel thereafter granted heritable bonds in favour of other creditors, which were followed by infeftment. And subsequently he executed a trust deed in the appellant's favour, for behoof of creditors, under which he was infeft. Wilson's bond contained a clause of sale in the usual terms, and in virtue thereof he took steps to bring the property to sale. The appellant attended the meeting fixed for the sale, and protested against it, and in consequence of the arrangement contained in the following letter it was adjourned:—"1st September "1820:—Sir, In consideration of your having ad- "journed the sale of Mr. Robert Waddel's lands of

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" Liltycockee and others contained in his bond to you " for 600*l.* sterling, and agreed to take the payment of " your said bond out of the price of Mr. Waddel's " lands when the same shall be sold by me, in virtue " of a trust deed executed by Mr. Waddel in my favour " for behoof of his creditors in general, I hereby bind " myself as trustee foresaid to pay to you the said sum " of 600*l.* out of the first of the price of any part of " Mr. Waddel's lands that shall obtain soonest a pur- " chaser; and till the recovery of such price I agree " and bind myself as trustee foresaid to pay you the " interest due to you at the regular terms according to " your bond. I shall likewise pay you at Martinmas " next the expenses you have hitherto incurred in " offering the said lands for sale, &c.; and farther, in " case you shall be desirous of receiving your money " before the lands can be sold, I promise to do what I " can to obtain it for you upon a transference of your " security. I am," &c.

The appellant having been urged by the respondent for a partial payment, wrote to the agent of the latter as fol- " lows:—You may please send me your client's bond " and infeftment, &c.; and if the agent to whom I shall " show it shall be satisfied with the title, and your client " be willing to bear the expense of an assignation, I can " now obtain you payment of the whole debt; or if any " unexpected obstacle arise to prevent this, I shall pay " from 150*l.* to 200*l.* to account upon receiving a " proper acknowledgment, with an obligation to assign " the security to that extent, if required, at your client's " expense; provided, on seeing your client's title, I " shall find myself in safety to do this."

The titles were transmitted to the appellant by the

respondent's agent, accompanied by the following letter:—"From a perusal of these writings you will "find Mr. Wilson's title to the bond complete, and "with the validity of which I presume you will be "satisfied. After examining the papers, I wish you to "write me what the neat expense of the proposed "assignation will be, and to say if you will cause "R. Waddel bear a part. I have no objections that "Mr. Wilson be at the expense of the assignation and "the stamps for the infeftment, but I do really think "it would be exceedingly hard to ask more."

The appellant wrote in answer to the respondent's agent:—"Having put into the hands of the agent for "the gentlemen from whom I proposed to obtain "money, upon an assignation to the security held "by your client Mr. Wilson over the lands of "Liltycockee and Longridgemuir, the title deeds of "that security, he observes that sasine given upon the "bond by Robert Waddel to James Wilson is informal. "The person mentioned in the instrument as bailie "having been absent when the infeftment was taken, an "attempt has been made to supply this defect by the "following words written at the bottom of the deed; "'Robert Waddel of Burnhead in my prasince, and "bailie in absince of H. Smith.' This marking is not "referred to in the doquet of the notary, nor is it "authenticated as the handwriting of Robert Waddel; "for which and other reasons the agent alluded to "considers the instrument to be irregular, and that in "fact there is nothing more than a personal security "to come in competition with the other creditors of the "granter of the bond. He therefore declines ad-"vancing the money, and for the same reason I must

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" also decline making any payment to account from my " own funds till the defect has been obviated."

The interest had hitherto been paid by the appellant; but after the defect was discovered the payment was qualified by a declaration, that it should not invalidate any legal objection to the respondent's titles.

The respondent then brought an action against the appellant for payment of the sum contained in the bond under deduction of the sum paid to account; and the appellant raised a counter action for reduction of the instrument of sasine, and the letter of obligation, and for repetition of the sum paid to account, on the ground that " the foresaid letter of obligation was granted by " the said John Grieve, trustee foresaid, upon the " understanding that the said Thomas Wilson held a " valid and preferable heritable security over the lands " before mentioned; that the said Thomas Wilson re- " presented to the said John Grieve and made him " believe that he held such valid preferable heritable " security; and it was only upon this understand- " ing that the said John Grieve agreed to come " under and did grant the foresaid letter of obligation. " That as the said Thomas Wilson did not at the " time hold a valid heritable security to the said sub- " jects, and as the writs bearing to constitute the said " heritable security are null and void, and as the said " letter of obligation was granted in consequence of " misrepresentation, and from a misunderstanding of " the true state of the fact, and as there is therefore " an error in substantialibus, the said letter of obligation " is null and void."

The Lord Ordinary reported the question both as to the validity of the sasine and the letter of obligation to

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the Court, accompanied by this note: "As it is admitted that Hume Smith, who is said to have "acted as bailie in the body of the instrument of "sasine, to which alone the notary's doquet applies, "was not so much as present, and the sasine is recorded in the register of sasines as a false instrument, no notice being taken in the register of the "addition at the foot of the pages of the sasine said to "have been made by Robert Waddel, the Lord Ordinary is clearly of opinion that the sasine is null and "void, and therefore, if the letter by the trustee "Mr. Grieve to Mr. Wilson, 1st September 1820, "and the proceedings following thereon had been out "of the way, the Lord Ordinary could have had no "hesitation in reducing the infeftment, and finding "that it conferred on Mr. Wilson no right of preference to payment in competition with Mr. Waddel's "other creditors; and, indeed, the Lord Ordinary has "no difficulty of being of that opinion in so far as any "right of preference is constituted by the infeftment. "His only doubt arises from that letter which was "granted by Mr. Grieve, as trustee for the creditors, "binding himself quâ trustee to pay Mr. Wilson in "full in consideration of his postponing the sale of the "lands in his bond and sasine, which he had then regularly brought into the market, and to allow the sale "of these parts of Mr. Waddel's estate to be included "in the sale of the rest. Mr. Grieve indeed says, that "when he gave this letter he had not seen Mr. Wilson's bond and sasine; but this was his own fault, "since they were lying on the table in the room, as the "warrant under which the lands were to be sold. On "the other hand it may be said that Mr. Wilson lost

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" nothing by desisting from the sale, since the pur-
" chaser would not have paid the price until he got a
" sufficient title, which Mr. Wilson could not have
" given him; or, at least, if the bond without the sasine
" could be held to constitute a sufficient mandate to sell,
" which the Lord Ordinary inclines to think it did, still
" Mr. Wilson would have had no preference over the
" other creditors of Mr. Waddel, and therefore, losing
" nothing by the delay of the sale, is not entitled to insist
" for payment in virtue of his letter. The case, being
" complex and uncommon, appears to the Lord Ordinary
" to be proper for being laid at once before the Court."

The Court sustained the reasons of reduction as to the sasine, but remitted the other point to the Lord Ordinary. Thereafter his Lordship on 28th November 1826, issued this note:—" The Lord Ordinary formerly
" made avizandum with this case to the Court, and
" ordered memorials to be prepared for their Lordships,
" on account of the difficulty arising out of the effect of
" Mr. Grieve's letter to Mr. Wilson, 1st September 1820,
" obliging himself quâ trustee unconditionally to pay to
" Mr. Wilson the full amount of his debt 'out of the
" 'first of the price of any part of Mr. Waddel's lands
" 'that shall obtain soonest a purchaser,' and the event
" of the sales having proved that there was not suffi-
" ciency of funds to pay his debt in full with those
" due to the other creditors. Mr. Wilson pleaded also
" on his heritable bond and infeftment entitling him to
" full payment; but on this right of preference the
" Lord Ordinary, having no doubt, expressed his decided
" opinion that the sasine was null, and bestowed no
" right of preference independently of the letter, and
" he hoped that the Court would have decided both

" points; but the Lord Ordinary has to regret that
" they have deferred to him the task of giving his single
" judgment on the point which he referred to their
" united wisdom. They (25th November 1825) con-
" firmed his opinion of the sasine; their Lordships,
" have found it void and null, they reduced it, and
" remitted the other points of the cause to him to be
" disposed of. In obedience then to this remit, he has
" attentively reconsidered the cases for both parties
" with the whole proceedings. He looks upon it as a
" point of law well understood, that where two con-
" tracting parties are in error about the essentials of a
" contract it must be void and null; and the Lord
" Ordinary felt all the difficulty arising out of the fact,
" that Mr. Wilson and Mr. Grieve both were satisfied
" that Mr. Wilson had an infeftment affording him a
" preference for payment of his full debt of 600*l.*;
" whereas it has been decided that the sasine is void and
" null, so that it may be thought that there was an error
" in both parties relative to the subject of the contract,
" which may render it void. But there are other con-
" siderations which must be kept in view: had parties
" entertained the idea that Mr. Waddel's estate and
" funds were insufficient for payment of his debts, then
" it might well be admitted that no other idea could
" have actuated Mr. Grieve, when he obliged himself
" to pay Mr. Wilson's debt in full, than that he had a
" right of preference to full payment. But this is not
" the truth; for Mr. Grieve's idea was, that Mr. Wad-
" del's estate was worth considerably more than his
" debts, as is proved by the protest taken against the
" sale when about to be made by Mr. Wilson. He there
" gives, as one of the reasons of his protest,—'Because

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" ' the trust estate conveyed to the said John Grieve as
" ' trustee aforesaid is greatly more than sufficient to pay
" ' all the debts of the said Robert Waddel.' Mr. Grieve's
" reason, therefore, for preventing the sale and obliging
" himself to pay Mr. Wilson's debt in full no way
" arose from the idea alone of the latter having a pre-
" ferable security for his money; because whether he
" had a preference or not was of no importance, seeing
" there was a fund sufficient to pay all Waddel's debts.
" Mr. Grieve's idea probably was, that if Mr. Wilson
" sold the lands and paid himself, the commission due
" to the trustee might pro tanto be diminished. But
" whatever were his motives, the Lord Ordinary cannot
" hold that there was an essential error in the subject
" matter of the contract. Mr. Wilson had a mandate
" to sell, which would have been good had there been
" no sasine. If the warrant had been broad enough
" he might have sold Mr. Waddel's whole estate, and
" had he raised a price sufficient to pay all the debts of
" that person, he might have handed it over to the
" trustee Mr. Grieve, and called on him to denude,
" which he must have done. It was to prevent a sale
" that Mr. Grieve, in the full belief that there were
" exuberant funds to pay all the debts, granted the
" letter which gives rise to this question, and conse-
" quently the Lord Ordinary cannot hold that the
" letter was granted on the sole ground that Mr. Grieve
" believed Mr. Wilson's heritable bond and infeftment
" to be entitled to a preference to the claims of his
" co-creditors. The Lord Ordinary feels the force of
" the question put by Mr. Wilson, and which no man
" can now answer: viz. ' who can tell whether, if I had
" ' been permitted then to sell, the land would not have

" ' yielded the expected price ?' There can be no answer " to this, except from presumption; which is, that the " expected price would have been obtained, since the " trustee thought that Mr. Waddel's estate would after " paying his debts leave a reversion; and the conclu- " sion from that is, that Mr. Wilson would have got " full payment. To all this it is no answer that the " lands sold afterwards at the distance of years for less. " Time and circumstances operate changes, of which " Mr. Grieve must be held to have taken his chance. " Neither is the Lord Ordinary moved with the idea " that the obligation was granted by Mr. Grieve " quâ trustee. If it was an obligation that he was " entitled to give quâ trustee, it will bind his con- " stituents; if not, he must perform it personally. " Mr. Wilson was entitled to trust that Mr. Grieve " knew his own powers, and to rely on his unqualified " obligation. As the Court have done the Lord Ordi- " nary the honour to defer back to him the decision of " this part of the cause, he has thought it incumbent on " him to explain his views." His Lordship at the same time pronounced this interlocutor:—" For the reasons " expressed in the prefixed note repels the defences in " the action at Thomas Wilson's instance against John " Grieve, and decerns against the said John Grieve for " payment to said pursuer of 300*l.*, with the legal in- " terest thereof since the term of Whitsunday 1822; " assoilzies him of course from all the other conclusions " of the action of reduction at the instance of the said " John Grieve against him, except from that which has " been already decided by the Court, namely, that the " sasine in favour of the said Thomas Wilson is void and " null; finds Mr. Wilson entitled to the expenses of dis-

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"cussing this point relative to the effect of Mr. Grieve's "obligatory letter to him, that is, since the 25th day "of November 1825, but to no other expenses, and "remits to the auditor of Court to tax the same."

Against this interlocutor, to which the Court adhered, Mr. Grieve appealed.

Appellant.—The Court of Session, in pronouncing the judgment appealed against, proceeded upon an erroneous view of the right existing in the person of the respondent, and this error is a prominent feature in the reasons assigned by the Lord Ordinary in support of his judgment. It was considered that the respondent had, at the time when the transaction took place between him and the appellant, a power of sale which might have been used for the payment of his debt notwithstanding the trust deed in favour of the appellant, and that this right was given up in consequence of the obligation to pay the amount of his bond from the proceeds of the estate when sold by the trustee.

But this is an assumption of the whole case: it is assumed, in the first place, that the respondent was entitled to sell the lands, and, in the second, that the proceeds would have been sufficient to liquidate his debt as well as that of all the other creditors, heritable and personal. But the power of sale did not exist, and even the mandate to sell was unavailing in competition with the appellant's infeftment. Neither does the respondent venture to assert that a larger price could have been obtained for the lands if they had been then sold than what they actually brought. There are, therefore, no relevant reasons stated for eliding the plea of the ap-

pellant, that the obligation was granted under a fundamental error, or rather a misrepresentation by the respondent, that he held a valid and effectual real security, which it has been decided he did not.*

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Respondent.—The obligatory letter bears to have been granted not on the faith of the infeftment on the heritable bond being valid, but in consideration of the respondent "having adjourned the sale of Mr. Robert Waddel's "lands of Liltycockee and others contained in his "bond, and agreed to take payment of his said bond "out of the price of Mr. Waddel's lands, when the "same should be sold by the appellant in virtue of his "trust deed." Had the appellant deemed the validity of the infeftment at all material he had a full opportunity of ascertaining the fact, and he was bound, and indeed must be presumed, to have examined it, if he conceived that the transaction into which he was entering was in any respect dependent on its validity. But that transaction was altogether independent of the infeftment, and there was evidently no error in substantialibus of the contract. To constitute an error in substantialibus, so as to entitle a party to insist on his contract being rescinded, it must have been an error regarding the nature and essence of the thing gained or acquired. But this cannot be alleged in the present case, because all that the appellant was desirous to procure was an abandonment of the sale; and the sale having been abandoned by the respondent, he obtained all the benefit for which he stipulated, and for which he agreed to make payment

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* *Authorities.*—Bell, vol. ii. p. 335; Steven and others v. Fleming, Feb. 19, 1811, Fac. Col.; Erskine, b. 3. tit. 3. s. 40.

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to the respondent out of the first of the price of any part of Mr. Waddel's property. Nor could the appellant have procured this advantage on any other terms, though he had not merely known but pleaded the nullity of the infeftment; for the respondent's power of sale was not contained in the infeftment but in the bond itself, which has not been reduced, and that power must have been executed by him as Mr. Waddel's mandatory, in which character he could have made a valid sale without any infeftment at all.

And even if infeftment had been necessary, the respondent's sasine would have completely answered his purpose had the sale been permitted to take effect; for the articles of roup declared "that the purchaser shall be "understood to have satisfied himself with the suffi- "ciency of the said progress and title deeds previous "to the roup, and shall not be entitled to quarrel the "same thereafter upon any ground whatever."

Nay, the respondent could have taken a new infeftment before a sale of the lands was effected, and thereby secured to himself full payment by a preference over all the personal creditors for whom the appellant acted, had the appellant not rendered it unnecessary for him to do so by granting the obligatory letter. The previous infeftment upon the trust deed in the appellant's favour was no bar to the respondent taking a new infeftment to this effect; for that deed conveyed the lands to the appellant for the payment of the truster's creditors in general, but without specifying either their names or the amount of their debts; in consequence of which it could not have made the debts of these creditors real burdens on the lands, although it had been intended to do so. The respondent, however, gave up that benefit

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on receiving the obligation of the appellant; and that being the case, the appellant cannot get quit of his obligation now, when a new infeftment is entirely barred by the infeftment of the purchaser.*

LORD LYNDHURST.—I move your Lordships, in the case of Grieve v. Wilson, that the judgment be affirmed.

LORD WYNFORD.—My Lords, I was in hopes that I should have heard stated by my noble and learned friend the grounds on which he moves the affirmance of the judgment. This case was argued a considerable time ago. I applied my mind at that time, and I have since applied my mind, to the consideration of this case. Every time I have taken up the papers it has so happened I have come to the same conclusion, that this judgment ought not to be affirmed, but to be reversed. My Lords, the facts not having been stated to your Lordships, I will take the liberty of stating them. This is a case in which proceedings were had for the purpose of setting aside an agreement, which I will read to your Lordships. The agreement is contained in a letter, which bears date on the 1st of September 1820. (His Lordship then read the letter quoted, p. 543.) Your Lordships perceive, therefore, this is an agreement, the consideration for which is the adjourning the sale of certain lands, in consideration of which he undertakes to pay 600*l.* out of

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* *Authorities.*—Bell's Com., vol. i. p. 586-7-8, 4th ed.; Erskine, b. ii. tit. 3, sec. 50, Bell's Com., vol. i. p. 588; Stenhouse v. Innes, Feb. 21, 1765; Mor. 10264; Broughton v. Gordon, June 20, 1739; Mor. 10247 and 10248; Chalmers v. Mackenzie of Redcastle's Creditors, Jan. 27, 1792; Bell, 404; Douglass of Dornoch's Creditors (not rep., vide Bell's Com., vol. i. p. 588, note 2, sec. 4); Bell, vol. ii. p. 584 and 582, and Com. p. 641, Macadam's case; Wight, p. 282, Campbell v. Speirs, Feb. 14, 1790; Mor. 8652 (affirmed); Anderson v. Matheson, Dec. 14, 1818, Fac. Col.; Erskine, b. ii. tit. 3, sec. 50.

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the first proceeds of the estate. The situation of these parties at the time of this contract was this:—The respondent, the person who had the judgment of the Court below, was supposed to have had a deed enabling him to give a complete right over a part of this estate, and it was thought the sale of that part would be injurious to the sale of the remaining part. The appellant was at that time a trustee of the whole of the estate, and he considered that the estate of which he was trustee would be injured, believing this conveyance to be in the possession of the respondent, and therefore he made the bargain which is expressed in this letter, to pay 600*l.*, under the supposition — and I believe both parties so conceived —that the respondent was in possession of a valid charge upon that estate. Now, my Lords, it turned out on inquiry that it was no charge upon the property at all. I admit it might have been made a legal charge by a regular process had in Scotland; but if it had been made a legal charge, it must have been made a legal charge which would have ranked to claim upon the estate after the deed under which the appellant was trustee; and the respondent would have made nothing of that legal charge, for the whole proceeds of the estates were only equal to the satisfaction of the creditors, of whom the appellant was trustee. The great object of the appellant was to stop the sale, he thinking that the respondent had a legal charge upon the estate, which would take precedence of the charge he had in his character of trustee. Now, as I have stated to your Lordships, that certainly could not have been the case, for there was a defect in the instrument of which the respondent was in possession, which might have been rectified; but however rectified, the person claiming

under that deed could only come in to claim after the creditors, under the deed which had been executed to the appellant, and which he held as a trustee for several of the creditors. My Lords, when it was discovered that that was the situation of the parties—that, in fact, the appellant derived no advantage from the agreement —the question arose, whether the contract was not void. If a contract be voidable, it may be set up by some circumstances, or it may be affirmed by subsequent conduct; but it is the law on each side of the Tweed, that if it be absolutely void it cannot be set up again by any circumstances which occur. The grounds upon which the decision in the Court below went are stated in the interlocutor of the Lord Ordinary, which I will read to your Lordships,—the judgment of the Court above having merely affirmed the judgment of the Lord Ordinary:—"The Lord Ordinary formerly made avi-
"zandum with this case to the Court, and ordered
"memorials to be prepared for their Lordships, on ac-
"count of the difficulty arising out of the effect of
"Mr. Grieve's letter to Mr. Wilson, 1st September
"1820, obliging himself quâ trustee unconditionally
"to pay Mr. Wilson the full amount of his debt out
"of the first of the price of any part of Mr. Waddel's
"lands that shall obtain soonest a purchaser, and the
"event of the sales having proved that there was not
"sufficiency of funds to pay his debt in full, with those
"due to the other creditors. Mr. Wilson pleaded also
"on his heritable bond and infeftment entitling him
"to full payment; but on this right of preference
"the Lord Ordinary; having no doubt, expressed his
"decided opinion that the sasine was null, and bestowed
"no right,"—so that your Lordships see these parties

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were under a mistake with respect to the effect of that deed,—" and bestowed no right of preference indepen- " dently of the letter, and he hoped that the Court " would have decided both points; but the Lord Ordi- " nary has to regret that they have deferred to him " the task of giving his single judgment on the point " which he referred to their united wisdom. They " (25th November 1825) confirmed his opinion of the " sasine;"—that is, they declared the sasine void— " their Lordships have found it void and null; they " reduced it, and remitted the other points of the cause " to him to be disposed of. In obedience then to this " remit, he has attentively reconsidered the cases for " both parties, with the whole proceedings. He looks " upon it as a point of law well understood, that where " two contracting parties are in error about the essen- " tials of a contract, it must be void and null." My Lords, it is on the ground here stated that I am of opinion that this learned Judge, to whose opinion I am referring, is erroneous in the conclusion to which he has come; for, if there be an error in the essentials of a contract, it must be null and void; therefore I feel it my duty to satisfy your Lordships, which I trust I shall shortly do, that if there is an error in the essentials of this contract it is null and void, and cannot be set right. He goes on to say,—" And the Lord Ordinary felt all " the difficulty arising out of the fact, that Mr. Wilson " and Mr. Grieve both were satisfied that Mr. Wilson " had an infeftment affording him a preference for pay- " ment of his full debt of 600*l.*; whereas it has been " decided that the sasine is void and null, so that it " may be thought that there was an error in both par- " ties relative to the subject of the contract, which may

" render it void. But there are other considerations," says the learned Judge, " which must be kept in view. " Had parties entertained the idea that Mr. Waddel's " estates and funds were insufficient for payment of his " debts, then it might well be admitted that no other " idea could have actuated Mr. Grieve when he obliged " himself to pay Mr. Wilson's debt in full than that " he had a right of preference to full payment. But " this is not the truth; for Mr. Grieve's idea was, that " Mr. Waddel's estate was worth considerably more " than his debts, as is proved by his protest taken " against the sale when about to be made by Mr. Wil- " son. He there gives us one of the reasons of this " protest,—' Because the trust estate conveyed to the " ' said John Grieve, as trustee foresaid, is greatly " ' more than sufficient to pay all the debts of the said " ' Robert Waddel.' Mr. Grieve's reason, therefore, " for preventing the sale, and obliging himself to pay " Mr. Wilson's debt in full, no way arose from the " idea alone of the latter having a preferable security " for his money; because whether he had a preference " or not was of no importance, seeing there was a fund " sufficient to pay all Waddel's debts. Mr. Grieve's " idea probably was, that if Mr. Wilson sold the lands " and paid himself, the commission due to the trustee " might pro tanto be diminished." My Lords, I think this is really uncharitable reasoning, under the circumstances;—" But whatever were his motives, the Lord " Ordinary cannot hold that there was an essential " error in the subject matter of the contract. Mr. Wil- " son had a mandate to sell, which would have been " good had there been no sasine." I have stated to your Lordships, that it would have been good if it had

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been made perfect, but that even, when made perfect after the other instrument, it would have been good for nothing; for the trustee under the other deed exhausting the whole of the estate, there would have been nothing left to satisfy this. Now, your Lordships perceive it is here admitted by this learned Judge, that if there be a material error in substantialibus the deed is altogether void. Let us see, then, whether there was not error in substantialibus. Lord Stair has expressed the same opinion more strongly than this learned Judge. Lord Stair, who is, as your Lordships know, the highest authority in the Scotch law, says: "Those who err in "the substantials of what is done contract not." It does not mean that there must be an error in every part; it is abundantly sufficient if there be a sound, important, and material error. Now, I submit to your Lordships, whether the parties in this case did not act entirely in error in a material part; if they were in error in a material part, that is enough. Is not that the case with respect to this instrument? In consequence of this error, this instrument was of no use whatever to the persons concerned. It has been said, it might have been of use if the sale had proceeded immediately, though he could not have had the proceeds of that sale until the creditors had been satisfied; and that, if the trustee had thought fit to proceed immediately, the estate might have produced enough to have satisfied all. Now it is extraordinary that should be stated, when we consider that this instrument was executed only in the month of September 1819. In a very few months after this attempts were made to sell different parts of this property, but no sales could be made; there is, therefore, no pretence, in my opinion, for saying that. Is it just then

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that the appellant should be called upon to pay this 600*l.*, which must, if paid by him, come out of his own pocket, when it is apparent that his conduct could not be dictated by motives of private interest, but was done entirely for the purpose of making the best for his principal, after several attempts made to sell? It appears that no such price could be obtained for this property as would have been sufficient to have paid the creditors under the trust deed; and if it would not have paid the creditors under the trust deed, no benefit could by possibility result from this agreement. Then, if that be so, why is the respondent to put into his pocket 600*l.* taken out of the pocket of Mr. Grieve, when he could not have got six hundred halfpence if this agreement had not been made? Is not this an error in substantialibus? I submit to your Lordships that it is. My Lords, if the parties fall into a material error, though not from fraud, but from mere mistake, that, according to the law of Scotland, and I believe the law of England, (but with that we have nothing to do now,) but according to the authority of Lord Stair, that is sufficient to render the instrument void. Is this then a material error? If a man thinks there is a valid charge on land, and it turns out no charge at all, and, in point of fact, every other creditor is to be let in before the particular person who makes it,—if that be not an error in substance, I confess my mind is incapable of understanding what an error in substance is. I shall trouble your Lordships no further upon this subject, but by a reference to an opinion of Mr. Bell's, a very eminent writer, as your Lordships know, upon the law of Scotland, which appears to me very important upon this subject, to show what is the effect of this error. "Where the security," says

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Mr. Bell, " is not accompanied with a transference of " the full feudal right, but is in the nature of a mere in- " cumbrance, or burden by heritable bond, the power to " sell is a mere mandate; and although it is an irrevoca- " ble mandate, and in the nature of a procuratory in rem " suam, which will entitle the creditor to proceed, if not " interrupted by the other creditors, yet, where there are " other creditors holding secondary securities, or pro- " ceeding in bankruptcy, the title which can be conferred " under the mandate is so questionable that a full price " will not be obtained. The purchaser may indeed ac- " quire a feudal title, but it must be under burden of the " heritable debts constituted by infeftment; and there " seems to be no secure limit to the burden, since, first, " the purchaser has not the benefit of the sequestration " act limiting real burdens to the amount of the price; " and, secondly, the price offered at the sale cannot, at " any rate, be a good criterion of value, as the subject is " sold on a questionable title." My Lords, Mr. Bell refers to a case in support of his opinion, which it is material also to mention to your Lordships. He says, " In September 1800 Brown granted an heritable " bond of annuity to M'Neill, on which infeftment was " regularly taken. The creditors under the two first of " these bonds proceeded in January 1802, long after " the term of payment in their bonds, to sell the lands " (with the knowledge of Fleming, trustee for Brown). " Steven purchased at the sale, and paid the price to " M'Dougal, holding the second security, with consent " of Glen and Currie, who held the first. He received " a joint disposition from them, was infeft, and took " possession. In 1803 M'Neill, holding the third

" security, raised an action of maills and duties. No " intimation had been given to the purchaser not to pay " to M'Dougal, Glen, and Currie. The purchaser " produced his titles in the maills and duties as exclu- " sive. The sheriff found M'Neill entitled to the " reversion of the subject, after deducting the two prior " debts. The case was advocated, and Lord Robertson " found that Brown had not been divested by the prior " heritable bonds, and that consequently the posterior " bond of annuity became a burden on the property, " which could not be disappointed by the sale. The " purchaser reclaimed, but the Court adhered." This shows, in the clearest and most satisfactory manner, that this instrument, which had been the subject of the purchase to which I have adverted, gave no priority in title; for they could not obtain any fruits of it until all the creditors upon the estate were satisfied, and there was not sufficient to satisfy the prior claims. My Lords, if these parties were not in error on a most material point, I do not know what a material error is. For these reasons I am humbly of opinion this judgment ought to be reversed, inasmuch as, in consequence of the error into which these parties fell, the appellant agreed to pay 600*l.*, which he must pay, if at all, out of his own pocket.

LORD CHANCELLOR.—My Lords, it is now a considerable time since this case was first heard before your Lordships. I had proposed more than once to have moved your Lordships to proceed to judgment, but it was delayed by different circumstances. It was the first case I heard after I had the honour of a seat in your

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Lordships House. I formed at the time a very clear and decided opinion upon the case, but I was prevented by the circumstance of my sitting as speaker, and not having taken my seat, from stating any reasons for the judgment which I thought it my duty to propose. Nevertheless afterwards, on the case being called on for the judgment of your Lordships, I did state explicitly the grounds of the opinion I had formed, and not differing in some respects from my noble and learned friend as to the general doctrine of law, but stating that in my opinion a different conclusion was to be drawn from the special circumstances forming part of the facts of the case, I proposed to affirm the judgment below. The difference between us arose out of the impression which those circumstances produced, having stated to your Lordships my opinion; but upon that occasion finding, which I was not previously aware of, that my noble and learned friend differed with me, I did not then desire your Lordships to proceed to judgment; but the case stood over, and was afterwards heard by one counsel on a side, and at my request my noble and learned friend the Lord Chief Baron (Lord Lyndhurst) attended the hearing with us. The result was that the argument did not at all change my opinion. I had the benefit also of hearing the opinion of my noble and learned friend who has just addressed your Lordships, and those reasons which influenced his mind (for he was kind enough, with his usual courtesy, to state them to me privately). I have since deliberately considered the arguments which have been adduced, and I certainly agree in the judgment which has been moved by my noble and learned friend in the first instance. My Lords, considering the

difference of opinion which exists in your Lordships House in relation to this case, I think the judgment ought to be affirmed without costs.

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The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed.

SPOTTISWOODE and ROBERTSON — ALLISTON and LOCK, Solicitors.