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

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

Friday, December 20.

SECOND DIVISION.

[Sheriff Court at Stirling.

GREIG *v.* CHRISTIE.

Passive Title—Succession—Vitious Intromission.

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

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

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

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

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

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

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

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

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

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

as sole tenant. As James, before 1879, was joint-tenant of Bankend and owner of half the stock, the *onus* was on the defender of proving that on leaving the farm in that year he was given his share of the stock, and that when he subsequently returned it was in some other capacity than that of joint-tenant — *i.e.*, as manager or factor for his nephew. (2) James, at any-rate, left estate to the amount of the cheque. It was not proved that the bulls belonged to Alexander. Even assuming that James merely acted as factor or *negotiorum gestor*, and as such received the cheque, the defender, his constituent, was not entitled to intromit with the cheque, but was only entitled to such balance, if any, as on an accounting was found due. Assuming the cheque represented the price of farm stock, it was *primo loco* liable to pay debts which were proved to be incurred in order to pay the farm rent. Though *bona fides* might absolve an intromitter from the penal consequences of universal liability, yet everyone who intromitted with the effects of a deceased person was liable, even assuming *bona fides*, to the extent of their intromissions—*Wilson* v. *Taylor*, July 4, 1865, 3 Macph. 1060; Ersk. Ins. iii, 9, 49 and 52; Bell's Prin., sec. 1921. *Adam* v. *Campbell (cit. infra)* was a special case dealing with universal liability.

Argued for the defender (respondent)—Where there was no dishonest intention, and no intention to take up a deceased's estate as a whole, intromission without a legal title did not involve universal liability—*Adam* v. *Campbell*, June 17, 1854, 16 D. 964; *Wilson* v. *Taylor* (*cit. supra*); Bell's Prin., sec. 1921. The pursuer, however, had failed to prove that the defender had intromitted with estate or effects of the deceased. It was not proved that James, even in 1879, and while still a joint-tenant, was entitled to half the stock. Joint-tenancy did not of itself make a partnership—Partnership Act 1890 (53 and 54 Vict. cap. 39), sec. 2. It must be presumed that in 1879, when the joint-tenancy came to an end, James got what stock he was entitled to. Since his return to Bankend, James had attended to sales of cattle and crop, and with the money paid the rent, but had no interest in the farm. It was proved that the cheque represented the price of certain cattle in which James had no interest. It was not proved that the sums he borrowed from the pursuer were used to pay rent and taxes, nor that it was necessary for him to borrow for that purpose. The *onus* was on the pursuer to prove that James was a creditor of the farm, and he had failed to prove this. Unless the farm was his debtor James could have had no right to apply the cheque in repayment of the pursuer, nor to retain it, even assuming it could be regarded as in his possession. The cheque, however, was not really in James's possession, as it was in a cash-box in the house of the defender.

At advising—

LORD JUSTICE-CLERK—The history of the connection of the late James Christie in connection with the farm seems to have been as follows:—Up to the year 1879 he and his brother had been yearly tenants, their only writing being their entry as tenants in the estate books. James then became a tenant of another farm—Bandeath—at some distance off, and took there all that he was entitled to as his share of what was on Bankend. From this time his name disappeared from the estate books, and for some years he had no connection of any kind with Bankend. It appears that in 1885 he became bankrupt, and that his brother Alexander received him again at Bankend, providing him with board and lodging, and that he attended to the finance of the farm—buying and selling, and keeping the accounts. He also did some separate business on his own account in buying and selling cows, he taking the use of the Bankend grazing for short periods when he had bought cows, until he got them resold to others.

There is no evidence that when he came back he brought any stock or farm implements, and indeed, being a bankrupt, it is not conceivable how he could have done so, and there is not, so far as I can see, anything to show that he at any time out of his own funds provided anything for the stocking or working of the farm of Bankend. The evidence, as I think, is quite inconsistent with his having had any right of his own in the farm or the stocking, although he again appears as joint-tenant in the estate books in 1890, and as sole tenant for the last three years of his life, which it is shrewdly suggested was for voting purposes. To me it seems clear that he had nothing of his own on the farm and had no practical right in it.

In these circumstances the question arises whether the defender in this case has fallen within the character of a vitious intromitter, by his having taken a cheque drawn in favour of the deceased and got another cheque in his own favour in lieu of it from the granter, and so got from the bank the amount in the cheque. I am satisfied that the cheque, which was from stock auctioneers, was for the price of three young bulls which did not belong to the deceased, being bulls reared on the farm, and not the deceased's property in any sense. The cheque was granted to him as managing the business of the farm.

In these circumstances the question which arises is one of some difficulty, and it is only after repeated consideration that I have come to be of opinion that the pursuer's plea in favour of vitious intromission must be repelled. I do not go further into the matter, as I have considered and concur in the opinions prepared by Lords Low and Ardwall. The deceased had, as I think, no right or title to the money represented by the cheque, and the burden of proof being on the party maintaining vitious intromission, I hold that the pursuer has failed to discharge the *onus*.

LORD LOW—I am of opinion, in the first place, that it is established that no part of

the stock, crop, or implements upon the farm of Bankend belonged to the deceased James Christie. It was impossible to obtain exact and precise evidence upon the question, because no farm books or accounts of any description appear to have been kept, and accordingly the evidence if taken in detail is somewhat vague and indefinite. When read as a whole, however, it leaves no doubt in my mind that after he returned to Bankend in 1885 James Christie was merely in the position of a lodger with his brother, who assisted in the management of the farm in return for board and lodgings, and who carried on business as a cow dealer on his own account.

There is, indeed, one fact which *prima facie* suggests that James Christie must have had an interest in the farm, and that is that in 1890 his name was entered in the estate books as joint tenant with his brother Alexander. There is nothing, however, in the estate office to show how or why the entry came to be made. Mr M'Laren, the present factor, only came into office in 1896, and his only source of information is the entry in the rental book. He says, however, that he always regarded Alexander as being truly the tenant, while the defender says that he understood that James's name was put in as joint tenant "to give him a vote for the laird." In these circumstances I cannot regard the entry in the rental as counterbalancing the great weight of evidence to the effect that James's position in regard to the farm was what I have stated.

The pursuer therefore has no claim against the defender in respect of the intromissions which the latter had with the stock and crop upon the farm.

So far the case appears to me to present no difficulty, but a delicate question arises as to whether the defender by his intromissions with the cheque for £46, 5s. 7d. granted by Speedie Brothers in favour of the deceased has not incurred liability for the debts of the latter as a vitious intromitter, at all events to the amount of the cheque?

The answer to that question depends upon whether the money represented by the cheque was the property of the deceased, because if it was not his property the defender cannot have incurred a passive title, however irregular and unwarranted his intromission with the cheque may have been. Mr Erskine in his Institutes (iii, 9, 51) states the law thus—"Intromission cannot be vitious, nor consequently infer a passive title, when the subject intermeddled with was truly not *in bonis defuncti*, no part of the estate of the deceased, or ceased to be such before the intromission."

Now a cheque is not a document of title, nor, in the general case, does it give any indication of the purpose for which, or the capacity in which, it is granted to the payee. Still when a cheque is found in a dead man's repositories, drawn in his favour in ordinary form, I think that there is a certain presumption that the money represented by the cheque belonged to him. It seems to me, therefore, that the *onus* in the first instance lay upon the defender to show that the money did not belong to the deceased. That *onus* he has, in my opinion, discharged because it is proved that the cheque represented the price of certain cattle which formed part of the stock of Bankend, which were sold by Speedie Brothers, upon James Christie's instructions, the sale of stock being a matter which was entrusted to him. If, therefore, I am right in thinking that it is established that no part of the stock of the farm belonged to James Christie, he held the cheque not in his own right but for the defender and his mother and sisters, to whom the stock upon the farm belonged. That being so, then unless circumstances existed which would have entitled James Christie to retain the money although it was the price of cattle which did not belong to him, the defender has not by his intromission with the cheque incurred liability for his uncle's debt.

It was argued, however, that upon the assumption that James Christie had no interest in the farm, he was entitled to retain the cheque in a question with the defender and his mother and sisters, because he had borrowed the sums now sued for from the pursuer for the purpose of paying the rent of the farm. I think that it may be taken to be proved that James Christie did in fact borrow the sums sued for, for the ostensible purpose of paying rent and taxes, but it does not follow that that gave him right to retain the amount in the cheque. Whether he would have been entitled to do so or not would have depended upon the result of an accounting for his intromissions with the produce of the farm. He appears to have conducted all the sales, both of crops (such as hay, beans, and barley), and of cattle, and out of the proceeds he paid the rent and other necessary expenses. The farm seems always to have paid its way, and also to have afforded a livelihood for Alexander Christie and his family, and no reason is disclosed why James Christie should have required to borrow money to pay the rent. Perhaps the fact that he engaged in cattle-dealing, apparently with little success, may have had something to do with it, but however that may be it is certainly not proved, nor do I think that it can be inferred from the evidence, that James was a creditor of the farm. It is possible that he may have been so, but as no books or accounts were kept it cannot now be ascertained how matters truly stood. That is unfortunate for the pursuer, but upon this branch of the case the *onus* of proof is on him.

I am therefore of opinion (1) that it is proved that James Christie had no right to or interest in the stock, crop, or implements upon the farm; (2) that it is proved that the cheque represented the price of certain cattle to or in which James Christie had no right or interest; and (3) that it is not proved that there was a

balance due to James Christie by the farm against which he would have been entitled to retain the proceeds of the cheque.

The result is that in my judgment the appeal should be dismissed and the interlocutor of the Sheriff affirmed.

I should like, however, to add that even if I took a different view of the result of the evidence I should still think that the defender could not be held to have incurred liability as a vitious intromitter. The most favourable view of the evidence which could be taken for the pursuer would be that it showed that James Christie had some interest in the farm and some right to the stock thereon. It is plain, however, that even if so much be established by the evidence, no data are supplied by which any estimate whatever can be made of the extent of James Christie's right or interest. I suppose that if he had any right at all it must have been a *pro indiviso* right along with his brother in the stock—a right which may have been to the extent of one-half, but which may have been to some lesser extent. Assuming that to have been the position of matters, I am unable to see how by carrying on the farm and thereby necessarily intromitting with the stock the defender could be regarded as a vitious intromitter. He was dealing with stock which *ex hypothesi* belonged to a greater or less extent to him or those for whom he acted, and which it was necessary for some one to intromit with if the farm was to be carried on in ordinary course.

I think that very much the same view applies to the cheque. Even assuming that the cattle for the price of which the cheque was given belonged to some unknown extent to James Christie, they also belonged to the defender and his mother and sisters whom he represented. No doubt the course which the defender adopted was irregular, but I do not think that it can be described by a more serious epithet. To whomsoever the cattle belonged they were part of the stock of the farm, and the proceeds of their sale naturally fell to be applied to farm expenses, and I can very well understand that it would have been very inconvenient, perhaps embarrassing, for the conduct of the farm if the money had been tied up indefinitely. I am indeed inclined to think that the defender had a probable title of intromission with the cheque, which the institutional writers regard as sufficient to exclude the consequences of vitious intromission.

Accordingly, even upon the most favourable view for the pursuer, I think that he has mistaken his remedy. It seems to me that the appropriate course would have been for him to confirm as executor-creditor and bring an action of accounting.

I need hardly say that the fact that the contrary view is held by my brother Lord Stormonth Darling, whose opinion I had an opportunity of reading, has led me to consider the case with much anxiety, but after repeated consideration of the evidence and the authorities I have been unable to come to any other conclusion than that which I have stated.

LORD ARDWALL—The pursuer in this case seeks to recover from the defender sums of £20, £12, and £25 which he alleges were lent by him to the deceased James Christie, an uncle of the defender. The loans are proved by valid writs produced in process, and the receipt for £25 bears that that sum was received to enable the deceased James Christie to pay "rent and taxes."

The action is brought in the first place against the defender as executor-dative of the deceased James Christie, but although he was decerned executor he never took out confirmation, for the reason, he says, that there was no estate to confirm to; but in the second place he is sued as a vitious intromitter with the moveable estate of the deceased James Christie. The moveable estate with which it is said vitious intromission took place was in the first place the half of the stock on the farm of Bankend, and second, in any view a cheque drawn by Speedie & Company, auctioneers, Stirling, in favour of the said James Christie. For I agree with what the Sheriff says regarding the £10 and the small moveable articles.

With regard to the stock on Bankend, I think it is proved that no portion of it belonged to James Christie. The facts of the case shortly are these—[*His Lordship then narrated the facts as stated above.*]

It was pleaded for the pursuer that the fact of his being first joint tenant with Alexander from 1890 till 1902, and then sole tenant from 1902 till 1905, raises a presumption that he was in the first place a partner with his brother in the farm, and from 1902 till 1905 was tenant of the farm and presumably proprietor of the stock. I am of opinion, however, that any presumption that does arise from the entries in the estate books is clearly redargued by the evidence in the case, and the result of that evidence as I have already stated is that at the time of his death James Christie had no interest whatever in any of the stock or implements on Bankend farm.

There remains, however, the question as to the cheque for £46, 5s. 7d.

It is proved that from 1902 till 1905 James Christie, who was not occupied with any regular work on the farm, and who had occasion to be frequently in the town of Stirling and up and down the country in pursuance of his cow-dealing business, was entrusted with the few financial transactions which were necessary in connection with the farm of Bankend. The rent receipts for the years 1903, 1904, and the first part of 1905 are in his favour, and it is otherwise proved that he always paid these rents. On the other hand he collected the moneys due to the farm for hay, barley, and other crops sold off the farm, and also for cattle sold, and out of these he paid the rent, wages, seed bill, and other things. This was quite a natural arrangement, as he had been experienced all his life in buying and selling farm stock and crop. He and his nephew Alexander were on perfectly good terms, and it was only fair that he should render what services he could

in return for his board and lodging. The two last transactions of which we know anything were the payment of the half-year's rent, amounting to £55, by James Christie on 6th February 1905 and the sale by him on 17th February 1905 of three bulls for which Messrs Speedie Brothers sent him the cheque for £46, 5s. 7d. The deceased among other things had this cheque in his possession at the time of his death, and the pursuer in this action put the cheque with two five-pound notes and a gold watch into a cash-box and took away the key. The defender Alexander Christie opened the box with a key which lay in the house, paid the funeral expenses out of the money so far as it went, and took the cheque to Speedie & Company, and obtained from them another in his own favour, and the question comes to be, was this treatment of the cheque vitious intromission on the part of the defender with his deceased uncle's estate.

The *onus* is on the pursuer to show that this cheque, or, as it may be taken to be, the money contained therein, formed part of the deceased James Christie's estate. I do not think any importance can be attached to the fact that the cheque was taken in the name of the deceased. It has been held that payment by a cheque is really payment in cash, and it perhaps simplifies matters to regard the cheque as in the same position as if instead of the cheque the deceased had received the money in bank notes and coin and had left it lying in a parcel in his repositories. It is proved by the sale-note and the evidence of Andrew M'Dermont, cashier for Speedie Brothers, the granters of the cheque, that the sum of £46, 5s. 7d. was paid for three shorthorn bulls which it is clearly proved belonged not to the deceased at all but to the defender and his mother and sisters, who seem to have been interested with him in the farm stock at Bankend, and I may observe that M'Dermont's evidence also shows that the deceased's transactions in cow dealing on his own account were kept perfectly separate from the sale of bulls bred upon Bankend.

This being so, it seems necessarily to follow that the cheque or the sum of money which it represented was not part of the deceased's estate at all, inasmuch as it was the price of and a surrogatum for bulls belonging to the defender, which the deceased was bound to hand over to the defender. Accordingly we may apply to the defender's intromissions with the cheque what Mr Erskine says (iii, 9, 51)—"Intromission cannot be vitious nor consequently infer a passive title where the subject intermeddled with was not truly *in bonis defuncti*, no part of the estate of the deceased, or ceased to be such before the intromission."

It is quite true that if Messrs Speedie had not been willing to cancel the old cheque and grant a new one it might have been necessary for the defender to take out confirmation to the cheque as to money held in trust by the deceased as agent or trustee for those to whom the bulls belonged, and then to have paid the proceeds to himself, which he had quite a right to do. Indeed, even supposing that the defender had not been decerned executor to the deceased, but that the pursuer had taken out confirmation as executor-creditor, I cannot doubt that the defender could have successfully vindicated the sum in question, which was never immixed with James Christie's own funds, as being money truly belonging to him, and representing part of the farm stock in which the deceased had no pecuniary interest; and the same result would have followed had sequestration been taken out of James Christie's estate, the sum being distinguishable from the rest of his estate. See *M'Adam* v. *Martin's Trustee*, 11 Macph. 33.

So far, then, I think it cannot be doubted that although the cheque was treated in a somewhat shorthand way by the defender, he thereby did nothing more than vindicate practically what was really his own property, as he would have been entitled to do in a more roundabout fashion in ordinary form of law. The only answer of any consequence suggested to the defender's claim upon this money is that the deceased being entrusted with many of the financial transactions connected with the farm might have been entitled to retain the money in question against advances which he might have made on behalf of the defender and those interested in the farm. I am of opinion that this would be a sufficient answer if the pursuer had proved—and the *onus* is upon him to do so—that at the time of James Christie's death the defender or those interested in the farm were due money to him on a just accounting. But so far from anything of the kind being proved, I think the evidence goes to show that whereas the farm easily paid its way during the lifetime of Alexander Christie senior, James Christie had frequently difficulty in meeting debts due by the farm out of the proceeds of sales, and after his death it was found that several farm accounts were unpaid which ought to have been paid out of what he had received from the sales of crops and stock. I think this appears very clearly from the evidence of Mrs Margaret Christie, and the impression which the whole evidence leaves on my mind is that James Christie was not successful in his business of cow dealing, and that so far as can be conjectured the balance was against him and not in his favour with reference to the financial business which from time to time he performed for the defender and those interested in the Bankend farm—in other words, that moneys derived from Bankend farm frequently went to cover James Christie's losses as a dealer in cows. But it is enough for the disposal of this part of the case, *first*, that it is proved beyond the possibility of a doubt that the money in the cheque was the property of the defender and those interested with him in Bankend stock; and *second*, that the pursuer has failed to prove that at the time of his death James Christie

had any claim of retention or otherwise over the said money in respect of sums due to him by the defender.

On the whole matter I am of opinion that the pursuer has failed to prove that there has been any vitious intromission on the part of the defender with his deceased uncle's estate, and it follows that the interlocutor of the Sheriff should be affirmed and the defender found entitled to the expenses of the appeal.

LORD STORMONTH DARLING — The only relevant facts of this case seem to me to lie in small compass, though the proof ranged over the whole business relations for forty years of two brothers, Alexander and James Christie, who are both now dead, Alexander having died on 12th December 1902, and James on 7th March 1905. Alexander was married and had a family, one of whom is the defender. James never married. The two brothers were for some time joint-tenants of a small farm of 80 acres on the Polmaise estate, near Stirling, at a rent of £110 a-year, where their father had been tenant before them. In 1879 James became tenant of a much larger farm on the same estate, but he does not seem to have succeeded in it, and after six years the landlord took the farm off his hands. James then returned to the family home at Bankend, and after Alexander's death James was recognised by the factor as the tenant of Bankend, and paid the rent regularly. The defender says James did so as manager for the family. What was the exact footing on which he stood towards his late brother's widow and children is left, as I think, to pure conjecture, just as there is no definite proof as to the precise financial relations of the brothers themselves. How your Lordships can say that there is anything like proof of what these relations were I do not profess myself to understand.

The only facts that can be said to be known with certainty are these. In 1902, and again in 1904, James borrowed money from the pursuer, who was his brother-in-law, to the amount in all of £57. For these sums of money (£20, £12, and £25) James granted receipts to the pursuer, the last dated 5th February 1904 (a little more than a year before James's fatal accident). It is in these terms—"Received from Mr David Greig the sum of twenty-five pounds further to enable me to pay rent and taxes, &c., and for which I am to grant a conveyance to him of my Upper Bridge Street property to secure repayment of this and any other advances that may be made in future." This document was signed through a stamp, "James Christie, 5th February 1904." It is not said that the security there mentioned was ever granted. Nor is it said that the loans were ever repaid. But as tending to corroborate the statement in the last receipt that the loans were wanted to pay rent and taxes, it is important to find that the loans were made a few days before the half-year's rent was payable.

The pursuer being thus undoubtedly a creditor of the late James Christie at the time of his death, applied to the defender for repayment of the loans as representing his uncle. The defender denied liability, and the present action was raised on the footing that the defender represented the late James Christie as executor-dative, or otherwise as vitious intromitter with his goods, gear, and effects. In the course of the proceedings it appeared that on 2nd May 1905 the defender along with other members of the family was appointed executor-dative *qua* one of the next-of-kin, but he admitted that he had not given up any inventory of the deceased's estate, nor obtained confirmation. For this the defender gave as his reason that he and his co-executors had not been able to discover any property belonging to the deceased other than some bedroom furniture of small value, with which they had not intermeddled. The sole question in the action thus resolved itself into one of vitious intromission, aye or no.

For the principles on which this passive title is founded one requires to revert to the institutional writers and to decisions which do not come down later than Dunlop and the early volumes of Macpherson. Perhaps the reason is that questions of intromission without a title generally arise in the Sheriff Court, and are confined to subjects of small value.

Erskine in his Principles (iii, 9, 25) defines vitious intromission as "an unwarrantable intermeddling with the moveable estate of a person deceased without the order of law," and adds, "The bare intermeddling infers this passive title, though the thing intermeddled with should not be applied to any use by the intromitter." The subject is treated more at length in the Institutes (iii, 9, 49–56) where it is said that the passive title is excluded when the thing intermeddled with was no part of the estate of the deceased, and also that the vitiosity may be purged if the intromitter gets himself confirmed executor, "as it shows a willingness in the intromitter to subject himself to account." The full penalty of vitious intromission being, as Mr Erskine remarks, "extremely severe and introduced as a check to fraud, is excluded in every case where equity interposes for the intromitter, where, for instance, the value of the things intermeddled with is so inconsiderable as to remove all suspicion of fraud, unless there be direct evidence, or at least pregnant presumptions to the contrary." Then he goes on to mention any probable title of intromission though imperfect in itself, such as letters of administration in England, as saving the intromitter from the passive title. Mr Bell in his Principles (sec. 1921) begins by stating that "the proper mode of entry, and the only effectual check on dishonesty in intromission with the moveable funds of a person deceased, is confirmation, and wherever one having an opportunity of intromitting does so without confirmation a universal responsibility is raised against him." Then he goes on to qualify this general statement by saying, "Any *bona fide* title of intromission, or circumstances removing the suspicion of fraud and affording a check on

the intromission, will relieve against the penal consequences" (*i.e.*, the incurring of universal liability).

Now, what were the actual intromissions founded on? They are of the simplest description, and stand on the evidence of the pursuer and the defender himself. The pursuer's account of it is—"I remember the death of James Christie. I was telegraphed to come and see him. I found some valuables in his cash-box. They were four single pound notes, two £5 notes, a cheque from Speedie Brothers for young shorthorn bulls sold by them and amounting to £46, 5s. 7d. There was also a gold watch. These were all put into the box and the box locked up, and I have the key in my possession. That box still remains at Bankend in the possession of defender." The defender's account of what happened is in substance the same, with an important addition. He says—"There was a cash-box in the house. Pursuer put in it two £5 notes, a gold watch, and cheque for £46, 5s. 7d. He locked the box and took away the key. The box is still at Bankend. We opened it with a key we got in the house. I took the money out of the box to pay the funeral expenses. I produce the account for the same, amounting to £11, 13s. 9d. The cheque was in payment for bulls sold at Speedie's sale. The account 6/2 of process is the account for them. The bulls belonged to my father. I took the cheque into Speedie's and they gave me another cheque in my name. Mr Speedie knew to whom the bulls belonged. The watch is still at Bankend." There is some corroboration by the mother and sister of the defender, but the defender's own admission is enough. The only other witness who deals with this matter is M'Dermont, the cashier of Speedie Brothers. Speedie himself, who is referred to the defender as "knowing to whom the bulls belonged," was not examined, and the defender is not corroborated as to Speedie's knowledge by M'Dermont, who says—"After Alexander's death in 1902 there would be grazing cattle sent in for sale from Bankend. They were entered in the name of Mr Christie, probably because we did not know who the owner was." It is fair to add that this witness depones that while the two brothers were alive it was James that sent in cows and Alexander's name that was entered in connection with the sale of shorthorn cattle, but he admits that after the death of Alexander the auctioneers knew no other name but James's to put in the catalogue, and so both the account for the lot in question and the cheque for £46, 5s. 7d. were made out in James's name. I say this as bearing on the *bona fide* belief of the defender when he possessed himself of the cheque and got Speedie's cashier (most irregularly) to substitute a cheque in the defender's favour. This matter of the cheque is really the only element of importance in the case, for I agree with the Sheriff that the money taken out of the cash-box and spent in funeral expenses was in a totally different position and must be disregarded. Indeed the pursuer's counsel ultimately presented his case on the footing that it raised no question of universal liability, but affected the defender's intromission with the sum in the cheque alone.

Now, what is a cheque? It is defined by section 73 of the Bills of Exchange Act 1882 as "a bill of exchange drawn on a banker payable on demand." According to the ordinary course of mercantile dealing, it is, at all events when drawn on a man's own bank, universally regarded as a cash payment. The creditor may not be legally bound to receive it, for he is not bound to be satisfied with anything but current coin of the realm; but if he takes it without objection, subject only to the condition of its being duly honoured on presentation, he is held to have been paid in cash. All this was clearly expounded by the Lord President within the last six weeks in the case of *Leggatt Brothers* v. *Moss' Empires, Limited*, 45 S.L.R. 67. Now, this cheque was sent to the late James Christie, the proper creditor of the auctioneer, on 17th February 1905, and it was received and retained by him down to the time of his death. What right, I ask, had the defender or anyone else to abstract it from the deceased man's cash-box, and with the connivance of the auctioneer to substitute another cheque in favour of a different person? The defender may have believed, and it is even possible that he may have been right in believing, that the cheque represented the value of cattle which truly belonged to his father's representatives. But that was a question which might require a long and complicated clearing up of accounts, and could not certainly be summarily solved by the defender taking the law into his own hands. Moreover, he and the other members of his family had been parties to placing the deceased man in the position of being the proper legal representative of the farm, responsible for the rent and other outlays, and entitled to the drawings for stock and crop. The defender was the last man, therefore, who could fairly disturb an arrangement for which he was largely responsible. I think it would undo all the benefits which the law endeavours to secure by the orderly and regular administration of the estates of deceased persons if a wholly unwarrantable and in some respects clandestine proceeding of this kind received any encouragement.

It is said that the *bona fides* of the defender ought to save the defender from penal consequences of his own acts, however irregular they may have been. Perhaps from the full penal consequences—*i.e.*, of being held universally liable—but not certainly from the consequences of intromission without a title, to the extent at least of that intromission. "Every person," said Lord Cowan in *Wilson* v. *Taylor*, 3 Macph. 1060, "who intromits without title with the effects of a person deceased is a vitious intromitter, according to the legal acceptation of the term. He may have intromitted in perfect *bona fide*, and if so it may be that although he is not the less a vitious intromitter he may not suffer the penal

consequences of vitious intromission. Universal liability is by no means the necessary consequence of vitious intromission, and in the present case I would be slow to sustain any claim of universal liability against the defender. But if there has been *de facto* intromission without a title with the estate of a deceased to a certain extent, it cannot on any good ground be contended that the good faith of the intromitter affords defence against a claim to that, or to a less extent, by a creditor of the deceased." The other Judges concurred, and it appears that the case was one in which the *bona fides* of the intromitter was unusually clear, for the deceased was a woman who had borne an illegitimate child, leaving some money on deposit-receipt, and the bank where it was deposited paid it, on the footing that the amount was not sufficient to warrant the expense of confirmation, on receiving a discharge from the whole of the deceased's relatives; and yet the defender was held a vitious intromitter to the extent of the money—about £90—which he had received from the bank without taking out confirmation, and responsible on that ground to a certain creditor of the deceased woman in a claim within that amount.

If the principles applied in *Wilson* v. *Taylor* were sound, it seems to me that they lead straight to the decision of this case in favour of the pursuer to the extent of £46, 5s. 7d. The amount of the cheque was undoubtedly part of the estate of the deceased James Christie at the time of his death. He alone had the right to cash it. What he was to do with the proceeds afterwards was for subsequent adjustment. The defender admittedly intromitted with the cheque, first by abstracting it from the repositories of the deceased, and then by exchanging it for another cheque in his own favour. This was, in my opinion, a vitious intromission, both because it was intromission without the shadow of a title, and also because there was a certain amount of clandestinity in it, at all events as regards the pursuer. Lastly, no amount of honest belief that the cattle were the property of himself and his family could save him from the consequences of intromission to the extent of the amount intermeddled with. I should therefore be in favour of recalling the Sheriff's interlocutor and giving decree for £46, 5s. 7d., with expenses in both Courts.

But your Lordships are deciding otherwise. I cannot pretend to regard your decision otherwise than with regret and apprehension. It not only defeats a just claim, with which the Sheriff himself expresses "much sympathy," but it rewards with success a proceeding of the most irregular and, as I think, most reprehensible kind. If that were all, its effects might end with the case in hand. But I am apprehensive that it will encourage the belief among people who already perhaps have not too scrupulous a regard for regularity of procedure, and who certainly have unusual facilities for tampering with the moveable funds of deceased persons, that they are safe to disregard the check—"the only effectual check" as Mr Bell describes it—afforded by confirmation, and to act upon their own ideas of what they are pleased to consider equity.

The Court pronounced this interlocutor—

"Find in fact and in law in terms of the findings in fact and in law in the interlocutor appealed against: Therefore affirm the said interlocutor: Of new assoilzie the defender from the conclusions of the action, and decern. . . ."

Counsel for the Pursuer (Appellant)—M'Lennan, K.C.—Spens. Agent—George Stewart, S.S.C.

Counsel for the Defender (Respondent)—Murray—Munro. Agents—Murray, Lawson, & Darling, S.S.C.

Friday, December 20.

FIRST DIVISION.

[Sheriff Court at Hamilton.

FLEMINGS *v.* GEMMILL AND OTHERS.

Process — Summons — Decree — Defenders Sued Jointly and Severally — Decree against Some of a Plurality of Defenders Sued Jointly and Severally — Competency.

Where a summons concludes for payment against a number of defenders "jointly and severally," it is competent to grant decree against some of them, the others being assoilzied.

River—Pollution—Interdict—Reparation—Landlord and Tenant—Title to Sue—Liability for Pollution of Proprietor of Houses though not in Occupation thereof—Liability of Every Contributor to Pollution—Damage.

Tenants in a farm sued a number of upper proprietors on a stream which flowed through their farm, to have them interdicted from polluting the stream, and for damage alleged to have been caused to their cattle through drinking the water of the polluted stream, some having died, the milk production having been diminished, and the general health and consequently value of the herd having deteriorated.

Held (1) that the tenants had as good a title to prevent the pollution as the proprietor would have had, the tenant being by force of the lease the assignee of the proprietor's title to every extent that was necessary for his protection in the lease; (2) that the defenders, though they were not the occupiers of the houses from which the pollution came, and consequently were not the immediate authors thereof, were responsible, inasmuch as it was the natural consequence of the way the houses were constructed, these having, though fitted