I cannot believe that the beer-trade, which is literally from hand to mouth, is the least dependent upon the brewery with which the station refreshment contractor deals. The case is perfectly extravagant, and in every aspect of it, because when the appellant himself denies that he sold "Bass," a great part of the evidence we find consists of that of an analytical chemist to prove that what he did sell was not made by the pursuers. I think we have all indicated our opinion sufficiently during the argument, and I propose that, negativing the pursuers' first plea-in-law, we find in fact that "The defender has not fraudulently sold as ale manufactured by the pursuers, ale which was not so manufactured," and in law that the pursuer is not entitled to the interdict claimed. We shall then sustain the appeal, recal the judgment of the Sheriff-Principal, and revert to that of the Sheriff-Substitute.

LORD CRAIGHILL and LORD RUTHERFURD CLARK concurred.

The LORD JUSTICE-CLERK was absent.

The Court pronounced this interlocutor:—

"Find in fact that the defender did not fraudulently sell as ale manufactured by the pursuers, ale that was not so manufactured: Find in law that the pursuers are not entitled to interdict; recal the judgment of the Sheriff appealed against; affirm the judgment of the Sheriff-Substitute; of new assoilzie the defender from the conclusions of the petition."

Counsel for Pursuers (Respondents)—Comrie Thomson — Dickson. Agents — J. W. & J. Mackenzie, W.S.

Counsel for Defender (Appellant)—M'Kechnie —Shaw. Agents—Curror, Cowper, & Curror, S.S.C.

Thursday, May 20.

SECOND DIVISION.

[Sheriff of Lanarkshire at Glasgow.

BRADLEY & COMPANY *v.* G. & W. DOLLAR.

Sale—Sale of Machinery for Particular Purpose—Seller's Right to Return.

Machinery for carrying out a particular operation was supplied to a purchaser, partly in April 1884, and partly in June 1885. During its working, after delivery, several trifling breakages occurred, all of which the seller remedied on the buyer complaining of them, but the buyer refused to pay for it on the ground that it was not according to the contract. Thereafter in a letter to the purchaser regarding a fresh complaint that the machinery was not according to contract, the seller offered to send a man to work it for several days, on the understanding that if it worked satisfactorily there would be no further dispute, and the purchaser, without expressly agreeing to this proposal, allowed the man to come and work it. In an action for the price, *held* by the Lord Justice-Clerk and Lord Craighill that the offer of the seller was a fair one, that it had been carried out by the parties, and *therefore* that the machine having worked satisfactorily when their man left it, the purchaser must pay the price—by Lords Young, Craighill, and Rutherfurd Clark, that the machinery supplied was according to contract, and had been retained and used, and that therefore the purchaser was liable for the price.

Observed by Lord Rutherfurd Clark that where machinery is supplied to an order the purchaser is not entitled to return it in consequence of small breakages such as are to be expected when it is put into use, though he may be entitled to require the seller to repair them.

In November 1883 G. & W. Dollar, tinsmiths in Glasgow, ordered from Richard Bradley & Co., engineers at Wakefield, a press to turn out tin can covers. Another article known as a stamp was afterwards ordered, and an account for those articles, packing, &c., was incurred, which in all amounted to £209.

At the time this action was raised G. & W. Dollar had paid £106, 4s. of this account. The action was raised for £102, 17s. 3d. as the balance due. The "press" was delivered in April 1884. The "stamp" was delivered on 8th August 1884. It was subsequently in the same month agreed to exchange it for one of another kind, and the new one was sent in June 1885.

Both press and stamp were set up in Dollar's works by Bradley's men. Certain small breakages occurred in the working of the machinery after it was delivered. In August 1885 Bradley came himself to Glasgow to inquire into complaint of the machinery having failed to work well, and put to rights a small disarrangement which had occurred. Thereafter a small rod of trifling value broke, and on 19th August Dollar wrote complaining of this, and a new rod was sent them, and on 4th September another complaint was made as to it. After some correspondence the solicitors for Bradley, who had on 7th September made formal demand for payment of the account, wrote on 26th September insisting that they had fulfilled the contract, but offering to send a man "to work the tools for three or four days on the understanding that if the tools work correctly during that time no further question is to be raised." Dollar answered that Bradley might send a man to satisfy him as to the justice of the complaint, and maintaining that they were entitled to "a good job and fulfilment of contract as to working," but saying nothing of the nature of agreeing to the proposal or dissent from it. The solicitors replied requesting a definite answer, to which Dollar answered that Bradley must put "the machine in good working order before we take it off your hands." Thereafter Bradley's man was sent on 13th October, and he remedied the breakage complained of, which was a very small one, the repair of which occupied a very short time. He then remained and worked the machine for two days, after which he left, and immediately thereafter Bradley's solicitors again applied for payment and threatened an action, to which Dollar answered that previously the machine had always broken down when it had been used for a day or two, and they would work it for a week,

and then if it did not break down in that time, would send a cheque in payment. In less than a week they wrote saying it had broken again, a small hammer having broken; but in the course of that week the action had been raised.

The Sheriff-Substitute (SPENS) found the defenders liable for the price of the articles sued for.

"*Note.*—So far as I am able to judge from the evidence, I think the pursuers acted reasonably and considerately. Practically the whole point in the case now is, whether defenders had a reasonable time in which to test the machinery supplied? I am of opinion they had. I do not know whether it was owing to defenders' faulty working of the machine that it went wrong on more than one occasion, but when the pursuers' skilled workmen came down there never seemed to be any difficulty in his making the machine do what was required. After the action was raised the defenders proposed a further test of eight days, which request pursuers' agent declined, notwithstanding defenders elected to go on and work the machine, with the result that the hammer was smashed. I think that before the action was raised there had been ample time to test the sufficiency of the machine, and I incline to think that if after it was raised defenders proceeded to use the machine as if it were their own, turning out plates for their own uses and purposes, and ultimately breaking a portion of it they are now barred from any right to reject. The fault now alleged is that the hammer being of cast iron is insufficient for the purpose, and there is considerable skilled evidence to this effect; but in the first place it seems somewhat curious that if its being of cast iron renders it insufficient it did not break long ago, and in the second place it was patent that it was cast iron. I put my judgment however upon this ground, that there had been ample time to test the machine before the action was raised, and defenders having after the action was raised used it at their own hands and not only without the consent, but in face of a refusal to permit any further test, are now barred from any right to reject, even if otherwise they had been held entitled to do so."

The defenders appealed, and argued—The question was one where reasonableness must be considered. The proof showed that the machinery was of such a delicate nature that it was reasonable they should have an opportunity of testing it before they paid the price. None such was given them. The machine was continually breaking in minor and essential parts, and in point of fact they were hurried into Court before the pursuers had satisfactorily completed their bargain to supply a sufficiently reliable piece of machinery. Where it took time and use to discover faults in machinery it was sufficient that notice should be given of defects, and the purchaser could not be bound to reject and return till he had had full trial with the machinery working properly—*Fleming* v. *Airdrie Iron Co.*, 31st Jan. 1882, 9 R. 473.

The pursuers replied—(1) The machine was conform to contract, and it was natural that the minor portions complained of as weak should occasionally and just at first get out of order. The pursuers had always promptly put these right. (2) The defenders lost their right to reject after the action for the price had been raised—*Chapman* v. *Couston, Thomson, & Co.*, March 10, 1871, 9 Macph. 675.

At advising—

LORD JUSTICE-CLERK—One regrets to see so much expense incurred in a litigation ensuing on a simple contract about a useful piece of machinery such as this. Apparently the machinery was furnished by the respondents at the dates stated in the account, and from time to time after a considerable period it appears that parts of it, which may generally be said to be immaterial if one judges from the expense which was required to replace them, gave way. I have no doubt that the machinery was of such a character that although skilled persons were using it, it required a certain amount of delicate manipulation, and that owing to the want of this it happened that one of the connecting rods of the hammer broke. From time to time such breakages were repaired, and in the end—and it is this that confirms me in my opinion of the case, and it is the part of the proof on which the Sheriff proceeds—the respondents made an offer that they should send one of their workman to give the machine a fair trial on the understanding that if it worked well there should be no more dispute about it. This was a fair offer, and I think that that offer was substantially accepted, and this is proved by the evidence of the person representing the respondents. The man came down and did the work from Wednesday to Saturday, when he went away, and then from the Saturday to the next succeeding one it was under the superintendence of the appellants when the hammer gave way. If that was a material and essential part of the machine, I do not say that the circumstance that it broke, even after the pursuer's engineer had left, might not have led one to a different result in this case, but we have it proved that it could have been replaced at a trifling cost. I am of opinion that as it was the understanding of the parties that if the machine worked well with the respondents' workman there should be no more disputes, the Sheriff has proceeded on sound grounds in his judgment. I consider that any right of rejection which may have previously existed was deliberately abandoned.

LORD YOUNG—I am of the same opinion, and have nothing to add to the grounds of judgment. We shall require, however, in terms of the Act of Parliament to pronounce findings in fact, and I wish to say that I am prepared to put the judgment entirely on the retention of the machinery and the failure to reject timeously. I should, as expressive of my own opinion of the import of the evidence, be prepared to find that the articles sued for were furnished and delivered to the defenders on their orders, and were retained by the defender, and that there is no evidence to show that they were in any respect contrary to the contract. If there is any necessity beyond that for special findings the judgment will probably be that the machinery was delivered in June last and retained by the defender after the month of October, when the action was raised, and is still retained. But the general findings which I have proposed would satisfy my mind.

LORD CRAIGHILL—I concur. I agree with

Lord Young in thinking that the machinery was ordered and supplied and retained, and the defenders have not shown that it was contrary to the contract, or that there was any deficiency entitling them to reject it. But I am equally satisfied, supposing this doubtful, that there was a special agreement between the parties relating to the way in which the machinery was to be tested. There was to be a week's continuous working. Now, supposing hypothetically that the full week had not expired, and at any time the defenders could say that no opportunity of testing had been given. This proposal still remains to be carried out. It was departed from by the pursuers as matter of form. They say they proposed to send down their own workman to superintend the work on consideration that all disputes should be ended. I think the proposal was accepted, and having been so, the only question comes to be, whether the machinery was satisfactory, and I think it was. But over and above, it was worked by the defenders themselves, and went well till the evening of the seventh day, when it broke down owing to what has been proved to have been a trifling defect.

Lord Rutherfurd Clark—I also am of opinion that the judgment should be in favour of the pursuers, and I confess I am disposed to place it on the more general grounds stated by Lord Young. I think it is proved that the machinery which the pursuers supplied to the defenders was conform to contract. There may doubtless be, as in all machinery of this class, from time to time, a likelihood of breakages. These are naturally incident to all machinery which does violent work. But such breakages do not give the purchaser of such machinery a right to reject it. They may doubtless give him a right to require the seller to make good the breakages. I do not say that it is a right which always exists, but if the seller makes good the breakages in such a case the buyer is bound to pay the price of the machinery. Now, this machine was used for some time—it may be said to have been on its trial—and there were a few breakages. At last the hammer broke. It would have cost merely five or six shillings to restore it. But yet the defenders maintain that they are entitled, on account of a breakage which any blacksmith could have easily mended, to return to the seller a machine costing £50 or £60. There is no justification for this. The only possible question would be as to whether the iron rod should be replaced at the pursuers' or the defenders' expense, and considering the value of it is 5s. or 6s., I decline to trouble my mind with a solution of the question. I confess I was a good deal impressed with Mr Baxter's argument until I found out how unimportant was the breakage.

The Court pronounced this interlocutor:—

"Find that the articles, sums, and disbursements enumerated in the account libelled were all delivered, rendered, and made by the pursuers to the defenders at the price specified in the said account, and that the same were according to contract, and have been retained and used by the defenders: Find in law that the defenders are not entitled to reject the articles so retained or any of them, and are liable to the pursuers for the price thereof, and for the value of said sums, and for the said disbursements: Therefore dismiss the appeal, of new repel the defences, and ordain the defenders to make payment to the pursuers of £102, 17s. 3d."

Counsel for Pursuers — Dickson — Salvesen. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Defenders—Comrie Thomson—Baxter. Agent—P. Stevenson, S.S.C.

Tuesday, May 25.

SECOND DIVISION.

JONES AND OTHERS *v.* PURSEY.

Testament—Confirmation—Executors.

A testator left, besides a disposition of his affairs which had been superseded, two other deeds of settlement, one of which was of doubtful validity. The Court *remitted* to the Sheriff to issue confirmation in favour of persons named as executors in both these settlements, reserving all questions as to the validity of the settlements.

The late John Gunnell, of Glasgow, died on the 15th January 1885. After his death there were found in his repositories (1) a general disposition and settlement by him dated 9th December 1864; (2) a general disposition and settlement dated 10th September 1875; and (3) a general disposition and settlement dated 10th September 1882. The second of these settlements, which were all holograph of the testator, was signed by him before two witnesses, and by it certain persons were named as trustees. The third—the settlement of 1882—bore to be signed by the testator "before these witnesses," but it did not bear to be signed by any witnesses. A list of persons named as trustees was appended to it, two of whom were the same as named in the deed of 1875, viz., John Jones junior and Gavin Watson. Acting upon counsel's opinion, that the will of 1882 was "inchoate and ineffectual and of no effect," and that the will of 1875 regulated the succession, three of the trustees in the deed of 1875, Thomas Jones junior, John Davidson, and Gavin Watson, as surviving and accepting executors named in that will, presented a petition to the Sheriff of Lanarkshire as Commissary for warrant to the Commissary-Clerk to issue confirmation in their favour as executors-nominate of Gunnell.

Intimation of the application was made to the beneficiaries under the settlement of 1882. Mrs Pursey, London, one of the said beneficiaries, lodged objections to confirmation being granted to the petitioners.

A record was made up. On 6th February 1886 the Sheriff-Substitute (Spens) granted warrant to the Commissary-Clerk to issue comfirmation as craved.

"*Note.*—The point which is raised before me is I think a difficult and doubtful one, and I decide the point with great hesitation. Three wills are produced. The last of these is, as indeed all of them are, holograph, and would undoubtedly be binding were it not for the fact that the words 'before these witnesses' appear and there are no