party asking them at the expense of going to Parliament for them. It is a reasonable practice and ought to be supported. Such powers are of course liable to be taken away if the use of the crossing is inconsistent with the primary uses of the road—if, for example, the road traffic has materially increased. No such case is raised here, and the question for our consideration is, whether or not the Road Trustees, having in the fair exercise of their powers given the right to use this crossing, are entitled to take away that right without assigning any reason, or to impose arbitrary and unreasonable conditions upon its use—although I have no doubt they do not think them either arbitrary or unreasonable. The right cannot, in my opinion, be taken away without having regard to the convenience to the public. The defender is willing to be responsible for any damage that may be caused by the state of the crossing, and he is willing to take his tenants bound for the proper use of the crossing, and I am not satisfied that it would be reasonable to make the defender responsible for all accidents. Such a demand I think unreasonable, and therefore I think the Lord Ordinary is right.

LORD KINNEAR—I am of the same opinion.

The Court adhered.

Counsel for the Pursuers and Reclaimers—Guthrie—Dykes. Agents—E. A. & F. Hunter & Company, W.S.

Counsel for the Defender and Respondent—Dickson—Dundas. Agents—Dundas & Wilson, C.S.

Friday, June 19.

FIRST DIVISION.

[Sheriff of Lanarkshire.

WHITE *v.* DOUGHERTY.

Sale — Auction — Conditions of Sale — Sample—Sale of Goods in Bulk.

A public roup of fruit was conducted under certain conditions which were not read, but which were, in accordance with the custom of trade, hung up in front of the auctioneer's rostrum. Article 3 provided—"Goods to be delivered to the purchaser as they now lie, with all faults and defects, without any allowance for inaccurate description of marks, quality, quantity, or condition, and intending buyers are requested to thoroughly inspect the bulk."

The fruit in bulk was stored in a cellar under the auction hall; six cases selected from the bulk were opened and placed on a dais in front of intending purchasers, and were referred to by the auctioneer as specimens of the fruit. The purchaser of a number of cases discovered, when they were delivered at his place of business on the following morning, that a large quantity of the fruit was in an advanced state of decay.

In an action for the price—*held* that the sale was not by sample but of goods in bulk, and that the 3rd article of the conditions of sale imposed on the purchaser the duty of satisfying himself both as to the quantity and quality of the fruit.

W. N. White & Company, Limited, fruit brokers, Covent Garden, London, and John Morton Threshie, writer, Glasgow, their mandatory, sued in the Sheriff Court at Glasgow, under the Debts Recovery Act 1867, James Dougherty for £39, 5s., the price of certain cases of apples which the defender purchased from the pursuers at public market in London.

The defender denied liability upon the ground that the sale was by sample, and that the goods delivered were not conform thereto.

The facts as established by the proof are set forth in the following passage of the Sheriff-Substitute's interlocutor—"A public sale of apples was held in Covent Garden Market on 11th June, and a large quantity of apples was sold on that occasion. Among the sales were two quantities of apples to the defender, being sixty cases of a brand know as the 'Eagle' brand and sixty cases of another brand known as the 'Kangaroo.' The apples had arrived from Tasmania, and they were brought to this country in steamers, which had refrigerators on board, so as to keep the apples fresh. According to the custom of trade in Covent Garden Market, the sales of apples, 'to arrive' by certain ships are publicly announced and on the arrival of the vessels the apples are taken to the market and sold by public auction. The apples in bulk are placed in the cellar underneath the market, and a certain number of cases is placed on a dais in front of the intending purchasers. These cases are selected from the bulk by the auctioneer or his deputy, and they are open, and the apples are visible to the offerers. The auctioneer refers to them as being specimens of the apples to be sold. The sale is conducted under certain conditions, which are not read out, but are hung up in front of the auctioneer's rostrum, and it appears to be in accordance with the custom of trade that the conditions are not read, but that they are known to be there and to regulate the sale. At the auction on 11th June the sales to the defender were made in accordance with these customs. The steamer by which the apples are said to have arrived had discharged its cargo the day before the sale, and the bulk of the apples was placed in the cellar, and six open cases were placed on the dais as specimens of the apples in the cellar. These cases contained good sound hard apples. The conditions of the sale were not read, but the defender was bound to know of them. After the sale the defender received a delivery-order for the apples and handed it to a carrier, and the carrier had them conveyed to Glasgow. They arrived in

Glasgow on the morning after the sale, and the 'Eagle' brand lot was found to be utterly useless, and the 'Kangaroo' lot was found to be good. The condition of the 'Eagle' brand lot is well described in the evidence of Mr James Pinkerton, a neutral witness. He says that the apples were absolutely valueless as fruit, and that they were in an advanced state of decomposition. A certain portion of the cases, viz.—twenty, was not so bad as the rest, but they were not sound fruit. The defender thereupon communicated with the pursuers, and he was told by them to do the best he could with the apples. A misunderstanding arose afterwards as to the defender selling them at his own hand, and a judicial warrant was then obtained to sell them, and the sale realised £5, 1s. 2d."

Article 3 of the conditions of sale was in these terms—"Goods to be delivered to the purchaser as they now lie, with all faults and defects, without any allowance for inaccurate description of marks, quality, quantity, or condition, and intending buyers are requested to thoroughly inspect the bulk."

The Sheriff-Substitute (BALFOUR) on 4th December 1890 assoilzied the defender.

"*Note.*— . . . Under these circumstances the question arises, whether the defender is liable for the price of the rotten apples? The pursuers say—(1) That according to the conditions of the sale the defender took the risk of the bad quality; (2) that he took delivery of them in London without objection, and is now barred from objecting; and (3) that the carrying of them from London to Glasgow would damage the apples, and that they (the pursuers) had no concern with the carriage—the place of delivery being London.

"With reference to the first point, the third clause in the conditions of sale is that the goods are to be delivered to the purchaser as they lie with all faults, and without any allowance for quality or condition, and intending buyers are requested to thoroughly inspect the bulk. I am of opinion that, if the sale to the defender had been made strictly on these conditions of sale, the defender would have been bound to have paid for the apples. He was bound to know the conditions, and he ought to have inspected the bulk. If he chose not to inspect the bulk he took the consequences, and the apples were his with all their faults unless he could prove fraud, which is not averred in this case. But it appears to me that the exhibition of six cases as samples makes a great difference in the transaction between the parties. It is the seller who selects these cases and opens them, and the only meaning which can be attached to the exhibition of them is, that the samples show the quality of apples that are to be sold. Nothing is said in the conditions of sale about samples, and the very fact of exhibiting samples takes away from the necessity of buyers inspecting the bulk. It seems to me that the third clause in the condition has reference to another state of things, viz., that the goods are in bulk, and that no sample is exhibited. But when you have a sample exhibited it is absurd to request the buyers to inspect the bulk. If that condition is to be maintained, even where a sample is exhibited, then the exhibition of the sample has no meaning. If, notwithstanding that a sample was exhibited, the auctioneer had told the audience to inspect the bulk, then I apprehend the auction would have been spoiled. It just comes to this, that these conditions of sale are a formal affair to which purchasers do not pay much heed, but they do this at their own risk, and if a sale comes precisely under the terms of the conditions, the purchasers would be bound by them. In this case, however, the auctioneer himself has entered into a sale by sample, to which the conditions do not allude, and to which the third clause of the conditions is not meant to apply. I hold that that condition applies to the sale of apples in bulk without the production of a sample, and any other result would enable auctioneers to impose on the public by exhibiting sound samples and delivering rotten bulk. If a sample is meant not to be a standard of the quality of the bulk, then the third condition should explicitly state that buyers are requested to inspect the bulk notwithstanding that a sample has been exhibited." . . .

The pursuers appealed to the Sheriff (BERRY), who on 12th March 1891 adhered to the judgment appealed against.

"*Note.*—I have felt some difficulty with reference to the first question dealt with by the Sheriff-Substitute, namely, whether under the conditions of sale the defender took the risk of bad quality. This really comes to depend on whether the third condition was intended to apply to such a case as we have here, where a sample or specimen of the apples was exhibited at the time of auction. On consideration, I am not prepared to take a different view from the Sheriff-Substitute, who has held that the condition has reference to another state of things, namely, where the goods are in bulk and no sample is exhibited. It is clear, from the terms of certain of the conditions, that they are intended to apply to different kinds of sales, thus the 6th and 7th conditions seem to have reference to sales of goods 'to arrive,' where it is impossible to have an inspection of samples. There is nothing in the conditions themselves to show to what precise state of matters the 3rd condition is intended to apply; but it seems reasonable to regard it as applicable to a case where samples are not shown at the time of sale. To hold otherwise would certainly place buyers at a great disadvantage, because, as the evidence shows, it would be next to impossible for them to inspect the bulk after purchasing on a view of the sample. At all events it seems reasonable to hold the condition as directed to a different kind of sale from that which took place here. In that view I think that, as the goods certainly did not correspond with the sample, the defender was entitled to reject them. I do not think that the delivery taken in London was such

as to exclude the defender from rejection, when on opening the bulk at Glasgow he found the case inferior. Nor do I think that the mere carriage from London to Glasgow would so damage the apples as to account for the condition in which they arrived there, and so bar the defender from rejecting them."

The pursuers appealed to the Court of Session, and argued—That the sale was by bulk, and was in terms of the printed conditions which were publicly exposed on the rostrum. The purchaser had an opportunity of examining the apples, and if he failed to do so, or did so imperfectly, he, and not the seller, must suffer. No guarantee was given, and the samples shown on the day of sale were just average specimens of the apples. The conditions of sale put the purchaser on his guard, and protected the seller—*Macdonald & Fraser* v. *Henderson*, November 3, 1882, 10 R. 95; *Hain* v. *Laing*, May 21, 1853, 15 D. 667; *Byewater*, 1 Ad. & Ell. 508.

Argued for the respondent—There was here a special reference to sample; it was in fact a sale by sample, and it was at the samples that intending purchasers were looking. No reference was made to the "conditions of sale" by the auctioneer, and nothing was done to make an intending purchaser aware of them. The sale was advertised to consist of fruit arriving by a particular ship, and the evidence showed that a number of the apples had come by another vessel, and had been kept for some time. The purchaser had no opportunity of examining his purchase till it was delivered to him. He took for granted that the sample fairly represented the bulk, which it was proved that it did not, and upon that account he was not liable.

At advising—

LORD PRESIDENT—In this case Messrs White & Company are fruit brokers at Covent Garden Market, and the defender Dougherty is a fruit merchant in Glasgow.

The subject of the contract was a number of cases of apples which were purchased by the defender from the pursuers at a public sale of fruit at Covent Garden on the 11th of June of last year.

The conditions of sale were posted up below the rostrum, and the third of these conditions was as follows—[*His Lordship here read condition* 3 *as above quoted*]. Now, it was under this condition that the defender purchased the apples, and it has been urged for him that this was not a sale under the conditions which were displayed on the occasion, but that it was a sale by sample.

The Sheriff-Substitute and the Sheriff have adopted this view, and they have accordingly given judgment in the defender's favour. I think, however, that they are wrong, and that this was not a sale by sample, but it was a sale of goods in bulk, and that with regard both to the quantity and the quality the purchaser himself was to be the judge, and that upon both these matters he must be held to have satisfied himself.

The doctrine of law upon this subject is plain enough, and is stated by Bell in section 98 of his Principles, when dealing with the subject of implied warranty—"In order to raise this implied warranty by sample, it is not sufficient that a part of the goods shall have been drawn and exhibited, unless it is expressly referred to in the bargain as such, and due precaution taken for identifying the sample." It appears to me that the facts of this case do not bring it within the definition of a sale by sample. There had been no due precaution taken for identifying the sample, and it also appears that a part of the goods were not drawn or accepted as sample.

The effect of the third condition, which I have already referred to, was clearly to throw upon the purchaser the duty of inspecting the bulk. This could only have been viewed as a sale by sample in the event of there having been deliberate fraud in the selection of the samples exhibited, and that is not suggested in the present case.

This doctrine has been developed by Lord Ellenborough in the cases cited by Bell, which fully bear out the views stated by him in the passage which I have already quoted, and the doctrine has been considerably amplified in subsequent cases. I think therefore that the defender here is wrong, and that the interlocutor of the Sheriff must be recalled.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court pronounced the following interlocutor:—

> "Find that the apples in question were purchased by the defender from the pursuers at a public sale conducted by the pursuers in Covent Garden Market; that the conditions of sale were posted up on the rostrum in such a way as to be patent to the defender and other buyers; that by the said conditions it was stipulated that 'the goods were to be delivered to the purchasers as they now lie, with all faults and defects, without any allowance for inaccurate description of marks, quantity, quality, or condition, and intending purchasers are requested thoroughly to inspect the bulk;" that samples of the apples in question were exhibited at the sale, but that the conditions of sale contain no reference to samples except such as may be implied in the said stipulation; and that the defender purchased and took delivery of the apples subject to the said conditions: Find in law that the defender is not entitled to reject the goods, and refuse payment of the price, on the ground that the bulk was disconform to the sample: Therefore sustain the appeal: Recal the interlocutor of the Sheriff-Substitute dated 4th December 1890, and of the Sheriff dated 12th March 1891: Repel the defences, and ordain the defender to make payment to the

pursuers of the sum of £39, 5s. as concluded for: Find the pursuer entitled to expenses, and remit to the Auditor to tax the account thereof in this and in the Sheriff Court, and to report to the Sheriff, and remit to him to decern in terms of the above findings, with power to decern for the taxed amount of expenses."

Counsel for the Pursuers—Clyde. Agents—J. & A. Hastie, Solicitors.

Counsel for the Defender—Shaw. Agent—James Skinner, S.S.C.

Friday, June 19.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

THE BANK OF SCOTLAND *v.* STEWART.

Property — Minerals — Reserved Right — Singular Successor.

In a conveyance of lands the disponer reserved the coal, except that under two portions of the land, with full power "to work, win, and carry away the said coal, provided this be done without entering upon the surface of the lands." The disponee was entitled, should it be found necessary for the support of the buildings conveyed that a larger quantity of coal should be left unworked than was contained in the two portions of land, to buy from the disponer such additional quantity of coal as was necessary for support at a specified rate per acre.

At the date of the contract the parties were aware that the coal was being worked, and would continue to be worked, by a system which exhausted the coal and must bring down the surface, and that loss to the surface could bear no comparison with the value of the coal if it became impossible that the coal should be worked.

In an action by a singular successor of the disponee to have the disponer interdicted from so working the coal as to cause disturbance or subsidence of any part of the lands—*held*, on a construction of the titles, that the defender's reservation included a right to work the coal, although the result might be that the surface would be damaged.

Prior to 1875 James Reid Stewart, iron merchant in Glasgow, was proprietor of the lands and estate of Calder Park, in the county of Lanark, including the surface and the minerals.

By disposition dated 8th and 12th July 1875 James Reid Stewart conveyed the lands to John Hendrie, coalmaster in Glasgow, reserving a portion of the minerals, and in particular the coal under part of the lands. The deed provided—"But excepting and reserving from the lands, subjects, and others hereby conveyed the whole coal under the same other than (first) the portion thereof which is delineated and shaded with brown parallel lines on the plan annexed and subscribed by me as relative hereto, containing 2·856 acres or thereby, and (second) the portion thereof which is delineated and shaded with blue parallel lines on the said plan, and containing 3·144 acres or thereby, with full power to me and my foresaids or our tenants to work, win, and carry away the said coal, provided this be done without entering upon the surface of the said lands and estate; but providing and declaring that my said disponee and his foresaids shall have right, should they find it necessary for the support of the said mansion-house and offices, or any of them, or for the support of the bridge or viaduct to be constructed on the said lands for carrying the authorised Glasgow, Bothwell, Hamilton, and Coatbridge Railway over the river Calder or the works connected with the said bridge or viaduct, that a larger quantity of coal should be left unworked than is contained in the said two portions of land, to purchase from me, or my heirs and successors, such additional quantity of coal as they shall find necessary for such supports, the price of which shall be calculated at the rate of £1000 per acre of wholly unworked coal; also declaring that it shall be lawful to me, and my successors in the mines and minerals in each side of the said portions of the lands, containing respectively 2·856 and 3·144 acres, and to my and their lessees, in working the said mines and minerals, to cut and make such and so many airways, headways, roadways, gateways, and water-levels through the mines, minerals, or strata in the said portions of land as may be requisite for ventilating, draining, or working the said mines and minerals; but no such airway, headway, roadway, gateway, or water-level shall be of greater dimensions or section than 8 feet wide and 6 feet high, nor shall the same be cut or made so as to injure the surface of the land, or the buildings, railway, or works thereon, or to impede the passage thereon."

By disposition dated 27th and 31st January 1888 the lands were conveyed by John Graham, C.A., Glasgow, trustee upon the sequestrated estates of the said John Hendrie, to the Bank of Scotland.

The title of the bank was in terms exactly similar to those in the original title to Hendrie, and the disposition contained an assignation to all claims competent to the trustee for damages occasioned to the lands conveyed by the workings of the mineral proprietors or their tenants.

In September 1890 the Bank of Scotland raised the present action against James Reid Stewart for declarator that the defender was not entitled to work the coal in such a manner as not to leave sufficient support for the pursuers' lands above and adjacent to the seams worked by him, and