sale would not have been necessary at all, because the curatory only lasted four months. Or again, the *curator bonis*, if he had not shown such haste in selling to the company, might have heard of some perfectly unexceptionable purchaser who was willing to give more than £15,000 for stock yielding a yearly income of £1550. In that case the directors could hardly have forced a sale at a lower price.

This leads to what I think is the critical point in the case, that while the articles of association gave the company a qualified right of pre-emption, they did not oblige Mr Mowat to sell at any price the directors might choose to offer. The right of the directors was to take the stock at such price as should be agreed on, or failing agreement, at a price to be fixed by neutral persons mutually chosen. Now, in this case a sale by agreement was impossible. Mr Mowat was the managing director, and he was also the *curator bonis* for Miss Chambers. He could not come to an agreement with himself. The plain meaning of the article is that there is to be one person representing the seller and another person or body of persons—namely, the directors—representing the purchasers, and if the two parties concerned are agreed as to the price the sale will be complete. But in this transaction the seller was not represented at all. There was only the managing director to act for her, and of course it was his business, as well as that of his colleagues, to get the shares on terms advantageous to the company. I will put a parallel case. Suppose that a railway director is also curator for a minor or insane person whose property is to be taken under powers of compulsory purchase, what would his duty be? Of course, to have the price fixed by arbitration or by a jury. A sale by agreement in such a case would be open to the same objection which annulled the contract between Messrs Blaikie and the Aberdeen Railway Company.

In this case I assume that Mr Mowat meant to deal fairly with reference to the interests of his ward, but I think that a perfectly independent curator would have insisted either that the price should be fixed by arbitration, or that he should be left a free hand in disposing of the shares; and the fact that no such alternative was put before the directors only proves how unfit it is that a person holding the double position of seller and intending purchaser should be allowed to act in that double capacity with reference to the interests of a third party.

There is another course that might have been taken. The *curator bonis* might have resigned his trust when he found himself placed in a position in which his duty conflicted with his personal interests, for it is not to be overlooked that Mr Mowat was a shareholder as well as a director in the company of W. & R. Chambers. Having regard to the observations of the Lord President in the case of *Perston's Trustees*, I should wish to reserve my opinion as to whether it was absolutely incumbent on Mr Mowat to resign. At least it was a way out of the difficulty—perhaps a more satisfactory way than a reference of the price to arbitration, because even in the choice of an arbitrator it is desirable that the ward's interests should be independently represented.

In the admitted circumstances of the case I am of opinion that this is a case of a purchase of the ward's interest by a person in the position of a trustee, and it makes no difference in the result that Mr Mowat had his co-directors in partnership with him in the purchase, because they are all affected with knowledge of the trust. They knew that the shares which they purchased from Mr Mowat were the estate of his ward, and they were not entitled to purchase that estate, or at least they could not purchase it except under the condition that the sale was voidable at her instance.

As regards the relief to be given, I do not follow the pecuniary conclusions of the action, and nothing was said in support of them. I think the right of the pursuer is to have decree of reduction of the transfer of the shares conditional on her repayment of the sum of £15,000 received in exchange for the shares by her curator on her behalf. This decree will entitle the pursuer to the dividend, if any, which may have been declared on the shares during the subsistence of the transfer.

LORD ADAM and the LORD PRESIDENT concurred.

LORD KINNEAR was absent.

The Court pronounced an interlocutor finding that on repayment of the sum of £15,000 the pursuer will be entitled to reduction, and continuing the cause.

Counsel for the Pursuer—Sol.-Gen. Dickson, Q.C. — Cullen. Agents — Ronald & Ritchie, S.S.C.

Counsel for the Defenders — Balfour, Q.C. — W. Campbell. Agent — Lindsay Mackersy, W.S.

Friday, December 3.

SECOND DIVISION.

[Sheriff of Lanarkshire.

KENNEDY'S TRUSTEE *v.* HAMILTON & MANSON.

Sale—Transference of Property—Sale of Goods Act 1893 (56 *and* 57 *Vict. cap.* 71), *secs.* 16, 17, 18 (*Rules* 1, 2, *and* 3), *and* 62 (1) "*Specific Goods*," *and* (4).

Evidence on which *held* that the parties to a contract of sale intended the property in the goods sold to be transferred to the buyer at the date when the contract of sale was concluded, and that consequently, in terms of section 17 of the Sale of Goods Act 1893, the property in the goods was so transferred at that date.

This was an action brought in the Sheriff Court at Glasgow by John Wishart, accountant, Glasgow, trustee on the sequestrated estates of William Kennedy, farmer, Cathcart, against Hamilton & Manson, hay, straw, and grain merchants, Glasgow.

The case arose out of a transaction between the defenders and Kennedy for the disposal of hay belonging to him. The pursuer originally maintained that this transaction ought to be set aside as having been entered into within sixty days of Kennedy's bankruptcy, when he was insolvent, with the view of securing payment to the defenders of a prior debt said to be due to them, and to the prejudice of Kennedy's other creditors. The pursuer also originally claimed payment of the value of all the hay of which the defenders obtained possession under this arrangement.

On appeal, however, it was not disputed that the transaction in question was a contract of sale duly concluded in the ordinary course of business, and the pursuer ultimately only claimed payment of the value of a part of the hay which had been removed by the defenders from Kennedy's farm without the consent of Kennedy or the pursuer, after Kennedy had granted a trust-deed in the pursuer's favour for behoof of his creditors.

The question ultimately came to depend upon whether the property in the hay passed to the defenders at the date of the contract, or whether the passing of the property was postponed till the date of delivery.

The pursuer maintained that what was sold to the defenders was 90 to 100 tons of rye grass and timothy hay in good condition at the price of £2, 10s. a ton, that they had no right to remove the hay at their own hand after Kennedy had granted a trust-deed for behoof of his creditors, and that they were not entitled to set off the value of the hay so removed against any sums due by the bankrupt to them.

The defenders, on the other hand, maintained that Kennedy had sold to them his whole crop of rye grass and timothy hay, estimated at between 90 and 100 tons, that they had a right to remove the hay when they did as being their own property, and that they were entitled to set off the sum due for the hay so removed against debts due to them by Kennedy.

By interlocutor dated 23rd November 1896 the Sheriff-Substitute (SPENS) allowed a proof before answer. The facts may be summarised as follows:—Kennedy and the defenders had had business transactions for several years before the date of the transaction in question. In July 1896 Mr Hamilton, of the defenders' firm, had an interview with Kennedy, when the sale of his hay for 1896 was discussed, but no arrangement was come to. On 13th July the defenders wrote to Kennedy —"We shall be glad to have the matter of your hay fixed one way or the other, as we want to begin now to take some for baling, and if we are not going to get yours we have other lots to start to." Thereafter Mr Hamilton had another interview with Kennedy, but no final agreement was arrived at. On 6th August the defenders wrote to Kennedy—"We confirm conversation with you to-day on your call here, and would ask you to make us a definite offer in writing of your hay, both as to quality, quantity, and delivery." On 10th August Kennedy wrote to the defenders—"I beg to acknowledge the receipt of yours of date 6/8/96. Referring to sale of my hay, I have to state that I expect to be able to deliver to you between 90 and 100 tons of rye grass and timothy hay in good condition. Price £2, 10s. per ton, to be delivered out of rick, before 1st October 1896, or stacked and taken delivery of before 1st December 1896. Conditions of payment that I receive from you the sum of £200 stg. to account on or before the 15th August /96. This, I expect, you quite understand. I will call and see you on Tuesday." On the same day the defenders replied—"Your letter of to-day's date offering us your hay duly to hand. We agree to take 90 to 100 tons of rye grass and timothy hay in good condition at £2, 10s. per ton, to be delivered to us out of rick before 1st October 1896, or stacked and taken delivery of up till the end of this year at the same price. Whatever remains over after 1st January 1897 to be charged 2s. 6d. per ton more. The financing to be arranged when you call to see us to-morrow."

On 13th August Kennedy had an interview with Mr Hamilton. He still wanted to get an advance of £200 out of the price which would be payable for the hay, but he ultimately agreed to accept £150. Hamilton & Manson drew two bills each for £75 at three months' date, which were accepted by Kennedy and discounted by the defenders, who handed the proceeds to Kennedy, and debited him with the charges on the bills and the bill stamps. These bills had ultimately to be taken up by the defenders. Hamilton & Manson also took a receipt from Kennedy for £150, "being to account of hay sold to them."

Between 15th August and 18th September 1896, both inclusive, Kennedy delivered to the defenders 31 tons, 2 cwts., 1 qr. of hay.

On 19th August 1896 the defenders wrote to Kennedy—"We have a serious complaint to-day from Mr Steven that the hay you are delivering to him is in very bad order. We gave you special instructions that this was for baling, and told you the quality was to be A1. Be good enough when loading this to see that you lay aside *all* that is *damaged*, otherwise there will be trouble." On 3rd September the defenders wrote to Kennedy—"We understand you have been delivering some hay beyond us. As we bought *all your hay* we hope this is not the case, and shall be glad to have your explanation." . . . Kennedy did not answer this letter nor did he call to explain. On 8th September the defenders wrote to Kennedy—"To enable you to send us the weight tickets for all the hay delivered to us by you we enclose you a stamped addressed envelope." On 17th September the defenders wrote to Ken-

nedy—"Please send us weight tickets per return of post for all hay delivered by you."

On 17th September 1896 a meeting of Kennedy's creditors took place, when he offered a composition which was not accepted, and on 23rd September he granted a trust-deed for behoof of his creditors in favour of the pursuer. The defenders refused to accede to this trust-deed, and on 8th October 1896 Kennedy's estates were sequestrated. On 19th October the pursuer was elected trustee, and was duly confirmed as such on the following day.

After Kennedy had called a meeting of his creditors, he refused to deliver any more hay to the defenders. Between 18th September and 18th October they took possession of the balance of Kennedy's crop of hay amounting to 50 tons, 1 cwt., and 3 quarters. This was done contrary to the wishes of Kennedy and without the consent of the pursuer. The defenders carted the hay to Glasgow themselves.

At the date of Kennedy's sequestration he was owing the defenders £50, being the sum due on a bill accepted by him. This bill represented the amount due by the defender for goods supplied to him by the defenders. Kennedy had also prior to his bankruptcy been supplied by the defenders with goods, for which he had not paid, to the value of £10.

It was the understanding that Kennedy was to deliver the hay.

There was originally some dispute as to what deduction should be allowed to the defenders on the sum due as the price of the hay which they removed themselves for carting it into Glasgow, but it was ultimately admitted that if this question required to be considered £15 was a fair allowance.

Kennedy deponed—"I had several fields of hay, but I did not arrange to deliver particular fields of hay. I did not intend to deliver all my hay to defenders. I required a considerable quantity of hay for my own use during the winter as I expected. . . . Mr Hamilton was quite aware I required a rick of Hay for my own horses, and at that time I told him I required one rick, and that he might leave a rick to do me up to the term. I knew the position I was in, and I wanted as little hay kept as possible. He would not leave the one rick; it was taken away loose on a lorry. I expect the hay would be weighed, but they baled it and took it away to the city. I had all the weights of the hay I delivered with my own carts. In taking the hay away they left a considerable quantity of it lying loose all over the fields." . . .

Archibald Henderson, a man with whom Kennedy had been negotiating before he sold the hay to the defenders, deponed—"It was the whole of his hay he was proposing to sell to me. . . . When I say the whole hay, of course it would be understood he was quite entitled to keep any quantity of the hay he liked for his own horses and cattle."

William Bowman Cochran, buyer and salesman in the defenders' employment, who was present at the interview with Kennedy prior to the conclusion of the contract, deponed—"When we were out at his (Kennedy's) farm, it was the whole of his hay he wanted to sell. He said whoever bought the hay would require to buy it all."

Mr Hamilton deponed—"We reckoned he would have about 80 tons of hay, and at 50s. a ton we were giving him 75 per cent. of an advance on the whole thing. . . . We would not advance the full amount of a purchase until it was actually weighed over. Roughly speaking, I calculated the quantity of hay on his farm would be about 80 tons. . . . We thought £150 was a very large proportion of the speculative amount of the hay."

The Sale of Goods Act 1893 (56 and 57 Vict. cap. 71) enacts as follows:—Section 16. Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained. Section 17 (1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. (2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case. Section 18. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer. Rule 1. Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed. Rule 2. Where there is a contract for the sale of specific goods, and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done, and the buyer has notice thereof. Rule 3. Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods, for the purpose of ascertaining the price, the property does not pass until such act or thing be done, and the buyer has notice thereof. Section 62. (1) In this Act, unless the context or subject-matter otherwise requires. . . . "Specific goods" mean goods identified and agreed upon at the time a contract of sale is made. . . . (4) Goods are in a "deliverable state" within the meaning of this Act when they are in such a state that the buyer would, under the contract, be bound to take delivery of them.

On 31st December 1896 the Sheriff-Substitute issued the following interlocutor—"Having heard parties' procurators and the evidence, and made avizandum, finds the transaction between William Kennedy and the defenders, on or about 13th August 1896, which was within sixty days of the bankruptcy of the said William Kennedy,

and which is here sought to be set aside by the trustee on his sequestrated estate, was in the regular course of business: Finds, as matter of law, it is not reducible under the Act 1696, cap. 5, and the Bankruptcy Statutes: *Quoad ultra*, with regard to the craving for payment of a certain sum under the final craving of the petition, Finds any obligations of the defenders to Kennedy at the date of the bankruptcy are extinguished *concursu debiti et crediti:* Therefore sustains the defences and assoilzies the defenders: Finds pursuer liable in expenses," &c.

Note.—[*After dealing with the pursuer's first craving*]—"This view of the law disposes of the principal craving of the petition; but what is the position with regard to the final money prayer? At the date of the transaction Kennedy was unquestionably owing defenders a bill for £50. Before Kennedy's bankruptcy, thirty-one tons of hay, two cwts and one qr., had been delivered, amounting in value to £77, 15s. 7½d., according to the contract of sale. Since bankruptcy, forty-nine tons, one cwt., and three qrs., have been taken possession of by defenders. Their money value, according to the contract price, would be £125, 4s. 4d., but from this defenders claim there should be a very considerable deduction, in respect Kennedy was bound to deliver to them, and defenders had to cart into Glasgow. There is a dispute as to the precise amount of fair carting rates, but, at all events, I think that £15 is not an excessive sum to allow as the fair expense of cartage to Glasgow. Making this allowance, the defenders have got hay, broadly speaking, to the value of £188. I am of opinion that defenders were entitled to get delivery of ninety to a hundred tons contracted for, although bankruptcy had supervened. Under the Sale of Goods Act the property had passed to defenders. I think the question therefore comes to be simply an adjustment of debit and credit, as between pursuer as representing Kennedy, and the defenders as at the date of Kennedy's bankruptcy. Prior to bankruptcy, defenders had supplied Kennedy with feeding stuffs to the value of £10. So, putting the hay at £188, and deducting the £150 advanced therefor, the £50 bill and the £10 for feeding stuffs, *concursu debiti et crediti*, at the date of bankruptcy, defenders owed Kennedy nothing. I am therefore of opinion that defenders are entitled to absolvitor."

The pursuer appealed to the Sheriff (BERRY), who on 10th July 1897 issued the following interlocutor:—"Having heard parties' procurators and considered the case, Finds that the transaction of August 1896, between the defenders and William Kennedy, which is challenged, was not out of the ordinary course of business: Therefore adheres to the interlocutor appealed against in so far as it finds that that transaction is not reducible, and assoilzies the defenders from the first conclusion of the petition: *Quoad ultra* recals the said interlocutor, and in regard to the craving for payment, Finds that Kennedy was rendered notour bankrupt on 11th September 1896, and that after he had called a meeting of his creditors, and on 23rd September executed a trust-deed, to which the defenders did not accede, his estates were sequestrated on 8th October, and the pursuer was appointed trustee in the sequestration: Finds that without the consent of Kennedy, or of the pursuer as trustee, the defenders at various times, from 30th September to 17th October, carried off from Kennedy's farm and appropriated to their own use a quantity of hay belonging to Kennedy's estate of the value of £125, 4s. 4½d.: Finds in law that they were not justified in doing so, and that they are not entitled to set off against the value of the hay so carried off any debts alleged to be due to them by Kennedy: Therefore decerns against the defenders for payment to the pursuer as trustee aforesaid of the said sum of £125, 4s. 4½d. sterling, with interest as craved; reserving to the defenders to claim in the sequestration process for any sum or sums which they allege to be owing to them by Kennedy, and to the pursuer to meet such claim by any counterclaim he as trustee may have in respect of hay weighed and delivered to the defenders by Kennedy under the contract of August 1896 or otherwise: Finds the defenders liable to the pursuer in expenses, modified at one-half of the taxed amount," &c.

Note.—[*After dealing with the pursuer's first craving*]—"There remains, however, a further question, which arises under the conclusion for a money payment. It appears from the letters of 10th August between the parties, taken along with the proof, that the transaction for the purchase of hay was with reference to between 90 and 100 tons of rye grass and timothy hay in good condition, price £2, 10s. per ton. In Kennedy's offer it was stated that the hay was to be delivered out of rick before 1st October 1896, or stacked and taken delivery of before 1st December 1896. In their reply the defenders stated the conditions regarding delivery of the hay as 'to be delivered to us out of rick before 1st October 1896, or stacked and taken delivery of up to the end of this year at the same price; whatever remains over after 1st January 1897 to be charged 2s. 6d. per ton more.' Apart from the conditions as to the 'financing' which defenders added, their reply was not a simple acceptance of Kennedy's offer, and it must have been partly at all events by means of verbal communings that a concluded bargain was made. Still the letters are of value as throwing light upon some of the terms of the contract. It cannot be doubted that it was for much the larger portion of Kennedy's hay crop that the defenders contracted, but it is not proved, and I do not think that in fact it was for his entire crop. The subject-matter of the contract is certainly not so described in the letters. Kennedy says that he required a certain quantity for his own use during the winter, and that that was not included. In support of there having been a reservation of this kind, there is the evidence of Henderson,

with whom he had previously negotiated for a sale of the same hay, and who speaks of it as understood that 'he was quite entitled to keep any quantity of the hay he liked for his own horses and cattle.' In other words, it was only what Kennedy could spare from what was required for the farm that the defenders purchased. Kennedy also says that the bargain did not relate to the hay of any particular fields.

"Under a contract of that kind the hay which was to be delivered to the defenders was not ascertained. Even the quantity sold was left indefinite. If we take the letters, it was estimated at from 90 to 100 tons, while the estimate of Mr Hamilton when he visited the farm is stated by him at from 80 to 90 tons. The hay the defenders were to get had to be weighed and delivered by Kennedy, the seller. That was necessary both to appropriate it to the contract and to ascertain the price. The proof is silent as to what was ultimately agreed regarding the time of delivery.

"Kennedy was rendered notour bankrupt on 11th September. He called a meeting of creditors for the 17th of that month, and on the 23rd he executed a trust-deed, to which, however, the defenders did not accede, and sequestration in bankruptcy followed on 8th October. Before the end of August he had delivered to the defenders in all over thirty-one tons of hay of the value of £77, 15s. 7½d., but after executing the trust-deed he refused, although pressed by the defenders, to make further deliveries. Thereupon at their own hand they entered his farm and took delivery at different times, from 30th September to 15th October, of quantities amounting in all to fifty tons, 1 cwt. and 3 qrs., carting it away themselves. He says that they even disregarded his request that they would leave a rick for his horses, and took it away loose in a lorry. I think they went beyond their rights as purchasers of an unascertained and indefinite quantity of hay in so doing. Their action is said to be justified on the ground that the property in the hay had passed to them by the contract of purchase under the leading provision in section 18 of the Sale of Goods Act. The hay purchased was not, in my opinion, so specific as to bring the case within that provision, and even if it were more specific than I think it was, it seems to me that rule 3 of section 18 would apply, to the effect that where in a contract for the sale of specific goods the seller is bound to weigh, measure, test, or do some other act with reference to the goods for the purpose of ascertaining the price, the property does not pass until that act has been done. Here no portion of the hay, beyond thirty-one tons which Kennedy had weighed and delivered to the defenders, had been weighed by him so as to ascertain the price. He was no doubt under contract to deliver a further quantity of somewhere about sixty tons, but the defenders were not, in my opinion, entitled to deal with any undelivered and unascertained quantity of the hay as already their property, and to take possession of it and carry it off as they did.

"My conclusion is that the defenders must make good to the trustee the price of the quantity so carried away, which at £2, 10s. per ton amounts to £125, 4s. 4½d., and that they are not entitled to compensate that sum with any debts due to them by the bankrupt. They are also due the price of the hay delivered to them by Kennedy, but the claim for that may properly be disposed of in the sequestration, in which I have by the interlocutor reserved to the defenders the right to claim for the debt they say is owing to them."

The defenders appealed, and argued—The defenders bought the whole of Kennedy's hay crop, estimated at between 90 and 100 tons. This was a sale of specific goods in a deliverable state, and it was the intention of the parties that the property should pass. The property in the hay therefore passed to the defenders at the date of the sale—Sale of Goods Act 1893, secs. 17, 18 (Rule 1), and 62 (1) (*sub voce* "Specific Goods") and (4). There was nothing in the terms of the contract, the conduct of the parties, or the circumstances of the case to prevent the property passing at that date. On the other hand, there was here an out-and-out sale and part-payment of the price, and these circumstances indicated an intention that the property should pass. The presumption in the case of such a sale was that the parties intended the property to pass. The *onus* of rebutting that presumption lay upon the pursuer, and that *onus* had not been discharged. The law of Scotland on this subject had now been assimilated to the law of England, and the English cases might therefore be referred to. These authorities were favourable to the defender's contention. See *Martineau* v. *Kitching* (1872), L.R., 7 Q.B. 436, *per* Cockburn, C.-J., at page 449, and Blackburn, J., at p. 454; and *Gilmour* v. *Supple* (1858), 11 Moore P.C. 551.

Argued for the pursuer and respondent—This was a sale of an unascertained part of a whole. The case of *Martineau* v. *Kitching*, *cit.*, was therefore distinguished from the present, for there the particular goods sold were finally ascertained, although the weight was not, except approximately. What was really intended here was a sale of from 90 to 100 tons of hay, or at least it was understood that part was to be retained for use on the farm. This was not therefore a sale of specific or ascertained goods within the meaning of the Sale of Goods Act 1893, sec. 17 (1). It was a sale of unascertained goods, and the property did not pass until the goods were ascertained.—Sale of Goods Act 1893, sec. 16. Sec. 18, rule 1, did not apply, because the goods were not specific goods in a deliverable state. It was also stipulated that the hay was to be in good condition. This must refer to the date of delivery, and the condition of the hay at that date could not be ascertained until delivery took place. The defenders considered themselves entitled to object to the condition of the hay when delivered, and to take the best only when they removed it after the seller's bankruptcy. Even supposing that this was a

sale of specific goods, something required to be done to the hay for the purpose of putting it into a deliverable state within the meaning of that expression as defined in the Sale of Goods Act 1893, section 62 (4), and the property did not pass until that was done. Moreover, here it was the duty of the seller to weigh the goods, and weighing was necessary to ascertain the price. This prevented the property passing at the date of the contract when the hay was not weighed—Sale of Goods Act 1893, sec. 18, rule 3. The risk under this contract remained with the seller. What was intended was that the property should not pass until delivery, when the weight and condition of the goods were known. This contract was an agreement to sell, but it was not such a contract of sale as passed the property in the goods sold to the buyer immediately on the conclusion of the contract.

At advising—

LORD TRAYNER—I agree with the Sheriff-Substitute. I think it proved that the contract between the defenders and Kennedy was a contract of sale of Kennedy's crop of hay; that it was the intention of parties that the property should pass on the contract being completed, and that therefore the property in the hay was in the defenders at the time they removed it from Kennedy's premises. That being so, the pursuer has no right to more than the balance of the price of the hay resting-owing at the date of sequestration. According to the Sheriff-Substitute's view of the proof (which was not controverted) that balance would be about £38. But against that the defenders plead that the bankrupt owed them, on bill, a sum of £50, which more than extinguished the balance. I have no doubt of the defenders' right, as in a balancing of accounts in bankruptcy, to set off the bill for £50 against the balance of the price of the hay, because that £50 is a liquid debt. There is also an open account for £10, said to be due by the bankrupt to the defenders, but that need not be taken into account. The bill is more than enough to extinguish the pursuer's claim. I would only add that I agree with both Sheriffs in thinking that the transaction or contract of sale in question is not reducible under the statute or at common law.

LORD MONCREIFF—I am of opinion that the defenders should be assoilzied from all the conclusions of the petition. The Sheriff and Sheriff-Substitute are agreed that the defenders should be assoilzied from the first conclusion, but the Sheriff, differing from his Substitute, has given a decree against the defenders for the sum of £125, 4s. 4½d. under the last conclusion.

He does so on the footing that the hay purchased by the defenders in August 1896 was not definitely ascertained when the defenders took possession of 50 tons or thereby between 30th September and 15th October; that the hay so taken possession of fell to be weighed by the bankrupt, and that on these two grounds the property in the hay had not passed to the defenders under the Sale of Goods Act 1893 at the date of the bankrupt's sequestration on 8th October 1896.

I think the Sheriff is wrong in this. It is sufficiently proved that the defenders purchased the bankrupt's whole crop of hay subject to the latter keeping a small quantity for his horses; and it is not proved that it was a condition of the bargain that the seller should weigh it.

This being so, I think that the defenders are entitled to retain the hay, and that on balancing accounts in bankruptcy nothing remains due from the defenders to the trustee on the bankrupt's estate.

LORD YOUNG concurred.

The LORD JUSTICE-CLERK was absent.

The Court pronounced the following interlocutor:—

"Recal the interlocutors of the Sheriff-Substitute and the Sheriff of Lanark, dated respectively 31st December 1896 and 10th July 1897: Find in fact (1) that in the month of August 1896 the bankrupt William Kennedy entered into a contract with the defenders whereby he agreed to sell, and the defenders to buy, his (the said William Kennedy's) crop of hay of that season, estimated at from 90 to 100 tons, at £2, 10s. per ton; (2) that said contract was entered into in the ordinary course of business, and that the defenders at the date thereof were not aware that the said William Kennedy was insolvent; (3) that in terms of said contract, and before any part of said hay had been delivered, the defenders paid to the said William Kennedy the sum of £150 sterling in part-payment of the price of said hay; (4) that when said contract was entered into it was the intention of the said William Kennedy and the defenders that the property in said hay should be transferred to the defenders, and that it was then transferred to them accordingly; (5) that the estates of the said William Kennedy were sequestrated on the 8th October 1896, and that the pursuer was duly elected and confirmed trustee on the said estate; (6) That prior to 18th September 1896 the said William Kennedy delivered to the defenders in part implement of said contract 31 tons, 2 cwt., and 1 quarter of said hay, and that between said date and the 18th October following the defenders took possession of the balance of said crop of hay, amounting to 50 tons, 1 cwt., and 3 quarters; (7) that the total quantity of hay delivered to and obtained by the defenders under said contract was 81 tons, 4 cwt., the price of which at £2, 10s. per ton amounted to the sum of £203 sterling; (8) that from said sum there fell to be deducted the sum of £150 paid to account as aforesaid by the defenders, as well as some allowance for the cartage to Glasgow

from Kennedy's farm of the hay, and delivered by him, which is reasonably stated at £15 sterling; (9) that there remained the sum of £38 sterling due by the defenders to the pursuer as the balance of the price of said hay; (10) that at the date of his sequestration the said William Kennedy was resting-owing to the defenders in the sum of £50, being the amount contained in a bill drawn by the defenders upon and accepted by the said William Kennedy, dated 4th September 1896 and payable one month after date: Find in law (1) that the said contract of sale is not liable to reduction either under the Bankruptcy Statutes nor at common law, and (2) that the defenders are entitled to compensate or set off the amount due to them under said bill against the balance of the price of the hay due by them to the pursuer: therefore assoilzie the defenders from the conclusions of the action, and decern: Find the pursuer liable to the defenders in the expenses incurred in this and in the inferior Court, and remit," &c.

Counsel for the Pursuer—Shaw, Q.C.—Findlay. Agents—J. & J. Galletly, S.S.C.

Counsel for the Defenders—Salvesen—A. S. D. Thomson. Agent—J. Stewart Gellatly, S.S.C.

Tuesday, December 7.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

SANDYS *v.* BAIN'S TRUSTEES.

Entail—Trust — Whether Trustees Vested with Discretionary Power to Execute Effective Entail—Specific Directions Inconsistent with Entail — Substitute or Conditional Institute.

A had two daughters, Mrs G. and Mrs S. The latter predeceased him leaving a daughter, F., and three sons, W., H., and E. F. died unmarried before attaining twenty-five years; H. attained the age of twenty-five in 1896.

A. by his trust-disposition and settlement conveyed the lands of L. to trustees, whom he directed (1) to hold the said estate subject to certain liferents for his granddaughter F. and the heirs of her body until F. should attain the age of twenty-five, and then to convey the estates, subject to the same burdens, to F. and the heirs of her body; . . . (3) In the event (which happened) of F. dying before twenty-five without issue, to hold the estate "for behoof of the younger sons" of Mrs S. respectively and successively in the order of seniority, and to the heirs of their bodies respectively," and to dispone the subjects "to the person who in the event foresaid may succeed thereto, and who shall attain the age of twenty-five years, on him or her attaining said age." The deed then provided (4) that in case none of the younger children of Mrs S. shall attain the age of twenty-five or have issue who shall attain that age, the estate was to be conveyed to his daughter Mrs G. "and the heirs of" her body, whom all failing to W., eldest son of Mrs S., "on his attaining the age of twenty-five years complete, and the heirs of his body, and whom all failing to my own heirs whomsoever." After these destinations the deed contained this provision — "It shall not be in the power of the said F. or her foresaids or any of the other children of my said daughter (Mrs S.) or their issue, who may succeed under these presents to my said estates, to sell or dispose of the same . . . or to contract debt whereby the same may be affected, or to alter the order of succession herein prescribed, and for the purpose of rendering these prohibitions effectual I direct my said trustees to cause these presents (or so much thereof as it may be necessary to record for that purpose), to be registered in the Register of Tailzies, it being my express desire that" the said lands "shall remain in perpetuity in the family of my said deceased daughter in terms of the foregoing destination.

In an action raised by H., Mrs S.'s second son, after attaining the age of twenty-five, the question submitted was, whether H. was entitled, under clause (3) above referred to, to a conveyance of the lands in fee-simple, or subject to the fetters of an entail.

Held (*rev.* the judgment of Lord Kincairney) that H was entitled to a conveyance in fee-simple, the trust-deed not containing any express direction (1) to make an entail, (2) to insert fettering clauses applicable to the prohibitions, (3) to register the conveyance to H. in the Register of Tailzies.

Per Lord Kinnear — "An express trust to make a valid entail will not be impaired by a specific direction to insert clauses which, taken alone, would be inadequate for that purpose, but I can find no authority in any of the cases for holding that where the testator has defined the manner in which his intention is to be carried into effect, and has given no discretion to his trustees, his explicit directions may be disregarded, and a different way of executing his intention adopted in preference to his own way, because his trustees, for sufficient reasons, consider it more effectual. On the other hand, it is established by a series of decisions that where no power to make an entail is conferred upon trustees, and they are directed to carry out the intention of the truster by a certain method, they must conform their action exactly to the directions so given, even although