ineffectually attempted to get the defender to sign a hire-purchase form.

The result is that I think we must return to the judgment of the Sheriff-Substitute, and while one feels that the result is not altogether an equitable one, because the defender meantime retains the piano while he does not seem to be in a position immediately to pay for it, yet that result I think is due entirely to the pursuer's loose mode of doing business, in that he did not take care to confine his purchaser to the contract which he says he intended to make.

LORD KINNEAR—I have found this a question of very great difficulty on the facts, but once the facts are ascertained there is not much difficulty in applying the law to them. But as to the facts themselves I have had very great doubt, arising mainly from the circumstances pointed out by the Lord President in his opinion, that the evidence before us is taken in such a way as to leave material points not only unexplained but unexpressed. The appropriate and perfectly simple method of proving a verbal contract by parole is to put the parties into the witness-box and make them depone to the words of agreement that passed between them when the bargain was made. Nothing can be simpler than to prove a contract of sale or contract of hiring by proving the verbal offer and acceptance in the terms which were used by the people making the bargain at the time. Unfortunately neither party has thought it necessary to prove either what was said by themselves or by the other party to the contract, and therefore we are left to gather as best we can the intention of the contracting parties from indirect expressions as to the conclusion at which each had arrived in his own mind, because we are not informed what they said to one another when they were making their bargain. But then I agree with your Lordship that after proof has been led and closed and the Judges in the Sheriff Court have applied their minds to it, it would be out of the question to throw out the case either because of defects in the pleadings, which are unfortunately very observable in the present case, or because of defects in the conduct of the case. We must take it as it stands and make the best of it, and although my difficulty has been very considerable I have come to the same conclusion and for the same reason as the Lord President has expressed.

The Court pronounced this interlocutor—

"Recal the interlocutors of the Sheriff-Substitute and of the Sheriff .... Find that the pursuers sold to the defender on the date specified a piano at the price of £26; that the pursuers in these circumstances have no claim for delivery of the piano, their proper remedy being an action for the instalments of the price so far as not paid: Therefore assoilzie the defender from the conclusions of the action, and decern: Find the defender entitled to expenses," &c.

Counsel for the Pursuers and Respondents —Lees, K.C.—Chree. Agents—Adamson, Gulland, & Stuart, S.S.C.

Counsel for the Defender and Appellant —Watt, K.C.—Mercer. Agent—D. Maclean, Solicitor.

Wednesday, March 1.

OUTER HOUSE.

[Exchequer Cause.

LORD ADVOCATE *v.* MACKENZIE'S TRUSTEES.

Revenue—Estate-Duty—Legacy-Duty—Inventory-Duty—Settled Property—Partial Payment of Duties—Exemption of Remainder in respect of Partial Payment —Finance Act 1894 (57 *and* 58 *Vict. cap.* 30), *sec.* 5, *sub-sec.* 2, *and sec.* 21, *sub-sec.* 1.

A truster who died on 30th July 1868 directed his trustees to hold his dwelling-house and half his other estate, which included both heritage and moveables, for the liferent use of his widow and in fee for his only son. The trustees paid inventory-duty on the moveable portion of the estate at the testator's death. The son subsequently died on 3rd February 1901, predeceasing his mother, and his executor gave up an inventory of his estate, which consisted solely of his expectant interest in the foresaid half of his father's estate and the dwelling-house. The inventory thus given up by the son's executor showed a deficit on the half of the truster's estate liferented by the mother owing to burdens laid on his interest in it by the son during his life, and accordingly no estate-duty was paid on that half. Estate-duty was, however, paid on the value of the dwelling-house liferented by the mother, after deducting the deficit above referred to and also a sum representing the value of the widow's unexpired liferent of the house. Among the burdens laid on his interest by the son was an assignation of a part of that interest in favour of his wife, who died in April 1901. On her death an inventory was given up containing a sum at which the interest which she had thus acquired in the truster's estate was valued, on which sum estate-duty was paid.

The truster's widow died in September 1902, and the Crown claimed from the estate which she had liferented (1) estate-duty on the heritable portion (so far as not already accounted for), and (2) legacy-duty on the personal portion.

The defence was founded on the Finance Act 1894, sec. 5, sub-section 2.

Held that the purpose and effect of section 5, sub-section 2, of the Act was to prevent a second payment of

duty, and not to exempt from payment of duty any portion of the settled estate either heritable or moveable which had not already once paid such duty, and accordingly that the heritable and moveable portions of the estate which had not already paid duty were liable at the widow's death respectively for estate and legacy-duty.

The Finance Act 1894 (57 and 58 Vict. c. 30) enacts, *inter alia*—section 5, sub-section 2—"If estate-duty has already been paid in respect of any settled property since the date of the settlement, the estate-duty shall not, nor shall any of the duties mentioned in the fifth paragraph of the First Schedule to this Act, be payable in respect thereof until the death of a person who was at the time of his death, or had been at any time during the continuance of the settlement, competent to dispose of such property."

Section 7, sub-sec. 6, enacts—"Where an estate includes an interest in expectancy, estate-duty in respect of that interest shall be paid at the option of the person accountable for the duty either with the duty in respect of the rest of the estate or when the interest falls into possession, and if the duty is not paid with the estate-duty in respect of the rest of the estate, then (*a*) for the purpose of determining the rate of estate-duty in respect of the rest of the estate, the value of the interest shall be its value at the date of the death of the deceased; and (*b*) the rate of estate-duty in respect of the interest when it falls into possession shall be calculated according to its value when it falls into possession, together with the value of the rest of the estate as previously ascertained."

Section 21, sub-section 1—"Estate-duty shall not be payable on the death of a deceased person in respect of personal property settled by a will or disposition made by a person dying before the commencement of this part of the Act, in respect of which property any duty mentioned in paragraphs 1 and 2 of the First Schedule to this Act, or duty payable, or any representation or inventory under any Act in force before the Customs and Inland Revenue Act 1881, has been paid or is payable, unless in either case the deceased was at the time of his death, or at any time since the will or disposition took effect had been, competent to dispose of the property."

The duties mentioned in the First Schedule to the Finance Act 1894 are, *inter alia*, as follows—inventory-duty, account-duty, legacy or succession-duty.

This was an action raised by the Lord Advocate for and on behalf of the Commissioners of Inland Revenue against the testamentary trustees of the deceased Dr William Mackenzie, who died on 30th July 1860, in which the pursuer concluded (1) for the delivery of the account of the heritable estate which was liferented by the testator's widow under his testamentary provisions in order that the estate-duty or otherwise the succession-duty payable in respect thereof on her death should be ascertained; (2) for payment of the said estate-duty, or alternatively for payment of the said succession-duty in respect of the succession to the heritable estate arising at the death of the widow; and further (3) for delivery of an account of all the personal and moveable estate which under the said testamentary provisions were liferented by the widow and had vested in his son William James Mackenzie, so that legacy-duty in respect thereof might be ascertained; and (4) for payment of the said legacy-duty.

The defenders pleaded in answer that estate-duty having been paid in respect of the whole settled property since the date of the truster's settlement, no further estate-duty was payable; and further, founding on section 5, sub-section 2, of the Finance Act 1894 above quoted, that they were entitled to absolvitor.

The facts sufficiently appear from the opinion of the Lord Ordinary.

On 1st March 1905 the Lord Ordinary (STORMONTH DARLING) pronounced the following interlocutor:—"Having considered the cause, appoints the defenders to lodge the account called for and decerns: Finds the pursuer entitled to expenses."

Opinion.—"Dr William Mackenzie of No. 1 Oakfield Terrace, Glasgow, died in 1868 leaving a widow and an only child. By his will he directed that his widow should have the liferent of his house in Oakfield Terrace and of one-half of the residue of his estates, heritable and moveable. The other half was to be made over to his son at majority or marriage, and at the widow's death he was to get the half liferented by her. At the testator's death inventory-duty was paid on the whole personal estate.

"The son attained majority in 1879, and on that event the residue was divided into two equal parts, one-half being made over to him absolutely, and the other half being retained by the trustees for the widow in liferent and the son in fee. A residuary account was given up and legacy-duty was paid on the half made over to the son. The other half liferented by the widow was treated as not then chargeable with legacy-duty. It consisted almost entirely of personal property in respect of which, as I have said, inventory-duty had been paid, but it also included a small ground-annual on which no duty had been paid. The same remark applies to the Oakfield Terrace house, which was retained for the widow's occupation.

"The son died on 3rd February 1901. The widow survived till 20th September 1902. On the son's death an inventory of his estate was given up, showing the value of his expectancy in the estate liferented by his mother to be £19,120, 8s. But from this sum deductions were made for burdens laid on by him which brought out a small deficiency of £90. Accordingly no estate-duty was paid on that half of the original testator's residue, and as regards the value of the Oakfield Terrace house estate-duty was paid only on that part of the value which remained after deducting (1) a sum

representing the widow's liferent of the house, and (2) the deficiency of £99 on the son's expectancy in the half of the residue.

"On the death of the son's widow in April 1901 a payment of estate-duty was made which included a sum representing the interest assigned to her by her husband in the original testator's residue; but this circumstance cannot affect the question for decision except as regards amount.

"The Crown's claim is (1) for estate-duty on the balance of the value of the Oakfield Terrace house as well as on the value of the ground-annual (so far as not already accounted for), and (2) for legacy-duty on the half of the residue liferented by the widow.

"The defence is founded solely on section 5 (2) of the Finance Act 1894, which provides that 'if estate-duty has already been paid in respect of any settled property since the date of the settlement, the estate-duty shall not, nor shall any of the duties mentioned in the fifth paragraph of the First Schedule to this Act, be payable in respect thereof until the death of a person who was at the time of his death, or had been at any time during the continuance of the settlement, competent to dispose of such property.'

"Now, the half of the residue liferented by the widow undoubtedly answers the description of 'settled property,' and it is true that 'since the date of the settlement' estate-duty has been paid on a small portion of it. But does this exempt the rest of the settled property from payment of either estate-duty or of the duties mentioned in Schedule I (5), including legacy-duty? I cannot think so. The meaning and intention of section 5 (2) have been explained by the House of Lords in *Priestly* [1901], App. Cas. 208. Adopting the reasoning of the late Lord Justice Rigby in *Attorney General* v. *Dodington* [1897], Q.B. 373, the Lord Chancellor said—'The whole question turns upon section 5, sub-section 2. As Rigby, L.J., has said, the manifest difficulty that was in the mind of the framers of the statute was that it would be unreasonable and improper in respect of settled property that the same whole estate should pay over and over again.'

"But this exposition affords no colour to the argument that settled property on part of which no payment either of inventory-duty or estate-duty has been made is to be exempted from duty as regards that part when the settlement comes to an end. The personal part of the settled property here is not liable to estate-duty by virtue of section 21 (1), because it has already paid inventory-duty, and the heritable part is not liable by virtue of section 5 (2) in so far as it has already paid estate-duty. But that is no reason, in my opinion, why the heritable part which has not paid estate-duty should escape payment of estate-duty now, or why the personal part which has not paid legacy-duty, to which it became liable on the death of the testator, should escape payment of legacy-duty now. Such payment will not in either case be a second payment of duty, which is the thing truly struck at by section 5 (2), but a first and only payment.

"That seems to me the short and sufficient view which supports the Crown's claim. I was referred to section 7 (6), but the sole effect of that section on the circumstances which here occurred was to give the son's executors an option (which they may not have had otherwise) either to pay estate-duty on the settled property in which his interest was only an interest in expectancy, or to delay making payment till the interest should fall into possession. For that purpose the section contains provisions as to the mode of calculating the payment. But the section does not seem to me to affect the question of liability for estate-duty, as distinguished from the question of its amount.

"I shall therefore order an account as concluded for."

The interlocutor pronounced is quoted *supra.*

Counsel for the Pursuer—C. N. Johnston, K.C.—Young. Agent—Philip J. Hamilton Grierson, Solicitor of Inland Revenue.

Counsel for the Defenders—H. Johnston, K.C.—Morison. Agents—Webster, Will, & Company, S.S.C.

Friday, June 2.

FIRST DIVISION.

[Sheriff Court of Lanarkshire at Glasgow.

BURNS *v.* HENDERSON & COMPANY, LIMITED.

Reparation—Master and Servant—Ship in Course of Repair—Open Hatchway—Accident Due to Pursuer's Negligence.

In an action of damages raised in the Sheriff Court by a workman against a firm of engineers and shipbuilders, the pursuer averred that he entered the employment of the defenders as a chipper and scaler; that whilst proceeding to his work along the lower deck of the vessel, which was lying in the defenders' yard, he fell into a hatchway and was injured; that the accident was due to the fault of the defenders in not having the hatchway covered or lighted; and that the fact that the hatchway was uncovered and unlighted was known to the defenders or their foreman.

On a proof it appeared that the vessel was in course of repair; that the pursuer in going to the place where his work was to be done, descended from the upper to the middle deck, and was walking along the middle deck when he fell down an open hatchway; that the hatchway had to be open so as to give light and ventilation to other workmen employed in the hold below;